

# Disclosing the Danger

*Likely death or bodily harm from greenhouse gases raises questions about the ethical responsibilities of an emitter's legal counselors. By focusing on the lawyers' role, climate activists avoid many of the problems of current litigation strategies, such as standing and preemption*



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**G**reenhouse gas emissions kill. This is not something we attorneys usually state so bluntly, but it is true. According to the United Nations, there are every year at least 100,000 deaths worldwide attributable to human-induced climate change, with that number rising to 400,000 by also counting certain natural disasters in which climate attribution is possible or likely. This annual figure is only expected to grow in the future. And unlike other actions which also can routinely result in death or substantial bodily harm — think driving, surgeries, or prescription drug usage — greenhouse gas risks are not voluntarily encountered, are unpredictable, and are largely out of the control of victims.

Organizations wishing to slow or stop climate change have been trying in multiple legal arenas to litigate liability for, or injunctions to stop, greenhouse gas emissions. Whether via nuisance lawsuits or substantive due process actions, the last few years have seen a growing cadre of attorneys bringing cases in multiple state and federal jurisdictions to slow climate change. Though not largely successful at this point, they continue despite the institutional challenges they present to the judiciary and its ability to handle what some view as questions for the political branches.

But climate activists can use a different strategy.

All state attorney ethics rules require or allow that lawyers disclose client actions if doing so could prevent death or substantial bodily harm. The deaths do not have to be of identified persons, do not have to be in the United States, and do not have to be temporally proximate. Some states only allow or require disclosure in cases of criminal or fraudulent client activity. But in some other states, reporting is required even with no client wrongdoing.

Put legal climate activism and dangers from greenhouse gas emissions together, and an attorney representing clients who emit GHGs may be accused of breaching ethical responsibilities if he or she fails to report these activities in certain circumstances. Attorneys who represent clients who emit greenhouse gases could find themselves under disclosure obligations in situations they might not have expected.

Government attorneys might also be snared in this net. While there has been debate about who the “client” is for attorneys working on rulemaking in federal agencies, all attorneys, even those who work solely for the federal government, are members of some state or territory bar or the District

of Columbia Bar, and subject to these ethics rules. Many government attorneys work on rulemakings or federal actions that actively facilitate more greenhouse gas emissions, especially since the Trump administration came into power.

For climate activists, focusing on the lawyer's role allows targeting of federal policy while addressing many of the problems of current climate litigation. Attorney ethics complaints avoid one of the large

be altered in specific states. But if it is possible, environmental and energy lawyers should be aware. What to do with this awareness is up to the individual lawyer. Just as attorneys who had worked in the tobacco industry were assailed under legal and ethical standards as more information about tobacco products and marketing came to light, lawyers in the far larger sectors associated with greenhouse gas emissions may come to be in ethical crosshairs many never realized existed.



est impediments to climate cases, standing. There are no questions of preemption, nor do laws have to be enforced to create attorney ethical reporting responsibilities. Here the climate activist would be using the ethics complaint system (about a specific lawyer) to bring about the hoped for change in the firm or agency represented. As gatekeepers of law, attorneys are necessary components of almost any large business and of government activities. Impeding representation of greenhouse gas emitters is therefore likely to be an attractive strategy to climate activists.

No ethical complaints have yet been brought against attorneys in this situation, but given climate activism such complaints may be forthcoming. I do not suggest that this is the best reading or understanding of state ethics rules around the country, and such decisions and interpretations could always

**T**he ABA's Model Rule 1.6 (which all states have adopted in some form) sets out the basic confidentiality obligations of attorneys. It provides that a lawyer "shall not reveal information relating to representation of a client unless the client gives informed consent." However, the rule also establishes categorical exceptions. 1.6(b)(1) provides that an attorney may reveal confidential information "to prevent reasonably certain death or substantial bodily harm." By the 1980s all states had adopted or were in the process of adopting some form of this rule. At the time, the paradigmatic case would have been an attorney being allowed (or required) to disclose any information the counselor may have had about direct client threats or intent to cause death or harm to individuals that a

disclosure of that information could avoid. Such a threat would almost always be classified as criminal in some way, and language in many states echoes this assumption.

Texas's disclosure rule is typical: "When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act."

Early on, interpretation of the rule clearly indicated that it could apply to harm that didn't occur in the traditional criminal context. The ABA and state courts recognized that more temporally remote harms, such as harm from hazardous waste or

other environmental hazards, also constituted a situation in which there would be a substantial threat of a loss of life or serious bodily injury. Rule 1.6(b)(1) was specifically amended in 2002 to ensure coverage of this type of environmental harm, and to expand the privilege of disclosure in cases where the harm results not from a criminal or fraudulent act, but even to environmental harms and breaches that are accidental.

The 2002 comment on 1.6(b)(1) makes its application to disclosure of environmental harms that threaten human life or substantial bodily harm crystal clear: “A lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer’s disclosure is necessary to eliminate the threat or reduce the number of victims.”

Moreover, the impacts of the harm do not have to be immediate — they must simply be foreseeable. The alteration of 1.6(b)(1) in 2002, which replaced the word “imminent” with the phrase “reasonably certain,” was designed to make sure the disclosure exception included not just a present threat but also a substantial threat of a future injury.

Every state has adopted some form of the Rule 1.6(b)(1) exception to the general confidentiality requirement. In some states, the rule is triggered by death or substantial bodily harm alone, while others require that the client action also be criminal or fraudulent. While 37 states and the District of Columbia permit disclosure in such circumstances, 12 mandate disclosure. (Massachusetts has a hybrid version.) Of the states that mandate disclosure, five (Florida, Illinois, North Dakota, Tennessee, and Washington) mandate disclosure of client actions to prevent what the attorney “reasonably believes . . . may result in reasonably certain death or substantial bodily harm,” omitting any requirement of client wrongdoing. Seven states, including New Jersey, Connecticut, and Texas, also mandate disclosure if there is a likelihood of death or substantial bodily injury, but require the threat to be from a client’s criminal or fraudulent act.

Rule 1.6(b)(1) does not exist in a vacuum and must be interpreted in the context of other ethical rules as well. ABA Model Rule 1.2(d) states that a lawyer may not assist a client in the commission of a crime or fraud. Rule 1.16(a)(1) provides that a lawyer must withdraw from a representation if continuing would violate any ethics rule. Thus, if a lawyer’s conduct would assist a client in the commission of a crime or fraud, the lawyer must withdraw. Moreover, Model Rule 4.1(b) provides that “in the course of representing a client a lawyer shall not knowingly . . . fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

Thus, in certain circumstances, an attorney must disclose information on criminal or fraudulent acts that could result in death or substantial bodily harm due to the action of 4.1(b) even in the 37 states that merely permit disclosure.

All well and good an attorney might say, but such rules couldn’t possibly apply to work relating to legal client activities that simply emit greenhouse gases. Depending on the emission amount and the specific state rule, that may very well be correct. Certainly in the 45 states that either require a criminal or fraudulent element or merely permit such disclosure, at first glance a lawyer might simply

dismiss such worries. And applicable to every state, how much of an emission can be said to “cause” death or substantial bodily harm, and could disclosure ever “prevent” a harm in the situations in which greenhouse gas emissions have already occurred? While such reasoning does suggest that all greenhouse gas emitting activities may not be covered, most attorneys would be surprised at what might still come under this disclosure requirement.

**C**ould a client’s greenhouse gas emissions ever be considered criminal or fraudulent? And exactly when would a client’s emitting of greenhouse gases be so considered? Such emissions and reporting of those emissions are subject to multiple legal re-

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## ABA Rules Could be a Climate Activist's Sword

**F**or those of us who teach professional responsibility, the Buried Bodies predicament is often the first case that causes our students to doubt their chosen career paths. It is the true and tragic story of a serial killer in upstate New York in the early 1970s who provided his court-appointed attorneys with a detailed description of the location of two bodies unrelated to the murder for which he was on trial.

The lawyers struggled with whether to share the information with police. The victims' families, after all, still did not know what had happened to their loved ones. But the lawyers ultimately concluded that the attorney-client privilege barred them from making any disclosures.

They suffered great personal and professional losses as a result. One of the attorneys, Francis Belge, was criminally charged with violating a New York law requiring a decent burial "within a reasonable time after death." The court hearing Belge's case eventually dismissed the charge, affirming that he "conducted himself as an officer of the court with all the zeal at his command to protect the constitutional rights of his client."

Because of that pronouncement, *People v. Belge* has achieved canonical status in legal ethics circles. It demonstrates how profoundly strong the prohibition on disclosing a client's confidences can be.

It is onto this stage that Victor Flatt, professor of law at the University of Houston, has walked with a provocative question about confidentiality and climate change.

This past semester, I invited him to Charlottesville to lead a classroom discussion on the matter. We enjoyed a lively debate on whether an attorney's failure to disclose her industrial client's greenhouse gas



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pollution would violate legal ethics rules designed to prevent clients from exploiting legal services to perpetuate an ongoing crime or fraud.

Lawyers can literally know where the bodies are buried and still protect that information as confidential. Can they be compelled to sacrifice attorney-client confidences over an internal matter of corporate management? Perhaps.

A lawyer cannot hide emissions data as part of a scheme to avoid compliance with a mandatory cap-and-trade program like the Regional Greenhouse Gas Initiative. And attorneys have faced legal turmoil for aiding a client in keeping damning company data hidden.

One of the most famous examples involves the accounting firm Arthur Andersen, which played a critical role in the Enron scandal of 2001. A review of in-house counsel's actions during that scandal took center stage in criminal proceedings that followed.

If a corporation were hellbent on keeping its climate data secret because of an unlawful objective — artificially inflating a stock price, for example — that could justify an attorney's becoming a whistleblower or at least withdrawing from the representation.

Still, it is unlikely that a disciplinary complaint filed against an oil giant's lawyers would lead a state bar ethics committee to impose sanctions — at least based on professional responsibility doctrines as they are understood today. But one of the most fascinating implications of Professor Flatt's theory is what it might portend for the future.

Environmental non-profits and their allies have proven to be resourceful and creative when tackling climate change. They have challenged the federal government's failure to reduce carbon emissions on substantive due process grounds (*Juliana v. United States*), and the president's anti-environmental rollbacks under the separation-of-powers doctrine (*California, et al. v. Trump*).

Claims rooted in the American Bar Association's legal ethics standards could be the next arena for climate-related innovation. And given the urgency of the climate crisis, it might very well be time for environmental advocates to view the ABA's rules as an adversarial sword — i.e., something to leverage in order to advance climate protection goals and the public interest.

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quirements in the United States and around the world. Certain states, currently California and the Regional Greenhouse Gas Initiative states in the Northeast, limit the emission of greenhouse gases by specific entities in certain circumstances. In these states, as under federal environmental law regulating other pollutants, emissions may occur, but only pursuant to a valid permit. The emitting entities are also responsible for properly tracking and surrendering their emission permits at the appropriate time. This would apply to all fossil fuel-fired power plants in the RGGI states, as well as multiple greenhouse gas emission sectors covered by state law in California. Violations of permits or failure to report may even be considered criminal violations in the nation's most populous state.

In addition, greenhouse gas emissions outside of the United States are subject to legal requirements in specific jurisdictions. As of 2017, some 67 jurisdictions, including the European Union, China, Japan, and New Zealand, either had or were expecting to create permit systems for the emission of greenhouse gases within their jurisdiction.

**M**ore surprising may be the laws currently surrounding greenhouse gas emissions reporting for sources of a certain size anywhere in the United States. In September 2009, EPA finalized a rule requiring that 31 categories of stationary sources report their GHG emissions every year. Some must report any emissions and others must only report emissions of over 25,000 tons a year of CO<sub>2</sub> equivalent. The EPA promulgated this regulation pursuant to the Clean Air Act's Section 111(e), as a standard of performance. Sections 113(c)(1) and 114 criminalize any false or omitted statements required by such a performance standard. Thus, failure to report could be considered a criminal act under state attorney ethics precedent.

In 2015, EPA estimated that over half of required reports had not occurred, and given the lack of interest in the requirement in the Trump administration, it is doubtful the compliance rate

has increased. Failure to enforce, however, has no bearing on whether or not an action would be considered criminal for purposes of the ethics rule. Because these sections also require records to be "maintained," if a reporting requirement has been violated the crime may still exist until that violation is remedied.

Federal courts are split on whether the failure to report under the CAA is a one-time violation or an ongoing one. Some courts view a party's failure to report a known violation as continuing, starting when the defendant is initially obligated to self-report and only ending on the day when the defendant finally does report. Thus, failing to report greenhouse gases as required under law could be considered a criminal act which could cause death or substantial bodily harm continuously until corrected, requiring attorney disclosure.

Fraud may also be associated with client activities in unexpected ways, and the ethical rules generally interpret the term broadly. Exxon-Mobil has already been investigated and charged for fraudulent activities for failing to disclose adequate and correct information to the public and its shareholders about climate change risks, primarily financial ones. Other companies may also be at risk for understating climate impacts of their activities. The Securities Act of 1933, passed in the aftermath of the stock market crash, requires that all investors in publicly traded

companies receive information about material risks to the company — and failure to so report can be considered fraudulent. Attorneys general, particularly the New York AG, who has jurisdiction over companies traded on the state's exchanges, have indicated intent to investigate understatement of greenhouse gas emissions and climate change on company bottom lines.

Though the SEC issued a guidance regarding disclosure of climate change risks from publicly traded companies in 2009 (since pulled by the Trump administration), in 2016 the Sustainability Accounting Standards Board determined that compliance was limited and "mostly boilerplate," suggesting vulnerability for many clients.

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**H**ow much greenhouse gas emission is necessary to “cause” death or substantial bodily harm? Can any client greenhouse gas emission, no matter how small, be seen as contributing or causing death or substantial bodily harm? Where is an attorney to draw a line in determining whether a client’s emissions rise to a harmful level?

First, it seems clear that particular greenhouse gas emissions themselves do not have to be the sole cause of death or substantial bodily harm. Common interpretation of criminal and tort law recognizes joint actors sharing responsibility for harm. The commentary to 1.6(b)(1), referencing hazardous pollution, does not require that it be the sole cause. Case law on the harm of one part of commingled hazardous waste as well as analyses of greenhouse gas emissions’ impacts focus on the importance of one emission stream, even if it is among many others that cumulatively cause the harm.

In requiring the Federal Energy Regulatory Commission to analyze emissions resulting from delivery of natural gas to certain locations under the National Environmental Policy Act, the D.C. Circuit in *Sierra Club v. FERC* stated “that burning natural gas will release into the atmosphere the sort of carbon compounds that *contribute* to climate change” (emphasis mine). And in focusing on the impact of 2 percent of worldwide emissions in its standing analysis, the Supreme Court in *Massachusetts v. EPA* noted that stopping a small amount of emissions may not reverse the problem but would slow the pace of climate change, and was therefore actionable.

But is there any line? Natural or background levels of greenhouse gas emissions would not apply since the harm is caused from climate change resulting from the addition of CO<sub>2</sub> emissions from large-scale human activity. If we apply theories of joint and several liability under the law of tort or the Comprehensive Environmental Response, Compensation, and Liability Act, there might be no specific legal minimum of additional anthropomorphic emissions that do not at least contribute to harm. However, perhaps a line could be drawn at sufficient emissions to be responsible for harm

on its own. The comment to ABA Model Rule 1.6 concerning the discharge of hazardous substances to a water supply notes that the discharge must at least constitute a “hazard.” To me this suggests at least a line drawn at the level at which no single emission event could be seen to be, or contribute materially to, a hazard to life or health.

For example, if currently climate change causes 400,000 deaths per year (using the high end of the 2012 UN range), and the amount of greenhouse gas emissions annually is around 53 billion tons (including land use changes), assuming a linear relationship, it would take 132,500 tons of greenhouse gas emissions annually to be responsible for one statistical death. In 2007, the Scherer coal-fired power plant in Juliet, Georgia, emitted 25 million tons of CO<sub>2</sub> in one year, or enough for approximately 190 deaths. For comparison, the average automobile in the United States emits about 6 tons of CO<sub>2</sub> every year, meaning that an individual car would have to operate for around 22,000 years to cause one death using this simple metric and calculation.

In the United States, most greenhouse gas emissions tend to be bifurcated in this manner, with some very large sources and a much larger number of small sources. You may recall EPA’s attempt at a greenhouse gas emission “tailoring” rule so that it would only cover these larger sources — since even though they were small in number, they were responsible for over 80 percent of emissions. This regulatory level might at least serve as some dividing line for an attorney wondering whether he or she might have a reporting obligation.

A critical point of requirement or allowance of disclosure in the case of death or substantial bodily harm is that such disclosure must be done to prevent or avoid the harm. If the harm has already occurred, the general requirement of client confidentiality applies (absent some other ethical issue such as aiding or abetting criminal or fraudulent activity). If a client failed to report emissions or to disclose material data to shareholders relating to greenhouse gas emissions, it would be easy to assume that no disclosure could stop the death

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or substantial bodily harm that would result from those emissions. While that may be true in some cases, it may not be true in all.

As noted above, courts are split on whether environmental reporting violations constitute an ongoing harm or whether or not they are a past harm. Those courts that have found an ongoing harm have done so based on the reasoning that the failure to report can lead to demonstrable harm long after the reporting date has passed. Material information at one time may still be material. Whether it is reporting emissions from the past or reporting material impacts from current or future emissions, it could be argued that exposing the violation is likely to either require amelioration of the harm or that it is likely to discourage continued violations in the future.

Emission reporting statutes such as the Toxics Release Inventory under the Superfund Amendments are predicated on the assumption that entities will reduce the amount of even legal emissions to avoid public identification as a bad actor. The purpose of disclosing and measuring environmental performance in the TRI was designed with the aim of lessening emissions over time.

Similarly, any information about company greenhouse gas emissions might encourage firms to lessen those emissions, which in turn would lessen the potential harm in the future. This is the basis for many voluntary emission reporting standards, such as the Carbon Disclosure Project. As stated by the CDP, “We must act urgently to prevent dangerous climate change and environmental damage. That starts by being aware of our impact so that investors, companies, cities, and governments can make the right choices now.”

Companies themselves often recognize and tout greenhouse gas reductions ostensibly to gain business and greater profit. If that is the case, then the converse, that failing to disclose to avoid scrutiny will increase greenhouse gas emissions, may also be true.

Government attorneys engaged in rulemaking would seem to be missing this requirement since by Section 553 of the Administrative Procedure Act, notice-and-comment rulemaking is supposed to be

on the public record. If something is on the public record, how could it be “revealed” to prevent a harm? Historically, this would be the end of the matter, but in the Trump administration we have seen evidence (such as outside communications) being disclosed that in turn does effect the ultimate legality of rulemaking and whether a rule goes into force. The most recent example relates to the census citizenship question but it is not a stretch to imagine that many proposed climate rule repeals might have similar underpinnings.

**G**reenhouse gas emissions causing climate change impacts may not be an activity that drafters of ethics rules would have considered a client action that could lead to death or substantial bodily harm when the rules were drafted in 1980. But the ways these ethical rules have been applied in the past indicates that certain private or government activities relating to greenhouse gas emissions might be considered client action that could cause death or substantial bodily harm which might be prevented by attorney disclosure.

If this tentative link is possible, given climate activism, it will likely be exploited in at least one of the multitude of jurisdictions that have some form of this rule, possibly putting attorneys in the crosshairs.

How this plays out is a big question. While an attorney might rightfully fear ethics complaints for no disclosure, disclosing in anticipation of ethics complaints might be an ethical breach in and of itself if client activity is not considered to cause death or substantial bodily harm that could be prevented by the lawyer. If attorneys did reasonably fear potential ethical complaints they would need to inform clients of

the possibility of disclosure in the future. This might also have a chilling effect on representation, much as attorneys moved away from law firms representing large tobacco companies in the 1990s. There are no obvious answers. Lawyers should at least carefully look at any possible client actions that might trigger such a possibility and manage their own risk. **TEF**

*This article is adapted from a longer article entitled “Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change,” forthcoming this year in the Utah Law Review.*

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