

# SHOOTING THE MESSENGER: THE ETHICS OF ATTACKS ON ENVIRONMENTAL REPRESENTATION

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## I. INTRODUCTION

Few legal controversies can be adequately and fairly resolved without the assistance of an attorney. The Supreme Court has recognized that the right to be heard in agency or court proceedings would be, in many cases, of little use if it did not involve the ability to be heard by counsel: “Even the intelligent and educated layman has small and sometimes no skill in the science of law.”<sup>1</sup> Likewise, rules of legal ethics and standards of professionalism emphasize that our complex adversarial system can only work if all sides to a legal controversy are well represented.<sup>2</sup> As one author observed, “access to minimal legal services is necessary for access to the legal system, and without access to the legal system, there is no equality before the law. The lawyer becomes the critical medium by which access to that legal system and the concomitant opportunity to secure justice is achieved.”<sup>3</sup>

Access to legal proceedings and legal representation is particularly appropriate in environmental disputes, where the law provides for extensive public participation in executive branch decision-making and for a right to judicial review of those decisions.<sup>4</sup> By authorizing “citizen suits” and attorneys fees to successful environmental plaintiffs, legislatures have embraced the notion that lawyers serve the public good by bringing cases against government agencies or private entities that fail to comply with environmental laws.<sup>5</sup>

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<sup>1</sup> *Powell v. Alabama*, 287 U.S. 32, 45 (1932).

<sup>2</sup> *See, e.g.*, MODEL RULES OF PROF'L CONDUCT Preamble (1999); MODEL CODE OF PROF'L RESPONSIBILITY EC 1-1, 2-1, 8-3 (1986); ABA, LAWYER'S CREED OF PROFESSIONALISM (1988). In 1988, the ABA formally recommended the creed as a model of ethical conduct rules for state and local bar associations.

<sup>3</sup> Robert A. Katzmann, *Themes in Context, in THE LAW FIRM AND THE PUBLIC GOOD* 1, 6 (Robert A. Katzmann ed., 1995).

<sup>4</sup> *See, e.g.*, 42 U.S.C. § 7661a(b)(6) (1994) (federal Clean Air Act requirements for air permits include public notice, opportunity for public comment and a hearing, and opportunity for judicial review).

<sup>5</sup> *See, e.g.*, 42 U.S.C. § 7604(d) (1994) (federal Clean Air Act citizen suit fee awards); 33 U.S.C. § 1365(d) (1994) (federal Clean Water Act citizen suit fee awards); 16 U.S.C. § 1540(g)(4) (1994) (federal Endangered Species Act citizen suit fee awards).

It is particularly important that those representing public interests be heard. The New Jersey Supreme Court notes in the famous case *Mount Laurel*: "The practice of public interest law is a much needed catalyst in our legal system. It helps to create a balance of economic and social interests and to assure that all interests have a fair chance to be heard with the help of an attorney."<sup>6</sup>

The complexity of environmental law increases the need for legal representation and further disadvantages those individuals and groups who find themselves without the resources to hire a competent environmental lawyer.<sup>7</sup> With the 1990 amendments to the federal Clean Air Act running over 300 pages,<sup>8</sup> and other environmental statutes that courts find "mind-numbing"<sup>9</sup> and capable of understanding by very few people even within the U.S. Environmental Protection Agency ("EPA"),<sup>10</sup> no regulated entity could competently participate in any important environmental proceeding without highly trained lawyers. Citizens who attempt to participate without legal assistance in the maze of environmental agency rule-making or permitting proceedings, much less sophisticated court cases, find themselves at a significant and usually insurmountable disadvantage.

Given the complexity of environmental disputes and the role that government entities often play in creating or failing to address environmental problems, litigation has been particularly crucial to advance environmental interests. As the Supreme Court has noted, "[L]itigation may

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<sup>6</sup> *Township of Mount Laurel v. Dep't of Pub. Advocate*, 416 A.2d 886, 893 (N.J. 1980).

<sup>7</sup> The president of the Environmental Law Institute observed that the complex scheme of laws and regulations designed to protect public health and the environment is not self-implementing and requires the concerted efforts and cooperation of members of the environmental bar to achieve its goals. J. William Futrell, *Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility*, 27 *Loy. L.A. L. Rev.* 825, 834 (1994).

<sup>8</sup> See Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399-2712 (1990).

<sup>9</sup> *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1189 (D.C. Cir. 1987). One environmental law professor observes: "Environmental law has become stupefyingly complex . . . . A few experiences with environmental law can make the tax code seem like a walk in the park." Jerry L. Anderson, *The Environmental Revolution at Twenty-Five*, 26 *RUTGERS L.J.* 395, 411 (1995). Another professor states:

Perhaps the central defining feature of environmental law in the United States is its mind-numbing complexity and detail . . . . Today there is no serious question that environmental law is the most complicated and detailed body of law the world has ever known; we have won the (dubious) distinction of representing the 'state of the art' in legal complexity and detail.

E. Donald Elliot, *The Last Great Clean Air Act Book?*, 5 *ENVTL. LAW.* 321, 326-27 (1998) (book review).

<sup>10</sup> *United States v. White*, 766 F. Supp. 873, 882 (E.D. Wash. 1991). As an EPA official stated: "[The federal Resource Conservation and Recovery Act] is a regulatory cuckoo land of definition. . . . I believe we have five people in the agency who understand what 'hazardous waste' is. What's hazardous one year isn't—wasn't hazardous yesterday, is hazardous tomorrow, because we've changed the rules." *Id.* (quoting an EPA Assistant Administrator).

well be the sole practicable avenue open to a minority to petition for redress of grievances.”<sup>11</sup> Litigation may be the only means by which conflicts between ordinary citizens and powerful financial interests or recalcitrant or unsympathetic government agencies can be resolved.<sup>12</sup> As an environmental lawyer has observed, “In no other political and social movement has litigation played such an important and dominant role [as in the environmental movement].”<sup>13</sup> Yet, plaintiff participation in an environmental lawsuit without the significant assistance of an experienced attorney is very rare, and successful pro se representation even rarer.<sup>14</sup>

However, legal representation—environmental and non-environmental—is not available to most Americans with legal problems. A 1992 American Bar Association study found that each year 71% of the legal needs of low-income households and 61% of those of moderate-income households are never addressed by the civil justice system.<sup>15</sup> When citizens require legal assistance to advance public rather than private interests, the lack of legal representation is even more severe—less than .001% of lawyers are public interest lawyers.<sup>16</sup> Citizens advancing issues of public concern often are left without an attorney or must turn to one of

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<sup>11</sup> NAACP v. Button, 371 U.S. 415, 430 (1963).

<sup>12</sup> See NAN ARON, LIBERTY AND JUSTICE FOR ALL 99–100 (1989). The late Rick Sutherland, the Executive Director of the Sierra Club Legal Defense Fund at the time, argued:

Without public interest lawyers representing concerned citizens willing to go to court, [the] strong environmental pronouncement [of the legislatures and courts] would have been rendered virtually meaningless. In fact, this is perhaps the most important role of environmental litigation—to compel government agencies and officials charged with administering our environmental laws to do their jobs.

*Id.* at 100.

<sup>13</sup> David Sive, *The Litigation Process in the Development of Environmental Law*, 13 PACE ENVTL. L. REV. 1, 3 (1995). As another environmental lawyer observed: “Litigation is the most important thing the environmental movement has done over the past fifteen years.” Tom Turner, *The Legal Eagles*, AMICUS J., Winter 1988, at 25, 27 (quoting Rick Sutherland, Executive Director, Sierra Club Legal Defense Fund). See also ARON, *supra* note 12, at 72 (observing that “environmental organizations rely heavily on litigation to achieve their goals”).

<sup>14</sup> To understand the importance of legal representation in environmental disputes, one need only look at the ferocity with which members of the environmental defense bar and their clients sought to deny Tulane Law School’s Environmental Law Clinic the ability to provide free legal representation to needy citizens and community organizations. See Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL’Y 33 (2000).

<sup>15</sup> A.B.A. CONSORTIUM ON LEGAL SERVICES AND THE PUBLIC, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS 23 (1994).

<sup>16</sup> Debra S. Katz & Lynne Bernabei, *Practicing Public Interest Law in a Private Public Interest Law Firm: The Ideal Setting to Challenge the Power*, 96 W. VA. L. REV. 293, 300 (1993–94) (citing a 1977 estimate that “public interest lawyers who work for nonprofit, tax-exempt groups constitute only one thousandth of a percent of the legal profession”). The Maryland Legal Services Corporation recently estimated that out of 30,000 attorneys in the state, fewer than 200 were public interest attorneys and that fewer private sector attorneys are volunteering these days for public interest service. Janet Stidman Eveleth, *Where Has All the Passion Gone?*, 34 MD. B.J., July/Aug. 2001, at 2.

a select few private lawyers who will agree to represent them either at no cost or at a reduced or uncertain fee, or to the limited free assistance provided by law school professors and law school clinics.

Even though all members of the legal profession should recognize the large unmet need for legal assistance and respect the commitment of the bar to address these needs, attorneys have often been at the forefront of attacks against other lawyers for providing legal representation on environmental matters.

The actions referred to as “attacks” in this Article have the intent to deter other attorneys from providing legal representation to certain clients or causes or to pressure them to alter the nature of the advice and legal representation they would otherwise provide their clients. By targeting the attorney who brings a contrary message to a court or administrative proceeding, the attacking attorney seeks to silence certain points of view in environmental disputes and decision making.

Although there is considerable scholarship about a lawyer’s duty to represent repugnant clients and about the moral nonaccountability of lawyers for the deeds of their clients,<sup>17</sup> there has been limited discussion of attacks by attorneys on those who represent unpopular or controversial clients, and even less analyzing the ethics of such attacks.<sup>18</sup> Articles on the ethics of environmental law practice make no more than passing reference to a lawyer’s duty to respect the need for all points of view to be heard, and make no attempt to analyze the role of attorneys in attacks on providers of environmental representation.<sup>19</sup>

This Article documents and challenges the propriety of attacks by attorneys on other lawyers providing environmental representation. Part II identifies some of the attacks and the justifications often given for such assaults. Part III analyzes the legal ethics of such attacks by focusing on the formal rules of professional conduct. Part IV sets forth proposals for amending rules of professional conduct and law school policies to deter attacks on providers of environmental representation.

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<sup>17</sup> See, e.g., Monroe H. Freedman, *The Lawyer’s Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995); Madeleine C. Petrara, *Dangerous Identification: Confusing Lawyers With Their Clients*, 19 J. LEGAL PROF. 179 (1994–95); Charles W. Wolfram, *A Lawyer’s Duty to Represent Clients, Repugnant and Otherwise*, in THE GOOD LAWYER 214 (David Luban ed., 1984).

<sup>18</sup> Professor Timothy Terrell and James Wildman argue that a lawyer’s responsibility to assist and enable those in the profession who desire to distribute legal services to those unable to pay means that “lawyers at the very least should not interfere with the efforts of other lawyers who seek to provide this wide distribution.” Timothy P. Terrell & James H. Wildman, *Rethinking “Professionalism,”* 41 EMORY L.J. 403, 431 (1992). Terrell and Wildman rely, however, on concepts of professionalism, not rules of professional conduct, as the basis for this responsibility not to interfere with the pro bono efforts of other attorneys.

<sup>19</sup> See, e.g., Lucia Ann Silecchia, *Ethical Dilemmas for the Environmental Lawyer as Policy Maker*, SB52 ALI-ABA 717, 720–22 (1997); David Sive, *Ethical Problems in Environmental Litigation*, C127 ALI-ABA 1369, 1379–80 (1995); Futrell, *supra* note 7, at 837.

The analysis in this Article is based almost exclusively on existing rules of professional responsibility rather than on other guidelines for professional behavior or on moral or public policy considerations. While this approach runs the risk of wrongly suggesting that only explicit codes of professional conduct define ethical attorney behavior,<sup>20</sup> the recurrence and severity of attacks on providers of environmental representation indicate that appeals to professionalism and fairness have failed to avert these attacks. In addition, because some attorneys use the explicit duty to provide zealous representation as a justification for attacking other attorneys and seeking to interfere with the ability of certain clients and causes to obtain legal representation, a rule-based counter to such arguments is appropriate. Hence, this Article argues that even if ethical conduct is defined solely by rules of professional conduct, attacks against attorneys for providing environmental representation are unethical and the legal profession should take further steps to make it clearer to attorneys that such behavior is improper.

## II. ATTACKS ON ENVIRONMENTAL REPRESENTATION

Attacks on attorneys in environmental disputes have occurred relatively often regarding a large array of issues, ranging from logging and grazing permits to chemical plants and highway construction. The examples documented below represent the breadth of issues and geographic areas in which such attacks occur and the avenues of justification used by those who seek to deny representation. Part III will then analyze these various forms of attacks through an ethics framework.

### A. *Attacks on Private Lawyers*

#### 1. *Early Attacks*

Attacks by attorneys on those providing legal representation on environmental matters began almost as early as the practice of environmental law. Somewhat ironically, one of the first attacks was by public interest attorney Ralph Nader. In 1969, Nader publicly attacked, and led a law student picket of, the Washington, D.C., law firm of Wilmer, Cutler & Pickering for its representation of the Automobile Manufacturers' Association ("AMA") on an air pollution conspiracy case.<sup>21</sup> The U.S. Depart-

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<sup>20</sup> The American Bar Association's ("ABA's") Model Rules of Professional Conduct explain that ethics rules "do not . . . exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law." MODEL RULES OF PROF'L CONDUCT Preamble ¶ 14 (1999).

<sup>21</sup> MARK J. GREEN, *THE OTHER GOVERNMENT* 171-80 (1975); David P. Riley, *The Challenge of the New Lawyers: Public Interest and Private Clients*, 38 GEO. WASH. L.

ment of Justice and the AMA reached a settlement accomplishing the injunctive relief sought by the government, but Nader believed that, due to the national importance of the issue, the firm should have urged its client to go to trial.<sup>22</sup>

Nader argued that the AMA's attorneys should consider the broader public interests, not just the interests of their client. He contended that this was not an effort to deny the automobile manufacturers legal representation, as surely the companies would be able to find someone else to defend them.<sup>23</sup> Other Nader supporters, however, including attorneys, did criticize the firm for its choice of clients.<sup>24</sup> Nader instead argued that the attack was about the limits of an environmental attorney's vigorous advocacy. According to Nader, the lawyer has a "duty to balance the private interest of his client against the public interest of society," and if the two interests do not coincide, the lawyer should then urge the client to take a broader view and do what is best for the public interest, not simply best for the client's interest.<sup>25</sup> He maintained that if the client, after urging by the attorney, would not act in the public interest and agree to a trial, then the firm should withdraw.<sup>26</sup> Of course, if this approach were carried out by all attorneys, environmental clients who choose not to act in a way that is perceived to be best for the public could ultimately find themselves without competent legal representation.

The automobile manufacturers' attorney responded to Nader's attack with a press release that stated, in part:

Today's picket line is a prime example of McCarthyism—1950 style . . . His [the late Senator McCarthy's] zeal lead him, as it now leads Mr. Nader, to assail his fellow lawyers for defending the targets of his attacks . . . The public interest is best served when all sides of such a controversy have the benefit of skillful advocacy . . . It is a basic premise of our constitutional system . . .

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REV. 547, 552 (1970); William M. Blair, *Law Students Trade Charges With Leading Capital Lawyer*, N.Y. TIMES, Oct. 10, 1969, at 30.

<sup>22</sup> Riley, *supra* note 21, at 564–65; Blair, *supra* note 21, at 30.

<sup>23</sup> Riley, *supra* note 21, at 565; Petrara, *supra* note 17, at 196–97; Freedman, *supra* note 17, at 115.

<sup>24</sup> "The group of [pro-Nader] activist lawyers is opposed not only to the legal representation of the big, corporate automobile manufacturers, but to the representation of any corporation that participates in an activity which the activists deem to be against the public interest." Petrara, *supra* note 17, at n.85. Professor Michael Tigar stated: "I am not criticizing [Wilmer, Cutler & Pickering] for [going all out on behalf of their clients]. I am criticizing them for the choice of their clients that they choose to go all out on behalf of." Freedman, *supra* note 17, at 112 (quoting from a 1970 debate between Professor Freedman and Professor Tigar).

<sup>25</sup> Riley, *supra* note 21, at 550 (quoting John Esposito, an associate of Nader).

<sup>26</sup> *Id.* at 564–65; Petrara, *supra* note 17, at 194–95.

that where the public interest truly lies can best be determined by the presentation of opposing views in the proper forum.<sup>27</sup>

## 2. *Recent Attacks*

More recently, a Seattle law firm forced attorney Steven Davis out of the firm when his environmental work came under attack by attorneys for development interests in Alaska. In 1999, the Alaska Department of Natural Resources issued a right-of-way permit to Golden Valley Electric Association (“GVEA”) to construct a large electric power transmission line.<sup>28</sup> Shortly thereafter, an environmental organization asked Davis to provide pro bono assistance and, with the blessing of his firm, Davis filed suit challenging the permit.<sup>29</sup> After the suit was filed, a new partner, who represented other Alaskan utility companies on unrelated matters, joined Davis’ firm. When a lawyer representing GVEA found out that the newly hired partner had joined Davis’ firm, the GVEA attorney threatened the firm’s relationships with GVEA and other Alaska-based utilities if the firm did not terminate its representation of the environmentalists.<sup>30</sup>

Reaching what it termed a “business decision,” the law firm gave Davis an ultimatum—the firm would drop the pro bono environmental case in two days and Davis could either remain at the firm and not work on the case or officially leave the firm but be given temporary access to his office, computer, and secretary so he could continue to work on the case while looking for a new job.<sup>31</sup> When the environmental organization client objected on ethical grounds to the firm withdrawing, and Davis noted that this would leave the clients without representation at a critical

<sup>27</sup> Riley, *supra* note 21, at 554 (quoting the law firm’s press release). For a further argument by Lloyd Cutler, the AMA’s lead attorney on the case, that the participation of able counsel for all whose interests are affected by public action or inaction “is essential to make the adversary process work,” see Lloyd N. Cutler, *Emory Buckner*, 83 HARV. L. REV. 1746, 1749 (1970).

<sup>28</sup> See *N. Alaska Env’tl. Ctr. v. Alaska Dep’t of Natural Res.*, 2 P.3d 629, 631–33 (Alaska 2000).

<sup>29</sup> Elizabeth Amon, *Hardball Tactics Slow the “Good Guys,”* NAT’L L.J., June 11, 2001, at A1; Supplemental Affidavit of Steven C. Davis in Support of Appellants’ Motion for Reconsideration of June 2, 2000 Order at ¶ 4, *N. Alaska Env’tl. Ctr. v. Dep’t of Natural Res.*, No. S-09367 (Alaska Aug. 11, 2000) [hereinafter Supplemental Affidavit of Steven C. Davis] (on file with the Harvard Environmental Law Review).

<sup>30</sup> E-mail from Steven Davis to Author (Aug. 31, 2001) (on file with the Harvard Environmental Law Review); Supplemental Affidavit of Steven C. Davis, *supra* note 29, at ¶¶ 7, 9; Dan O’Neill, *Behind the Scenes in the Intertie Case*, FAIRBANKS DAILY NEWS-MINER, Sept. 3, 2000 (on file with the Harvard Environmental Law Review); Dan O’Neill, *Environmentalists’ Lawyer Squeezed Out*, FAIRBANKS DAILY NEWS-MINER, Sept. 2, 2000 (on file with the Harvard Environmental Law Review).

<sup>31</sup> Supplemental Affidavit of Steven C. Davis, *supra* note 29, at ¶ 7; E-mail from Steven Davis to Author (Sept. 17, 2001) (on file with the Harvard Environmental Law Review).

juncture in the case, the firm temporarily retreated.<sup>32</sup> Subsequently, the firm revived its proposal that Davis leave the firm but be given temporary access to office resources. As Davis then explained:

Given (1) the possibility that the firm would simply terminate me (thereby depriving my clients of their representation) rather than let me continue to file briefs or argue in Fairbanks and (2) my departure would allow me to continue to work on behalf of my clients but without constant harassment and pressure from other Lane Powell attorneys regarding the case, I concluded that the most effective way I could ensure that my clients would have continued access to representation would be to accept the deal offered by Lane Powell.<sup>33</sup>

When a University of Alaska professor later stepped forward to provide free legal assistance to another group of citizens challenging the same project, a GVEA lawyer threatened the citizens with a massive Strategic Litigation Against Public Participation (“SLAPP”) suit to, as the citizens’ attorney stated, “punish my clients and to chill future public interest litigation.”<sup>34</sup> Fearing bankruptcy, the citizens were forced to settle their claims for little of what they had sought.<sup>35</sup>

### B. Attacks on Law School Professors and Students

Attorneys have also repeatedly attacked, and in many instances directed the attack on, law school professors and students for providing free legal assistance on environmental matters.<sup>36</sup>

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<sup>32</sup> Supplemental Affidavit of Steven C. Davis, *supra* note 29, at ¶¶ 8, 9.

<sup>33</sup> *Id.* at ¶ 11. An attorney for GVEA, who is also the lawyer for the Fairbanks Daily News-Miner, allegedly sought to influence the content of the newspaper’s stories about the attacks on Davis. Amon, *supra* note 29, at A20.

<sup>34</sup> Dan O’Neill, *Utility Threatens to Stick Critics with Bills*, FAIRBANKS DAILY NEWS-MINER, May 8, 2001 (on file with the Harvard Environmental Law Review); *see also* Amon, *supra* note 29, at A20 (quoting the GVEA lawyer as stating: “the gates of hell shall open and fall upon your clients”). *See generally* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 83–104 (1996) (discussing the SLAPP litigation strategy of filing multi-million-dollar lawsuits against environmental activists and their attorneys).

<sup>35</sup> Dan O’Neill, *Fen Defenders Bowed to Threats*, FAIRBANKS DAILY NEWS-MINER, June 11, 2001 (on file with the Harvard Environmental Law Review); *see also* Diana Campbell, *Inertie Appeal Settled*, FAIRBANKS DAILY NEWS-MINER, May 24, 2001 (on file with the Harvard Environmental Law Review).

<sup>36</sup> For a discussion of some of the academic freedom issues implicated by attacks on law school clinics, *see generally* Elizabeth M. Schneider, *Political Interference in Law School Clinical Programs: Reflections on Outside Interference and Academic Freedom*, 11 J.C. & U.L. 179 (1984).

### 1. *University of Tennessee*

One of the first attacks on a law school professor took place in the 1970s. In 1976, University of Tennessee College of Law Professor Zygmunt Plater, as one of the plaintiffs and later as attorney on appeal, filed suit against the Tennessee Valley Authority (“TVA”) to enjoin completion of the Tellico Dam and Reservoir Project on the ground that the construction and operation would jeopardize the existence of the snail darter and violate the Endangered Species Act.<sup>37</sup> Plater’s pro bono work, and efforts to gather financial support for the case, led to a backlash from Tennessee attorneys. A local bar association president forwarded a draft bar grievance petition to the dean of the College of Law alleging that Plater had engaged in barratry and champerty.<sup>38</sup> The bar association president warned that the petition would be filed with the bar disciplinary committee if the law school did not discipline Plater and curtail his legal representation activities.<sup>39</sup> At Plater’s insistence, the dean replied to the bar president that Plater’s actions were appropriate and would be vigorously defended in any disciplinary proceeding.<sup>40</sup> The draft grievance was never filed, and the Tennessee barratry and champerty statutes were found unconstitutional in a later case.<sup>41</sup>

Around the same time, representatives of the TVA informed the law school that it would withhold the approximately twenty scholarships it provided to the school’s law students until Plater and Donald Cohen, a co-plaintiff on the law faculty, left the faculty or backed down on the case.<sup>42</sup> Although there is no direct evidence that this threat to terminate scholarship support was initiated by the TVA’s attorneys, those familiar with the way the TVA handled its environmental litigation observe that the TVA’s attorneys significantly influenced the TVA’s out-of-court conduct.<sup>43</sup>

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<sup>37</sup> *Hill v. Tenn. Valley Auth.*, 419 F. Supp. 753, 754 (E.D. Tenn. 1976), *rev’d*, 549 F.2d 1064 (6th Cir. 1977), *aff’d*, 437 U.S. 153 (1978).

<sup>38</sup> Telephone Interview with Zygmunt Plater, Professor, Boston College Law School (Aug. 22, 2001); E-mail from Zygmunt Plater, Professor, Boston College Law School, to Author (Sept. 12, 2001) (on file with the Harvard Environmental Law Review). “Barratry” is the offense of inciting litigation, especially by soliciting potential clients; “champerty” is an agreement between a stranger and a party to a law suit by which the stranger pursues the party’s claim in consideration of receiving part of any judgement. BLACK’S LAW DICTIONARY 144, 224 (7th ed. 1994).

<sup>39</sup> Telephone Interview with Zygmunt Plater, *supra* note 38; E-mail from Zygmunt Plater, *supra* note 38.

<sup>40</sup> See E-mail from Zygmunt Plater, Professor, Boston College Law School, to Author (Sept. 17, 2001) (on file with the Harvard Environmental Law Review).

<sup>41</sup> *Id.*; see *ACLU v. Tennessee*, 496 F. Supp. 218 (M.D. Tenn. 1980).

<sup>42</sup> Telephone Interview with Zygmunt Plater, *supra* note 38; E-mail from Zygmunt Plater, *supra* note 40.

<sup>43</sup> Telephone Interview with Zygmunt Plater, *supra* note 38; E-mail from Dean Rivkin, Professor, University of Tennessee College of Law, to Author (Sept. 17, 2001) (on file with the Harvard Environmental Law Review).

## 2. University of Oregon

Attorneys for timber interests severely attacked the University of Oregon Law School's environmental law clinic for its choice of clients and cases. In 1981, shortly after the National Wildlife Federation and the law school entered into an agreement jointly to operate an environmental law clinic, opposing parties in the clinic's cases objected and convinced the president of the university to sever the arrangement.<sup>44</sup> Because they were unsatisfied with the mere termination of this joint arrangement, starting again in 1982 and continuing unabated through the early 1990s, attorneys for timber interests attacked the law clinic and urged university officials to shut down the program.<sup>45</sup> In an unsuccessful attempt to get the clinic disqualified from a lawsuit, timber interest attorneys deposed two clinical instructors, the dean of the law school, two former clinic students, and university officials for information on the clinic's finances and decision-making processes.<sup>46</sup>

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<sup>44</sup> Report of the Ad Hoc Study Committee for the Environmental Law Clinic, University of Oregon School of Law 4 (Nov. 30, 1988) (unpublished report, on file with the Harvard Environmental Law Review). The university president rationalized that the National Wildlife Federation's sponsorship violated the university's policy of institutional neutrality. *Id.* at 4. However, a subsequent report by university professors and Oregon attorneys concluded that the fact that a law clinic takes on clients with certain kinds of problems does not violate the university policy of institutional neutrality, noting: "Institutional neutrality applies to the institution as a whole. Individual professors and students are free to advocate their own political and social views." *Id.* at 11.

<sup>45</sup> Memorandum from John E. Bonine, Professor, University of Oregon Law School, to Faculty, University of Oregon Law School (Dec. 18, 1987) (on file with the Harvard Environmental Law Review); E-mail from Michael Axline, Professor, University of Oregon School of Law, to Author (Apr. 3, 2002) (on file with the Harvard Environmental Law Review) (explaining that lawyers for the forestry industry were heavily involved in the attack on the Oregon clinic and led the charge in many instances).

<sup>46</sup> Schneider, *supra* note 36, at 187; Elizabeth M. Schneider & James H. Stark, Political Interference in Law School Clinical Programs: Report of the AALS Section on Clinical Legal Education, Committee on Political Interference 2 (1982) (unpublished report, on file with the Harvard Environmental Law Review).

In response to complaints about the Oregon law clinic's use of public funds, the Oregon attorney general issued an opinion holding that in representing private plaintiffs, the clinic was providing a substantial public benefit that is not defeated just because a private purpose also is served. Letter from Donald C. Arnold, Chief Counsel, Oregon Department of Justice, to William E. Davis, Chancellor, Oregon State System of Higher Education, and Max Simpson, Oregon State Representative (July 11, 1983) (on file with the Harvard Environmental Law Review) (responding to Opinion Request OP-5498).

Similarly, the Rutgers Environmental Law Clinic successfully defeated a claim that use of university resources to pursue litigation on behalf of a nonprofit public interest organization was an improper donation of state funds under the New Jersey constitution. Transcript of Motion at 35-37, N.J. Dep't of Env'tl. Prot. v. City of Bayonne, No. C-118-97 (Chan. Div. Hudson County, N.J. Super. Ct. June 11, 1999). The court held that by advancing the hands-on education of law students and helping enforce environmental laws the clinic served a public interest, even though it might also benefit private parties. *Id.* at 36-37 (citing *Roe v. Kervick*, 42 N.J. 191 (1964), and *Township of Mt. Laurel v. Dep't of Pub. Advocate*, 83 N.J. 522 (1980)).

As a final strategy, and largely in response to the clinic's filing of a 1987 lawsuit to protect the habitat of the endangered northern spotted owl, timber industry lawyers turned to the state legislature.<sup>47</sup> Faced with a proposed bill to withdraw state funding of not just the law clinic but the entire law school, the Oregon environmental law clinic voluntarily moved off campus in 1993 and was reorganized as an independent not-for-profit public interest law organization.<sup>48</sup>

### 3. *Tulane University*

One of the most aggressive efforts by members of the bar to restrict the activities of law school professors and students involved Tulane Law School's Environmental Law Clinic. Upset with the law clinic's success in presenting a lower-income, minority community's opposition to a proposed chemical plant (the Shintech case), members of the Louisiana bar, in conjunction with the Governor and business interests, attacked the clinic and pressed university officials to intervene and restrict the clinic's advocacy activities.<sup>49</sup> This attack was led, in large part, by the Governor's Special Counsel<sup>50</sup> and by attorneys representing business interests that

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<sup>47</sup> Alan Pittman, *UO Environmental Law Clinic Funding Axed*, WHAT'S HAPPENING (Eugene, Or.), Sept. 2, 1993, at 1 (reporting that two local timber industry lawyers who have been advocating de-funding the Oregon Environmental Law Clinic are pleased that the university has severed funding for the clinic). The attorneys sought to justify their actions on the ground that state money should not be used to support political advocacy or oppose economic development activities. See Katherine Bishop, *Oregon Law Clinic Battles the Timber Industry*, N.Y. TIMES, Aug. 5, 1988, at B5.

<sup>48</sup> Peter A. Joy & Charles D. Weisselberg, *Access to Justice, Academic Freedom, and Political Interference: A Clinical Program Under Siege*, 4 CLINICAL L. REV. 531, 534 (1998); Pittman, *supra* note 47, at 1; Posting of John Bonine, *Attacks on Law Clinics* (2), University of Oregon School of Law, to lawclinic@lawlib.wuacc.edu (Mar. 31, 1998) (on file with the Harvard Environmental Law Review).

<sup>49</sup> See Kuehn, *supra* note 14; see also Peter A. Joy, *Political Interference with Clinical Legal Education: Denying Access to Justice*, 74 TUL. L. REV. 235 (1999); Adam Glaser, Note, *The Implications of Changes to Louisiana's Law Clinic Student Practice Rule*, 12 GEO. J. LEGAL ETHICS 751 (1999); Kerryann B. Hamill, Comment, *Strict Student Practice Rules Impose Substantial Burden on Disadvantaged Groups Seeking Environmental Justice*, 7 U. BALT. J. ENVTL. L. 1 (1999); Jennifer L. Jung, Comment, *Federal Legislative and State Judicial Restrictions on the Representation of Indigent Communities in Public Interest and Law School Clinic Practice in Louisiana*, 28 CAP. U.L. REV. 873 (2000); Frances M. Nicastro, Comment, *Southern Christian: A Call for Extra-Constitutional Remedies, Legal Clinical Education, and Social Justice*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 333 (2001).

<sup>50</sup> Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L L.J., Sept. 8, 1997, at 1, 27 (reporting remarks of Terry Ryder). In a private meeting with Tulane officials, the Governor's Special Counsel pressed the university president and law school dean to retreat on the Shintech case. Telephone Interview with Dr. Eamon M. Kelly, Former President, Tulane University (Oct. 8, 1999).

During this time, the Governor's Special Counsel served as chairman and vice-chairman of the Louisiana Bar Association's Environmental Law Section, which took no public position on the attack on the Tulane law clinic or on efforts to amend the law student practice rule to restrict the availability of clinic representation. Kuehn, *supra* note 14, at 71. The Section's only action was to publish an article in the Louisiana Bar Journal,

had been defeated in proceedings by law clinic students.<sup>51</sup> For example, at the time of his attacks on the Tulane clinic, the chairman of the Chamber, one of the three business organizations that pressed the Louisiana Supreme Court to intervene and restrict the ability of the Tulane clinic to provide free legal assistance,<sup>52</sup> and his law firm were battling with clinic lawyers over the eligibility of a hazardous waste incinerator for state tax breaks.<sup>53</sup>

The reasons given by these attorneys for seeking to deny the Tulane law clinic the ability to provide free legal assistance were that clinic lawyers went “too far” in “trying to blaze new territory in the environmental justice arena,”<sup>54</sup> that the clinic was “not supposed to be a public policy advocate”<sup>55</sup> for “legal views . . . in direct conflict with business positions,”<sup>56</sup> and that business interests wanted a level playing field undisturbed by clinic lawsuits.<sup>57</sup>

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written by an environmental defense attorney whose firm often opposed the Tulane clinic. The article urged all licensed attorneys to report any representation of ineligible clients by law clinics to the bar ethics committee and seek disqualification of the law clinic students and supervising attorneys from the case. *Id.* at 72 (noting that the bar journal refused a request by the Tulane clinic’s acting director to present a different perspective on the new student practice rule restrictions).

<sup>51</sup> See Kuehn, *supra* note 14, at 72–75 (detailing the role of attorneys in the attack on the Tulane clinic).

<sup>52</sup> The Chamber president argued that Tulane law clinic lawyers were “overzealous” and that the clinic’s actions showed “how uncertain our economic future can be when irresponsible acts are tolerated.” Sam A. LeBlanc III, *Business Interests Unfairly Portrayed in Law Clinic Flap*, TIMES-PICAYUNE (New Orleans, La.), June 27, 1998, at B6; see 8 MARTINDALE-HUBBELL LAW DIRECTORY LA246B (2002) (listing LeBlanc as the Chairman-Elect of the Chamber of Commerce and a member of the New Orleans law firm of Adams & Reese); see generally Letter from Sam A. LeBlanc III, Chairman, the Chamber/New Orleans and the River Region et al., to the Honorable Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Mar. 12, 1998) (on file with the Harvard Environmental Law Review) (arguing why the court should limit the ability of the Tulane law clinic to provide representation to community organizations).

<sup>53</sup> These multi-million-dollar tax breaks were earlier ruled unlawful by a trial judge, and the Chamber chairman and his firm were ultimately unsuccessful in their four-year legal battle to preserve the tax exemptions. See *Robinson v. Ieyoub*, 727 So. 2d 579 (La. Ct. App. 1998), *writ denied*, 747 So. 2d 1096, 1097 (La. 1999); see also Motion to Vacate and Motion for Continuance, *Robinson v. Ieyoub*, (No. 412,867) (La. 19th Judicial Dist. Ct. Feb. 10, 1995) (identifying LeBlanc as counsel for Rollins Environmental Services (La.), Inc.).

<sup>54</sup> Coyle, *supra* note 50, at 27 (quoting remarks by the Governor’s Special Counsel).

<sup>55</sup> Christi Daugherty, *Target: Tulane*, GAMBIT WKLY. (New Orleans, La.), Oct. 13, 1997, at 9 (quoting Dan Juneau, President, Louisiana Association of Business Interests).

<sup>56</sup> Letter from Robert H. Gayle, Jr., President and Chief Executive Officer, the Chamber/New Orleans and the River Region, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (July 8, 1997) (on file with the Harvard Environmental Law Review).

At the time of the attack on the Tulane law clinic, the Chamber’s president, and many of its officers and directors, were prominent local attorneys. See The New Orleans Regional Chamber of Commerce, *1998 Board of Directors*, at <http://chamber.gnofn.org/bod.html> (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review) (identifying attorneys and their respective firms as officers or members of the Board of Directors: Sam A. LeBlanc III, Adams & Reese; Walter J. Leger, Leger & Mestayer; Herschel L. Abbott, Jr., BellSouth; Gary Elkins, Elkins, P.L.C.; Richard McMillan, Jones, Walker; and Paul Pastorek, Adams & Reese).

<sup>57</sup> See generally *Fox News* (Fox News Channel television broadcast, Sept. 1998) (on

Some attorneys in Louisiana were not satisfied simply with denying the Tulane Environmental Law Clinic the ability to provide free legal representation. One senior partner in a prominent New Orleans law firm warned that if applicants for a job at the firm had the Tulane clinic on their resume “they might as well not come through the front door.”<sup>58</sup> The hiring boycott remark came during a meeting of the Inns of Court, an organization dedicated to promoting the professionalism of the bar by making “the legal system more accessible” and perfecting the availability of justice in the United States.<sup>59</sup> The Louisiana Department of Environmental Quality allegedly engaged in similar blacklisting by refusing to hire qualified Tulane Law School alumni because of their participation in the environmental law clinic during law school.<sup>60</sup> Further, at least one chemical company reportedly stopped recruiting Tulane University students, even Tulane engineering school students, as a way to pressure the university to shut down or restrict the Tulane Environmental Law Clinic.<sup>61</sup>

#### 4. *University of Pittsburgh*

At the University of Pittsburgh, critics attacked two law professors, William Luneburg and Jules Lobel, for their pro bono environmental work from 1996 to 1998 challenging proposed logging on government lands.<sup>62</sup> A lawyer for the U.S. Forest Service started the attack by circulating a document identifying the role of the law professors in the case.<sup>63</sup>

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file with the Harvard Environmental Law Review) (reporting remarks by Herschel Abbott). Abbott was chairman of the Business Council of New Orleans, one of the three business groups that petitioned the Louisiana Supreme Court to restrict the clinic’s ability to represent clients, and president and former general counsel of BellSouth Corporation; students at the Tulane Environmental Law Clinic had earlier blocked BellSouth’s plans to demolish an historic New Orleans building. Kuehn, *supra* note 14, at 72.

<sup>58</sup> E-mail from Crawford Rose to Author (May 16, 1999) (on file with the Harvard Environmental Law Review) (recounting remarks of Henry B. Alsobrook, Jr.). The attorney reasoned that businesses would not want to hire firms that employed former Tulane law clinic students. *Id.*

<sup>59</sup> *Id.*; see also American Inns of Court, *Professional Creed*, available at <http://www.innsocourt.org> (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review); American Inns of Court, *Mission Statement*, available at <http://www.innsocourt.org> (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review). Alsobrook is an attorney with the firm of Adams & Reese. 8 MARTINDALE-HUBBELL LAW DIRECTORY LA251B (2002).

<sup>60</sup> Telephone Interviews with Malcolm Pipes, Environmental Law Clinic alumnus (Oct. 23 and 30, 1999) (relating discussion with a Louisiana Department of Environmental Quality official).

<sup>61</sup> Kuehn, *supra* note 14, at 61–62 & nn.135–41 (noting the pressure put on Tulane by DuPont and other chemical companies). It is not known whether attorneys with the chemical company played a role in this boycott.

<sup>62</sup> Jim Buck, *Pitt Law Prof Argues His Case*, BRADFORD ERA (Bradford, Pa.), Apr. 24, 1998, at 1; Jim Buck, *Pitt Sets Guidelines for Law Professors*, BRADFORD ERA (Bradford, Pa.) Apr. 22, 1998, at 1; Casey Cobbs, *University of Pittsburgh Re-Examines Faculty Work Policy*, BRADFORD ERA (Bradford, Pa.), Feb. 28, 1998, at 3.

<sup>63</sup> E-mail from William Luneburg, Professor, University of Pittsburgh School of Law,

Recently, attorneys attacked the law school's new environmental law clinic over assistance provided to a local community group concerned about the proposed construction of a highway expressway.<sup>64</sup> At the forefront of the attack was a justice of the Pennsylvania Supreme Court and chairman of the Law School's Board of Visitors, who characterized the law clinic's participation in the environmental review process required by the National Environmental Policy Act as "the teaching of rudimentary social activism rather than law" and "a real and present danger to the well-being of the law school."<sup>65</sup> In response to these attacks, the university announced it would impose a \$62,559 per year charge on the environmental law clinic for administrative and overhead costs, out of the clinic's annual budget of \$102,000, and proposed to separate the law clinic from the law school.<sup>66</sup> After a public outcry, the university reversed its position and decided that the clinic would remain in the law school and be fully funded by the law school through private funds.<sup>67</sup>

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to Author (Feb. 10, 2000) (on file with the Harvard Environmental Law Review).

<sup>64</sup> See Don Hopey, *Law Clinic at Pitt Feeling Pressure*, PITTSBURGH POST-GAZETTE, Oct. 17, 2001, at B-1; Marylynn Pitz, *Murphy Clashes with Turnpike Officials*, PITTSBURGH POST-GAZETTE, Oct. 19, 2001, at C-8; Johnna A. Pro, *Road Group Targets Law Clinic at Pitt*, PITTSBURGH POST-GAZETTE, Aug. 24, 2001, at B-4. The president of a pro-expressway development organization called "upon the University of Pittsburgh to dismiss the [environmental law clinic] director and sever its relationship with CANTR [the clinic's existing client]." Frank Irej Jr., *Pitt Should Drop Client that Opposes Expressway*, PITTSBURGH POST-GAZETTE, Sept. 19, 2001, at E-2 (letter to editor). The university administration allegedly barred the environmental law clinic from seeking additional financial support from private foundations until the clinic agreed not to "take on any clients that will cause controversy [with the legislature] in Harrisburg." Bruce Steele, *Controversy Threatens Funding of Pitt Environmental Law Clinic*, U. TIMES (Pittsburgh, Pa.), Oct. 25, 2001, at 1 (quoting E-mail from David Herring, Dean, University of Pittsburgh School of Law, to William Luneburg, Professor, University of Pittsburgh School of Law).

<sup>65</sup> See Hopey, *supra* note 64 (reporting that state Supreme Court Justice Ralph J. Cappy, chairman of the law school's Board of Visitors, criticized the environmental law clinic's operations and clients); Letter from Ralph J. Cappy, Justice, Supreme Court of Pennsylvania, to William V. Luneburg, Professor, University of Pittsburgh School of Law (Oct. 2, 2001) (on file with Harvard Environmental Law Review).

<sup>66</sup> Hopey, *supra* note 64; Bill Schackner & Don Hopey, *Pitt Faculty Wants Nordenberg to Buck Legislature*, PITTSBURGH POST-GAZETTE, Nov. 13, 2001, at B-3. The University, whose chancellor is the former dean of the law school, announced the imposition of these charges shortly after a meeting at which the Pennsylvania Supreme Court justice criticized the clinic. Hopey, *supra* note 64. The University's imposition of these overhead charges would have bankrupted the clinic in eighteen months. *Id.*; see also Elizabeth Amon, *Environmental Law: School Law Clinics Spark Hostility*, NAT'L L.J., Apr. 1, 2002, at A5 ("[T]he clinic would have had trouble raising [the \$62,000] privately because the university limited who the clinic could speak to in order to raise funds. The assessments would have caused the clinic to close in a year and a half.").

<sup>67</sup> See Amon, *supra* note 66. ("Law school Dean David Herring said of the university's recent decision to support the clinic, 'At some point you have to stand by your principles. You have to stand up for academic freedom and the principles of our profession and teach your students by model behavior.'").

5. *Other University Attacks*

At the University of West Virginia, critics attacked law professor Patrick McGinley in the 1980s over his pro bono representation of citizens challenging illegal mining practices.<sup>68</sup> Lawyers for coal companies led the public and behind-the-scenes efforts to drive McGinley off the case, including an unsuccessful effort to deny McGinley tenure.<sup>69</sup>

Similarly, timber interests attacked Professor Mark Squillace of the University of Wyoming College of Law in 1994 for providing pro bono legal assistance to environmental interests.<sup>70</sup> Leading the attack on the law professor and efforts to reduce funding to the law school was an attorney, and former student of Squillace's, supporting timber interests.<sup>71</sup> In response to Squillace's pro bono activities, and the later publication of a controversial book on Western grazing practices by his colleague Debra Donahue, the president of the Wyoming Senate proposed legislation to close the law school.<sup>72</sup> The bill was never introduced.<sup>73</sup>

In addition to these publicized attacks, some law professors and law clinics have refused to represent certain cases or clients out of fears that taking such cases could result in problems with their job security or threats to their school's funding.<sup>74</sup> Because of complaints from law school alumni and opposing counsel, many other law professors have had

<sup>68</sup> *Consol Talks to WVU Officials About Law Professor Handling Case Against It*, U.P.I., Oct. 15, 1984; *West Virginia News in Brief*, U.P.I., June 10, 1987; *W.Va. Newspaper Editorials*, U.P.I., June 25, 1987.

<sup>69</sup> See E-mail From Patrick McGinley, Professor, West Virginia University College of Law, to Author (Apr. 5, 2000) (on file with the Harvard Environmental Law Review).

<sup>70</sup> See Kerry Drake & Chris Tollefson, *Legislator Slams UW*, CASPER STAR-TRIB. (Wyoming), Feb. 27, 1996, at A1; Kerry Drake, *UW Clears Squillace of Wrongdoing*, CASPER STAR-TRIB. (Wyoming), July 21, 1995, at A1; *Legislators May Question University Funding*, POWELL TRIB. (Wyoming), Oct. 17, 1995, at 7; Marc Lumpkin, *Children Protest Law Professor Defending Anti-Logging Interests*, LARAMIE DAILY BOOMERANG (Wyoming), July 19, 1994, at 1.

<sup>71</sup> Lumpkin, *supra* note 70 (noting that an alumnus of the University of Wyoming's College of Law led the attack on the law professor's pro bono work). Another alumnus of the law school attacked, and called for an investigation of, Professor Debra Donahue for the publication of a book criticizing grazing practices in the West. Letter from Law School Alumnus to Jerry Parkinson, Dean, University of Wyoming College of Law (Jan. 20, 2000) (on file with the Harvard Environmental Law Review) (identity of alumnus deleted from copy of letter supplied to Author).

<sup>72</sup> *Legislator May Propose Closing Wyo. Law School*, DENVER POST, Feb. 11, 2000, at B6; Deirdre Stoelzle, *Ag Officials Slam Prof's Use of UW Stationery*, CASPER STAR-TRIB. (Wyoming), Feb. 15, 2000, at A1.

<sup>73</sup> Tom Kenworthy, *A Discouraging Word in Tome on the Range*, USA TODAY, Mar. 3, 2000, at 3A.

<sup>74</sup> See Kuehn, *supra* note 14, at 147 & n.517 (recounting effect of attack on Tulane clinic on other law school clinic activities); *State Senator Gets Symbolic Rebuke of Pitt Professor*, ASSOCIATED PRESS NEWSWIRE (Pa.), June 23, 2001 (reporting that as a result of threats by a state legislator, the director of the University of Pittsburgh's environmental law clinic chose to provide legal assistance on his own time to a group challenging logging practices in the Allegheny National Forest, rather than through the school's law clinic); Hopey, *supra* note 64.

to respond to hostile phone calls and letters, or to defend their case and client selection decisions before meetings with law school and university officials.<sup>75</sup>

### III. ETHICS RULES ADDRESSING ATTACKS ON ENVIRONMENTAL REPRESENTATION

An area of concern for many attorneys who practice public interest environmental law is in-court attacks on their ability to provide environmental representation. These attacks often come in the form of challenges to attorneys fees, naming attorneys as defendants in SLAPP lawsuits, unsubstantiated ethics complaints, and ghost-writing frivolous pleadings.<sup>76</sup> In the view of attorneys on the receiving end, the purpose of such tactics is to drive the attorneys off the case, or off future cases, thereby denying potential clients of legal representation.<sup>77</sup>

Because these attacks on environmental representation take place within an ongoing judicial proceeding, they are defended by the attackers on the ground that such tactics are simply the zealous representation to which their clients are entitled and to which they are bound to provide.<sup>78</sup> However, rules of professional responsibility and lawyer oaths also provide that a “lawyer is not bound to press for every advantage that might be realized for a client”<sup>79</sup> and shall not assert or controvert an issue if the

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<sup>75</sup> See, e.g., E-mail from Lawrence M. Grosberg, Professor, New York Law School, to Author (Nov. 14, 2001) (on file with the Harvard Environmental Law Review) (explaining complaint to dean of Columbia Law School because of activities of law clinic); E-mail from Paul D. Reingold, Professor, University of Michigan Law School, to Author (Mar 20, 2001) (on file with the Harvard Environmental Law Review) (documenting complaints to the dean of the University of Michigan Law School about law clinic activities); Posting of John Bonine, *supra* note 48 (documenting attacks on fourteen law school clinics).

<sup>76</sup> See, e.g., Defendants’ Motion to Strike Plaintiff’s Petition, *Duke Energy Murray, LLC v. Ga. Pub. Interest Research Group*, No. 2001CV38459 (Fulton County Super. Ct. May 30, 2001) (responding to threatened SLAPP suit by Duke Power if Georgia Center for Law in the Public Interest files a Clean Air Act citizen suit or takes further action in the administrative appeal of a Duke Power construction permit); PRING & CANAN, *supra* note 34, at 165–66 (documenting tactic of attacking the environmentalists’ lawyers); Dennis Pfaff, *Pests of Nature*, DAILY J. (San Francisco), Feb. 10, 2000, at 1 (reporting an observation of an attorney for an environmental organization that pro se filings by a “wise use” group appeared to be prepared by an attorney anonymously to avoid facing “sanctions or problems with the bar”); Howard Pankratz, *High Court Won’t Discipline Lawyer*, DENVER POST, Apr. 28, 1993, at 2B; E-mail from Geoff Hickcox, Attorney, Kenna & Hickcox, P.C., to Author (July 18, 2001) (on file with the Harvard Environmental Law Review); Telephone Interview with Jay Tughton, Attorney, EarthJustice Legal Defense Fund (Aug. 20, 2001); Telephone Interview with Ray Vaughan, Attorney, Wildlaw (Sept. 12, 2001).

<sup>77</sup> E-mail from Geoff Hickcox, *supra* note 76; Telephone Interview with Jay Tughton, *supra* note 76.

<sup>78</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.3 & cmt. (1999); see also MODEL CODE OF PROF’L RESPONSIBILITY Canon 7, DR 7-101(A)(1) (1986).

<sup>79</sup> MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. (1999).

action is taken primarily for the purpose of harassing or maliciously injuring a person.<sup>80</sup>

These attacks in on-going proceedings generally have a neutral arbiter available to evaluate their propriety and order appropriate action. By contrast, the attacks addressed in this Article are those where lawyers are generally acting outside the shadow of the law or some other regulated process to influence or intimidate other lawyers to deny certain causes or clients legal representation or deny clients independent professional advice and representation. Thus, the focus of this Article is on extra-judicial, rather than in-court attacks on attorneys providing environmental representation.

Members of the bar who engage in extra-judicial attacks on other attorneys and seek to deprive citizens of representation on environmental matters violate long-standing fundamentals of professional conduct, as embodied in ethics codes. These principles of professional conduct include an attorney's duty not to refuse representation to unpopular or controversial clients or causes, the duty to act independently of third-party interests, the legal profession's pro bono publico responsibilities, and the duties not to prejudice the administration of justice or use means that have no substantial purpose other than to embarrass, harass, or delay a third person.

Though the professional rules and ethics opinions regarding attacks on other attorneys are non-binding (in the case of ethics opinions) and generally lack enforceable sanctions (in the case of professional rules), the attacks remain contrary to rules of professional responsibility and are therefore unethical.

#### *A. The Duty Not To Refuse Unpopular or Controversial Clients or Causes*

In seeking to restrict access to justice to certain environmental points of view, lawyers attacking environmental representation neglect their duty not to deny legal representation to parties with controversial causes. A comment in the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules")<sup>81</sup> states that "legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval."<sup>82</sup> In-

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<sup>80</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt., 3.1 & cmt. (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 7, EC 7-4, 7-10, DR 7-102(A)(1) (1986); *In re* Amendments to Rules Regulating the Fla. Bar, 573 So.2d 800, 803 (1990) (reprinting Florida's oath); MI. STATE BAR R. 15, § 3 (Procedure for Admission; Oath of Office) (2001).

<sup>81</sup> Forty-four states and the District of Columbia have adopted some form of the ABA's Model Rules. RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 7 (1995).

<sup>82</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1999).

deed, an individual lawyer's pro bono obligation involves "accepting a fair share of unpopular matters or indigent or unpopular clients."<sup>83</sup>

The ABA's Model Code of Professional Responsibility ("Model Code")<sup>84</sup> similarly provides that a lawyer "should not decline representation because a client or cause is unpopular or community reaction is adverse."<sup>85</sup> An attorney's preference to avoid adverse alignment against judges, other lawyers, public officials, or influential members of the community does not justify refusing to represent a client.<sup>86</sup>

In a number of states, a further duty is imposed by the lawyer oaths given upon admission to the bar. Many oaths state: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any person's cause for lucre or malice."<sup>87</sup> Violation of the oath constitutes grounds for disciplinary action,<sup>88</sup> although it is not known whether any attorney's selfish refusal to represent the defenseless or oppressed has ever resulted in discipline.

These duties flow from the professional conviction that legal services should be fully available to all persons and from the principle that representation of a client "does not constitute an endorsement of the client's political, economic, social or moral views or activities."<sup>89</sup> Similarly, the participation of law school professors or law school clinical programs in a lawsuit does not make the university a party to the proceeding nor constitute the university's position on the underlying dispute.<sup>90</sup>

A number of ABA ethics opinions reinforce this responsibility not to deny legal services to certain clients or causes.<sup>91</sup> ABA Formal Opinion

<sup>83</sup> MODEL RULES OF PROF'L CONDUCT R. 6.2 cmt. (1999); *see* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-26, 2-29 (1986).

<sup>84</sup> Five states (Illinois, New York, North Carolina, Oregon, and Virginia) base their ethics rules on both the ABA's Model Rules and the ABA's Model Code; California never adopted the Model Code but has incorporated some Model Rule provisions. ZITRIN & LANGFORD, *supra* note 81, at 7; STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS xxiii (2001). For an analysis of how some of the rules in these states differ from the Model Rules, *see* LAWS. MAN. ON PROF. CONDUCT (ABA/BNA) 01:30, 1:33-1:35, 1:49-1:59 (2002).

<sup>85</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27 (1986).

<sup>86</sup> *Id.* at EC 2-28 (1986).

<sup>87</sup> *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6067, 6068(h) (2001); *In re* Amendments to Rules Regulating the Fla. Bar—1-3.1(a) and Rules of Judicial Admin.—2.065 (Legal Aid), 573 So.2d 800, 803 n.8 (Fla. 1990) (reprinting Florida's oath); Louisiana State Bar Association, *The Lawyer's Oath*, at [http://www.lsba.org/Bar\\_Admissions/lawyers\\_oath.html](http://www.lsba.org/Bar_Admissions/lawyers_oath.html) (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review); MI. STATE BAR R. 15, § 3 (Procedure for Admission; Oath of Office) (2001).

<sup>88</sup> *See, e.g.*, CAL. BUS. & PROF. CODE § 6103 (2001); MONT. CODE ANN. § 37-61-301(2)(b) (2001); WASH. REV. CODE § 2.48.220(3) (2001).

<sup>89</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (1999).

<sup>90</sup> *See* Letter from Donald C. Arnold, *supra* note 46. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (1999) (noting that "representing a client does not constitute approval of the client's views or activities").

<sup>91</sup> Ethics opinions are generally not binding on courts or disciplinary committees. *See* ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1420 (1978) (explaining the purposes and intended effects of the Model Code and ABA ethics opinions). Nonethe-

324 states that an attorney on a legal aid society's board of directors "is under a similar obligation not to reject certain types of clients or particular kinds of cases merely because of their controversial nature, anticipated adverse community reaction, or because of a desire to avoid alignment against public officials, government agencies, or influential members of the community."<sup>92</sup> Lawyer members of the governing bodies of legal assistance organizations and law school clinics are admonished to avoid establishing guidelines that prohibit acceptance of controversial cases or clients or that prohibit aligning the organization against public officials, governmental agencies, or influential members of the community.<sup>93</sup> Instead, they "should seek to establish guidelines that encourage, not restrict, acceptance of controversial clients and cases," especially if legal representation is otherwise not available.<sup>94</sup> For an attorney to deny representation to certain clients or causes because of attacks by another attorney would be to violate these precepts.

The ABA's Committee on Ethics and Professional Responsibility clarified that this duty applies to all attorneys, not just to those who serve on legal services boards or in law school clinics: "We stress that *all* lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the rendition of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist."<sup>95</sup>

The ABA and the American Association of Law Schools ("AALS") have interpreted this ethical duty to preclude criticism by lawyers of those attorneys who are willing to represent unpopular causes:

No member of the Bar should indulge in public criticism of another lawyer because he has undertaken the representation of

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less, ABA opinions have significant influence on courts and disciplinary committees and provide an important source of ethics authority. Ted Finman & Theodore Schneyer, *The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 83–88 (1981).

<sup>92</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 324 (1970). Four years later, the ABA's Committee on Ethics and Professional Responsibility revisited the issue of the extent to which a governing board may prescribe organizational rules or operational methods to limit or restrict the activities of staff lawyers and stated that the "holdings [in Formal Opinion 324 and Informal Opinions 1232 and 1252] still appear . . . to be sound and fully supported by the sections of the Code of Professional Responsibility." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974). ABA Informal Opinion 1208, addressing threats to cut financial assistance to a law school clinic, extended the obligation to encourage the acceptance of controversial clients and cases to attorneys involved in the oversight of law clinics. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

<sup>93</sup> ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1208 (1972).

<sup>94</sup> *Id.*

<sup>95</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 334 (1974) (emphasis added).

causes in general disfavor. Every member of the profession should, on the contrary, do what he can to promote a public understanding of the service rendered by the advocate in such situations.<sup>96</sup>

### 1. *Justifications Given for Attacks*

Attorneys attacking the availability of legal assistance on environmental matters ignore these ethical considerations and often argue that the clients and their causes justify denying them access to legal representation. For example, attorneys leading the attack on the Tulane Environmental Law Clinic sought to justify their actions by arguing that the projects that the Tulane clients sought to block were beneficial to the community and should not be opposed by anyone.<sup>97</sup> These lawyers view the representation by law school professors of community organizations that might object to certain large-scale development projects as improper political "activism,"<sup>98</sup> equating the concept of inappropriate legal activism with the potential economic damage caused by these suits. The Chief Justice of the Louisiana Supreme Court sought to justify new restrictions on law clinic representation of community organizations, which were imposed at the request of business interests in Louisiana and their attorneys, by arguing, "We don't want people with agendas to outgun the other side. So, we restricted the clinics to even up the playing field."<sup>99</sup>

Similarly, the attorney who organized the effort to prohibit a University of Wyoming law professor from providing pro bono legal services complained of the allegedly radical, economically damaging positions taken by the law professor's clients.<sup>100</sup> A Pennsylvania Supreme Court justice characterized the efforts of the University of Pittsburgh's envi-

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<sup>96</sup> *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1217 (1958) (reprinting report of the ABA and AALS's Joint Conference on Professional Responsibility).

<sup>97</sup> LeBlanc, *supra* note 52, at B6 (letter to editor objecting to the Tulane law clinic's representation in the Shintech matter and other industrial expansion projects).

<sup>98</sup> Supplemental Comments on Proposed Amendments to Law Student Practice Rule, attachment to Letter from Daniel L. Juneau, Louisiana Association of Business and Industry et al., to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Mar. 12, 1998) (on file with the Harvard Environmental Law Review) (including signature of attorneys LeBlanc and Abbott). The attorney chairman of the Chamber argued that certain types of law clinics, "particularly in the area of domestic relations, financial problems, criminal matters, and others," pursue "legitimate goals" but others, such as environmental law clinics, are improper "social programs and can even have political agendas." Sam A. LeBlanc III, *Debate Over the Law Clinic Practice Rule: Redux*, 74 TUL. L. REV. 219, 234 (1999).

<sup>99</sup> Telephone interview with Luz Molina, Professor, Loyola Law School (Dec. 7, 1998) (recounting statements made by Chief Justice Pascal F. Calogero, Jr., during a meeting earlier that day); *see also* Kuehn, *supra* note 14, at 88 & n.266.

<sup>100</sup> *See* Drake, *supra* note 70; Lumpkin, *supra* note 70.

ronmental law clinic to ensure compliance with federal environmental laws as “social activism.”<sup>101</sup>

It is not apparent why the representation of community groups suing to enforce environmental laws is any more radical or political than when a private attorney represents businesses or business associations suing to avoid environmental restrictions.<sup>102</sup> In reality, the attacks on legal representation for certain environmental causes are simply instances of some lawyers believing that certain clients and their causes should not have access to the legal system. As one legal scholar observed, an attempt to disqualify attorneys from representing certain clients and interests “is the equivalent of selectively disbaring attorneys who have won on controversial matters.”<sup>103</sup> Yet ethics rules, as well as the Supreme Court, have rejected the “notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.”<sup>104</sup>

## 2. *The Substantive vs. Process Perspective*

Lawyers who attack another lawyer’s representation of an unpopular client adopt, in effect, the substantive perspective on a lawyer’s relationship to the causes and positions of her client.<sup>105</sup> Proponents of this perspective argue that lawyers should have the right to refuse to represent unpopular clients, and to prejudge the quality and culpability of the client, because once the formal legal relationship begins, the lawyer and client are one and the same.<sup>106</sup>

Since lawyers have a choice of clients and can withdraw if the client insists on pursuing an objective that the lawyer considers repugnant, the substantive perspective condones, or at least would not condemn, attacks on lawyers and the tactics they use to represent unpopular causes or clients, all the while claiming that the attacks are not an attempt to deny legal representation.<sup>107</sup> However, even those who embrace the substantive perspective concede that the “last lawyer in town,” whose refusal to pro-

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<sup>101</sup> Letter from Ralph J. Cappy, Justice, Supreme Court of Pennsylvania, to William V. Luneburg, Professor, University of Pittsburg School of Law, *supra* note 65.

<sup>102</sup> I am indebted to Tulane Law School Professor Oliver Houck for this observation.

<sup>103</sup> Frank H. Wu, *A Lesson in Power Politics*, NAT’L L.J., May 3, 1999, at A21.

<sup>104</sup> *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977); *see also* MODEL RULES OF PROF’L CONDUCT R. 6.1 cmt. (1999) (stating that lawyers have a professional responsibility to provide legal services to those unable to pay and to those whose cause is controversial); MODEL CODE OF PROF’L RESPONSIBILITY, EC 2-25, 8-3 (1986) (noting that the fair administration of justice requires the availability of competent lawyers).

<sup>105</sup> *See* Andre A. Borgeas, Note, *Necessary Adherence to Model Rule 1.2(B): Attorneys Do Not Endorse the Acts or Views of Their Clients by Virtue of Representation*, 13 GEO. J. LEGAL ETHICS 761, 761–62 (2000).

<sup>106</sup> *Id.*

<sup>107</sup> For a discussion of the moral and public accountability of lawyers for their choices of clients, *see* W. William Hodes, *Accepting and Rejecting Clients: The Moral Accountability of the Second-to-Last Lawyer in Town*, 48 U. KAN. L. REV. 977 (2000); Monroe Freedman, *Must You Be the Devil’s Advocate?*, LEGAL TIMES, Aug. 23, 1993, at 19.

vide representation would leave a client or cause without legal representation, is entitled to moral immunity from other attorneys' criticism of his choice of clients or causes.<sup>108</sup>

The process perspective, on the other hand, contends that a lawyer is simply an agent whose duty is to advocate the rights of the client and that the adversary process, not the lawyer herself, should judge the appropriateness or inappropriateness of the client's behavior.<sup>109</sup> Under this view, lawyers should not suffer criticism based on the clients they represent, and certainly should not be denied the opportunity to provide such assistance, provided the lawyers honor professional standards while rendering such legal services.<sup>110</sup> At the time of Ralph Nader's attack on lawyers for the automobile industry, Abe Fortas described the process role of a lawyer as follows:

Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client's practices. Rapists, murders, child-abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream polluters—are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism for so doing.<sup>111</sup>

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<sup>108</sup> See Hodes, *supra* note 107, at 984.

<sup>109</sup> Borgeas, *supra* note 106, at 762.

<sup>110</sup> *Id.* at 768, 777.

<sup>111</sup> Abe Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970). Fortas further explained: "[T]he social implications of the position to be taken on the client's behalf were submerged by the lawyer's dedication to the value of the legal and constitutional system as he saw it, to the duty of the advocate, and to the obligations of advocacy in an adversary system . . ." *Id.* at 996. "[T]he social values of [the client's] character and conduct are not the lawyer's concern unless they are so abhorrent to the lawyer, and he is so emotionally involved, that he feels he cannot represent the client with full dedication." *Id.* at 997.

In urging representation for unpopular clients and causes, Judge Simon Rifkind similarly argued:

As you know, there are fashions in untouchability. One season it is a sharecropper in Mississippi, the next season it is a multi-million share corporation in Detroit . . . . If [the public] comprehended how the engine of the adversary process is ignited and works, they would never ask to explain why a lawyer did take a particular case, but rather why he had rejected another. That, indeed calls for justification.

Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 534, 536-37 (1975).

### 3. *The ABA's View*

Following a history of attacks on attorneys representing unpopular civil rights clients and alleged communist sympathizers in the 1950s and 1960s, the ABA adopted the ethics rule that representing a client does not constitute endorsement of the client's views or activities and the comment that "[l]egal representation should not be denied to people . . . whose cause is controversial or the subject of popular disapproval."<sup>112</sup> Therefore, while academics may still debate the relative merits of the substantive and process perspectives, the ethics rules are clear—lawyers should be free of restraints on, interference with, and criticism of the clients they represent. As Professor Monroe Freedman argues, clients and their causes should be attacked directly, not through their lawyers.<sup>113</sup>

One should note that the provisions in rules of professional conduct proscribing a lawyer from refusing to handle controversial clients and cases use permissive rather than imperative language, and are located in the comments to the Model Rules and ethical considerations of the Model Code. Only imperatives define professional misconduct, and comments and ethical considerations merely provide guidance and aspirations.<sup>114</sup> Thus, no attorney would be sanctioned under these rules of conduct for rejecting the representation of a defenseless or oppressed client or for seeking to induce another attorney to do so.

Even if this lack of an imperative, enforceable rule does not subject attorneys to disciplinary action, the attacks are contrary to rules of professional responsibility and, therefore, are unethical in light of the repeated ethics rule pronouncements on not denying certain persons or causes access to legal representation. As the ABA's Standing Committee on Ethics and Professional Responsibility explained: "To say, as we have sometimes done, that a particular [action of a lawyer] is not forbidden by the disciplinary rules is not to say that such [action] is wise or is consis-

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<sup>112</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) & cmt. (1999); *accord* MODEL CODE OF PROF'L RESPONSIBILITY EC 2-27, 2-28 (1986). The endorsement of the process perspective is also reflected in the limited grounds on which a lawyer may avoid a court appointment. *See* MODEL RULES OF PROF'L CONDUCT R. 6.2(c) (1999) (stating that "[a] lawyer shall not seek to avoid appointment by a tribunal to represent a person" unless "the client or cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client"); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-29, 2-30 (1986) (similar).

<sup>113</sup> Riley, *supra* note 21, at 584 (referring to comments made by Freedman during a 1970 debate at George Washington University). The old ABA Canons of Professional Ethics enjoined attorneys not to criticize other attorneys: "Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case." CANONS OF PROF'L ETHICS, Canon 17 (1956). Likewise, the preamble to the Model Rules states that a lawyer should demonstrate respect for the legal system and for other lawyers. MODEL RULES OF PROF'L CONDUCT Preamble (1999).

<sup>114</sup> *See* MODEL RULES OF PROF'L CONDUCT Scope (1999); MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1986).

tent with applicable ethical considerations.”<sup>115</sup> At most, especially where the intent of the rules is clear, the absence of an enforceable ethics rule simply provides the offending attorney a safe harbor from disciplinary action.

### B. *The Duty To Act Independent of Third-Party Interests*

Attorneys attacking environmental representation have sought to restrict not just the clients and cases that other attorneys may assist, but also their methods of lawyering.

Attorneys attacking the Tulane Environmental Law Clinic argued that clinic attorneys were overly zealous and had “gone too far” in raising the issue of environmental discrimination.<sup>116</sup> The Chief Justice of the Louisiana Supreme Court contended that certain types of legal advocacy were “beyond the legal parameters of helping indigent people.”<sup>117</sup> These comments do not argue for the equal application of the rules of professional conduct to all sides representing environmental disputes. Rather, they seek to restrict how lawyers representing some environmental interests may advocate so that their clients receive second-class lawyering.<sup>118</sup>

Limits on the advocacy that certain environmental clients and causes may receive are contrary to rules of professional responsibility. Ethics rules mandate the duty of all attorneys “to use legal procedure for the fullest benefit of the client’s cause” and to zealously assert the client’s position under the rules of the adversary system.<sup>119</sup>

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<sup>115</sup> ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974). The president of the Louisiana Bar Association, who represented the Louisiana Supreme Court in its defense of the new restrictions on law school clinic representation and who sought to persuade the U.S. Fifth Circuit Court of Appeals to adopt similarly stringent restrictions on law clinic clients, argues that even compliance with the rules of professional conduct does not make an attorney’s behavior ethical. See Michael H. Rubin & Brady M. Fitzsimmons, *Simply Complying with the Rules of Ethics Doesn’t Make You an Ethical Lawyer*, in *IN OUR OWN WORDS: REFLECTIONS ON PROFESSIONALISM IN THE LAW* 95, 96 (Roger A. Stetter ed., 1998); MARTINDALE-HUBBLE LAW DIRECTORY, LA60B (2002); Letter from David Udell et al., Brennan Center for Justice, to Charles Fulbruge III, Clerk, U.S. Fifth Circuit Court of Appeals (Aug. 1, 2000) (on file with the Harvard Environmental Law Review).

<sup>116</sup> See LeBlanc, *supra* note 52; Coyle, *supra* note 50.

<sup>117</sup> James Varney, *Justice Calogero Seeking 3rd Term*, TIMES-PICAYUNE (New Orleans, La.), Aug. 7, 1998, at A2.

<sup>118</sup> See *Interview with Archibald Cox, Professor, Harvard Law School*, U.S. NEWS & WORLD REP., Aug. 3, 1981, at 33 (arguing that to ensure persons represented by legal service attorneys do not get second-class coverage, legal services attorneys must be able to do all of the things that privately retained attorneys do for their clients); see also *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (holding restrictions on Legal Services Corporation lawyers’ ability to amend or challenge existing laws unconstitutional).

<sup>119</sup> MODEL RULES OF PROF’L CONDUCT Preamble, R. 3.1 cmt. (1999). The Model Code reads: “A Lawyer Should Represent a Client Zealously Within the Bounds of the Law.” MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (1986).

Moreover, the assertion that certain people, because of the nature of their cause or their inability to afford the services of the private bar, should receive different, and less, advocacy in environmental disputes is repugnant to notions of fair play and due process. As Supreme Court Justice Lewis Powell argued, "It is fundamental that justice should be the same, in substance and availability, without regard to economic status."<sup>120</sup> There is nothing unique about environmental representation or representation by public interest lawyers or law professors that makes certain types of advocacy inappropriate. Once these lawyers agree to represent the client, they are ethically bound, like all lawyers, to use the legal system to their client's fullest advantage.

Attempts by attorneys to get others, such as partners in law firms, legislators, or university officials, to intervene against other lawyers on pending environmental cases are particularly disturbing. "In representing a client, a lawyer shall provide independent professional judgment" free of interference from third parties.<sup>121</sup> The Model Rules provide that "[a] lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such advice."<sup>122</sup> The Model Code contains a similar provision.<sup>123</sup>

ABA ethics opinions also caution against the influence of third parties on a lawyer's independent professional judgment.<sup>124</sup> "[A] lawyer's obligation to remain professionally independent forbids a lawyer to drop an existing client merely because a funding source does not like that client."<sup>125</sup> Even where those in the governing body of a law school or public

<sup>120</sup> M. Catherine Richardson, *Legal Services for the Poor Should Be Maintained*, N.Y.L.J., May 1, 1997, at S2 & n.3 (reprinting quote by Justice Powell in Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, JUDGES J., Winter 1995, at 1).

<sup>121</sup> MODEL RULES OF PROF'L CONDUCT R. 2.1 (1999); see also MODEL CODE OF RESPONSIBILITY DR 5-105(A), 5-107(B), EC 5-21 (1986) (requiring that a lawyer exercise independent professional judgment and disregard the desires of others that might impair the lawyer's free judgment).

<sup>122</sup> MODEL RULES OF PROF'L CONDUCT R. 5.4(c) (1999); see also *id.* at R. 1.8(f) (prohibiting a lawyer from accepting compensation for representing a client from a person other than the client unless "there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 134(2) (2000).

<sup>123</sup> MODEL CODE OF PROF'L RESPONSIBILITY DR 5-107 (1986) ("Avoiding Influence by Others Than the Client"); see also *id.* at EC 5-21, 22, 23.

<sup>124</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1208 (1972). Requiring law professors to seek the prior approval of the dean or a law faculty committee before accepting a particular case would violate the ethical responsibilities of the law professor, dean, and law faculty committee members "because the case-by-case review makes it likely that the independent judgment of the [law school professors] and their loyalty to their clients will be impaired." *Id.* Limitations on a law professor's professional judgment are improper regardless of whether the limitations are imposed by the university board of trustees, university administration, law school faculty, or law school dean. See *id.*

<sup>125</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 399 (1996).

interest law organization have no intent to influence a law professor's or staff attorney's decisions, a requirement to consult on case decisions may inhibit the attorney from taking potentially controversial actions in a case.<sup>126</sup>

Efforts of one attorney to get another to provide less than diligent, zealous representation, or to focus on interests other than those of the client, constitutes an attempt to induce another attorney to violate ethical rules, and is thus professional misconduct. Rules of professional conduct define misconduct as not only directly violating an ethical rule but also inducing another attorney to violate the rules.<sup>127</sup>

Of course, attorneys are free, as Nader and others submit, to advise their clients to consider the moral, social, and political implications of their actions, not just the legal.<sup>128</sup> Attorneys are also free, through agreement with the client, to limit the scope or objectives of the legal services provided and to exclude objectives or means that the lawyer regards as repugnant or imprudent.<sup>129</sup> For example, an attorney representing development interests could inform the client that the attorney will not engage in attacks on the plaintiffs, such as through SLAPP suits or other tactics intended to punish or intimidate the plaintiffs, or their attorney, for pursuing environmental claims. Similarly, an attorney representing environmental interests might inform the client, in advance of agreeing to the legal representation, that the attorney will not seek relief that would result in the closing of an ongoing business.

But in the end, the decision whether or not such approaches are appropriate rests with the client and the independent professional judgment of the client's attorney.<sup>130</sup> The failure of a lawyer in an environmental case to render non-legal advice or to seek to persuade the client to follow such advice is not grounds for an attorney to attack another attorney, nor

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<sup>126</sup> See *Estep v. Johnson*, 383 F. Supp. 1323, 1326 (D. Conn. 1974) (warning of the influence of legal aid board members over staff salaries and promotions); *STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, STANDARDS FOR PROVIDERS OF CIVIL LEGAL SERVICES TO THE POOR* 7.2-5 (1986) (warning that members of the governing body of a legal aid organization can exert subtle influence through pointed inquiries to attorneys and staff).

<sup>127</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(a) (1999) (stating that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct or to "knowingly assist or induce another to do so"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5(2) (2000).

<sup>128</sup> See MODEL RULES OF PROF'L CONDUCT R. 2.1 (1999); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1986).

<sup>129</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.2(c) & cmt. (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(B)(1) (1986); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 19 (2000).

<sup>130</sup> See MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1986) (stating that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client, not for the lawyer). The client may not be asked, however, to agree to representation so limited in scope as to violate the ethical rule requiring competent representation. MODEL RULES OF PROF'L CONDUCT, R. 1.2 cmt. (1999).

does the failure of the client to follow non-legal advice justify criticizing the attorney for not then abandoning the client.<sup>131</sup>

Blacklisting job applicants because the applicant previously represented an unpopular or controversial law clinic client, or merely participated in a law clinic, also raises significant ethical concerns.<sup>132</sup> While the Model Rules and Model Code prohibit a lawyer from entering into an agreement that restricts another lawyer's right to practice law, the rules do not explicitly address discriminatory hiring practices.<sup>133</sup> Bias or prejudice in law office hiring is, however, antithetical to the ethical precept that "representing a client does not constitute approval of the client's views or activities"<sup>134</sup> and to every lawyer's responsibility to ensure that legal representation is available to those whose causes are controversial or unpopular. Regardless of any firm's underlying politics or business orientation, it should not be able to exclude qualified job applicants simply because of the classes or clinics they attended while at law school.

Beyond ethics rules, the emerging professionalism movement and its emphasis on civility and the accessibility of the legal system to all persons dictate that no lawyer, or law school for that matter, should be punished for providing legal assistance to an unpopular client or cause.<sup>135</sup> The ABA has noted, "the law school experience provides a student's first exposure to the profession, and . . . professors inevitably serve as important role models for students. Therefore, the highest standards of ethics and professionalism should be adhered to within law schools."<sup>136</sup> Thus, law school faculty and administrators have a heightened responsibility to ensure that they do not discourage the acceptance or zealous representation of unpopular or controversial clients or causes.<sup>137</sup>

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<sup>131</sup> Cf. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (1999) (authorizing, but not requiring, a lawyer to withdraw from representing a client if the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(C)(1)(e) (1986) (permitting, but not requiring, a lawyer to withdraw if the client insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the disciplinary rules).

<sup>132</sup> See *supra* notes 58–61.

<sup>133</sup> MODEL RULES OF PROF'L CONDUCT R. 5.6 (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108 (1986).

<sup>134</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(b) cmt. (1999).

<sup>135</sup> See ABA GUIDELINES FOR LITIGATION CONDUCT (1998) in COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 378, 379 (2001) ("[I]n our dealings with others we will not reflect the ill feelings of our clients.").

<sup>136</sup> ABA COMMISSION ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM 20 (1986).

<sup>137</sup> Association of American Law Schools, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, available at <http://www.aals.org/ethic.html> (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review).

### 1. Further Justifications Given for Attacks

Attorneys cannot justify their attacks on the availability of legal representation and discrimination against law students in employment by saying they were simply following the directives of an elected official, carrying out the decisions of a business association, or doing the bidding of the attorney's client. These attacks generally have not occurred in the attorneys' capacity as paid advocates for their clients' interests, but outside the law firm employment context. Court decisions and ethics opinions reject the argument that the rules of professional responsibility do not apply to an attorney's individual or personal activities or when working for an elected official or engaged in some activity other than the practice of law. "[A] lawyer must comply at all times with all applicable disciplinary rules of the Code of Professional Responsibility whether or not he is acting in his professional capacity."<sup>138</sup>

Furthermore, Model Rules 6.3 and 6.4 and similar provisions in the Model Code clarify that a lawyer may serve as a director, officer, or member of a service organization, including legal services or law reform organizations, even if that organization may serve persons or advance interests adverse to the lawyer's client.<sup>139</sup> Thus, whatever moral cover is afforded when the attorney acts pursuant to the client's direction is generally unavailable when the attorney is acting outside the context of the attorney-client relationship. Consistent with other ethical obligations to clients who may want an opposing lawyer silenced, an attorney may support, or at least remain neutral toward, the public service efforts of other lawyers or law schools. And, of course, as with the case of attorneys counseling unpopular environmental clients, attorneys who are urged by their clients to attack opposing attorneys may object that such objectives and tactics are repugnant to the attorney and, through agreement with the clients, limit the scope or objectives of the legal services, or even withdraw from the representation.<sup>140</sup> At a minimum, an attorney cannot justify

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<sup>138</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 336 (1974). "The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor." *Md. State Bar Ass'n v. Agnew*, 318 A.2d 811, 815 (Md. 1974). An ethics violation by a lawyer who also is a public official "makes his offense a more serious one than a singular violation of the disciplinary rules by an individual attorney." *Office of Disciplinary Counsel v. Eilberg*, 441 A.2d 1193, 1197 (Pa. 1982).

<sup>139</sup> MODEL RULES OF PROF'L CONDUCT R. 6.3, 6.4 (1999); MODEL CODE OF PROF'L RESPONSIBILITY Canon 8, EC 7-17, 8-1 (1986). The Model Rules' endorsement of uncompensated public service notwithstanding the client's interests is tempered by the comment that "[i]n determining the nature and scope of participation in such activities, a lawyer should be mindful of obligations to clients under other Rules, particularly Rule 1.7 [conflicts of interest]." MODEL RULES OF PROF'L CONDUCT R. 6.4 cmt (1999).

<sup>140</sup> See *supra* notes 128-131 and accompanying text; MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(3) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 2-110(C)(1)(e) (1986).

such attacks as a means to aid clients who have not retained the attorney for the purpose of attacking the availability of the legal representation.

The numerous documented attacks on environmental representation show how easily provisions of the rules of professional responsibility are ignored when attorneys perceive them to be contrary to their own, or their clients', interests. In the attacks on environmental representation chronicled in Part II, it does not appear that any attorney who attacked another attorney, or who sought to deny legal representation by lawyers or law schools, ever considered whether those efforts were inconsistent with ethical responsibilities.<sup>141</sup>

The ease with which attorneys apparently disengage from the defining characteristics of the legal profession is troubling and hard to explain. For example, how can it be that at an Inns of Court meeting on professionalism an attorney proclaims that firms should discriminate in hiring decisions against students who simply participate in law school clinical programs?<sup>142</sup>

One answer could be the intense economic pressures attorneys encounter in environmental cases and the win-at-all-costs attitude that results.<sup>143</sup> Lawyers, although usually not retained to make such attacks, may perceive that they will gain future business from pleased clients or find that persons opposing their clients' interests are no longer represented by competent environmental counsel if they work to deny legal assistance to opposing clients and causes.<sup>144</sup> Indeed, one partner justified

<sup>141</sup> See, e.g., LeBlanc, *supra* note 98, at 234 (arguing that concern over new law clinic restrictions are much ado about nothing and contending that new restrictions will achieve "justice for all under law," but failing to propose any alternative source of legal assistance for those now unable to obtain the assistance of the state's law clinics); *Morning Edition: Rules on Law School Clinics* (National Public Radio broadcast, July 30, 1998) (quoting Governor Foster's Special Counsel's defense of the denial of legal assistance—"individuals don't have a constitutional right to have free legal assistance in civil cases"—but showing no concern for the inability of law clinic clients to obtain alternative representation).

<sup>142</sup> See *supra* note 58.

<sup>143</sup> See generally Orrin K. Ames III, *Duty to the Client: The Need for Perspective and Balance*, FLA. B. NEWS, Oct. 1, 1999, at 24; *Professionalism in Practice*, ABA J., August 1998, at 48, 52–56 (reprinting a panel discussion on economic pressures that contribute to unprofessional or unethical behavior); Terry Carter, "Inns of Court" Movement Taming "Rambo" Lawyers, NAT'L L.J., June 5, 1989, at 8 (stating that emphasis on the bottom line has skewed some perceptions of the ethical lines not to be crossed).

<sup>144</sup> Professor Robert Gordon argues that efforts by law firms to restrict the ability of members of the firm to represent unpopular pro bono clients are contrary to rules of ethics and notions of professional independence:

Sometimes [law firms] explicitly prohibit other activities, such as pro bono activities or political causes or even just publishing law review articles, that might create a potential "business" conflict—that is, not a properly disqualifying conflict of interest, but merely the risk of loss of business from having a firm member be perceived to adopt a policy position that one of the firm's clients might not like. What is especially interesting about such prohibitions is not so much that partners impose them, but that the partners are so *unembarrassed* about doing so, even though the practice violates—in addition to the formal provisions

withdrawing legal assistance to a controversial environmental organization after an influential client objected by stating that if the attorney refusing to withdraw from the pro bono case “had a mortgage and kids to feed,” he would “understand” why the case and clients should be dropped.<sup>145</sup>

Such unabashed attention to the attorney’s personal financial interests likely explains the frequent attacks on the pro bono work of law professors and students. Economic pressures particularly affect environmental law disputes because of the large sums of money at stake in those cases.<sup>146</sup> As one scholar noted, the true concern of lawyers attacking law professors and law clinics for their pro bono work is that the professors and students are “bringing suits that wouldn’t be brought at all if the clinic didn’t do it.”<sup>147</sup> Though this perhaps reflects the shortcomings of the government’s environmental enforcement mechanisms, such inade-

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of some codes of ethics—every conceivable traditional ideal of independence their profession has ever entertained.

Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 61–62 (1988) (citing MODEL CODE OF PROF’L RESPONSIBILITY EC 7-17).

Norman Spaulding similarly noted:

[P]aying clients (in many instances without even speaking a word on the subject) have a great deal of authority to determine which public interest causes and pro bono clients [of firms] are legitimate. Paying clients thus help define the line between popular and unpopular clients of limited means. Popular clients and causes are allocated what little pro bono assistance firms offer, while unpopular clients and causes simply go without when [legal services offices] are unable to meet their needs. That some clients in the later category have politically controversial or morally charged legal problems is especially troubling, since it is the pro bono representation of just these kinds of clients that, at least rhetorically, undergirds the profession’s monopoly status.

Norman W. Spaulding, *The Prophet and the Bureaucrat: Positional Conflicts in Service Pro Bono Publico*, 50 STAN. L. REV. 1395, 1420 (1998).

To at least one environmental defense attorney in Louisiana, clients and attorneys should also be able to define which clients and causes are appropriate for representation by law professors and students at that client’s attorney’s old law school. *See* Kuehn, *supra* note 14, at 74–75 (citing statement by lawyer for New Orleans law firm that, as a contributing alumnus of Tulane Law School, it is inappropriate for the Tulane Environmental Law Clinic to “represent citizens opposed to his client’s projects”).

<sup>145</sup> Supplemental Affidavit of Steven C. Davis in Support of Appellants’ Motion for Reconsideration of June 2, 2000 Order, *supra* note 29, at ¶ 11. Regardless of an influential client’s perceived wishes, an attorney’s effort to delay or deny access to legal representation, when motivated by the attorney’s desire for financial gain, is contrary to the lawyer’s oath to never “delay any person’s cause for lucre or malice.”

<sup>146</sup> For example, The Tulane Environmental Law Clinic’s Shintech case involved the proposed construction of a \$700 million petrochemical plant. Coyle, *supra* note 50. The University of Pittsburgh’s environmental law clinic represents local residents opposed to a proposed \$2.5 billion expressway expansion. Joe Grata, *Mon-Fay Expressway Now 13 Miles Longer*, PITTSBURGH POST-GAZETTE, Apr. 13, 2002, at D1.

<sup>147</sup> A. F. Conard, “Letter From the Law Clinic,” 26 J. LEGAL EDUC. 194, 204 (1974); Alfred F. Conard, *Letter From the Law Clinic*, 18 U. MICH. L. QUADRANGLE NOTES, Fall 1973, at 16, 22.

quacies neither explain nor excuse the ethical issues involved in denying a litigant legal representation.

Denying that they are motivated by financial gain, attorneys leading attacks on law professors and law clinics have often sought to justify their actions on the ground that it is inappropriate for law school employees or students, even where acting on their own donated time, to oppose the interests of law school alumni or their clients. They contend that restrictions on the representation activities of professors and students will protect the university from the financial harm and loss of public goodwill that the law school's involvement in controversial cases might bring.<sup>148</sup>

Contrary to the ethical precepts set forth above, lawyers leading or supporting attacks on law professors and law school clinics never proposed or provided an alternative source of legal representation for the clients aided by the professors and students.<sup>149</sup> One attorney who led the attack on the Tulane Environmental Law Clinic even perversely argued that denying the clinic the opportunity to represent citizens and community organizations who would otherwise go without legal assistance would help achieve "justice for all under the law."<sup>150</sup> Without an effort by the attorneys responsible for such attacks to ensure that the disqualification of the attorneys or law students does not leave present and potential clients without legal representation, it is hard to see such attacks as anything other than attempts to increase the lawyers' and their clients' self interests by denying legal representation to opposing clients and their causes.

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<sup>148</sup> See, e.g., Kuehn, *supra* note 14, at 74–75 & n.203 (reporting the justification given by a Tulane law school alumnus for restricting the school's environmental law clinic); *The University of Mississippi*, AAUP BULL., Spring 1970, at 75, 83 (containing the chancellor of the University of Mississippi's justifications for prohibiting law school professors from working with the local legal services program); Letter from Ralph J. Cappy, *supra* note 65 (characterizing the University of Pittsburgh Environmental Law Clinic's participation in enforcement of federal environmental laws as "a real and present danger to the well-being of the law school"). See generally WASHINGTON LEGAL FOUNDATION, IN WHOSE INTEREST? PUBLIC INTEREST LAW ACTIVISM IN THE LAW SCHOOLS (1990) (arguing that law school public interest programs are politically liberal and one-sided); Kenneth Lee, *Where Legal Activists Come From*, AM. ENTERPRISE, June 2001, at 50 (complaining that law school clinics improperly train young lawyers to pursue partisan, often radical, policy goals).

<sup>149</sup> See E-mail from Patrick McGinley, *supra* note 69 (critics of University of West Virginia law professor's pro bono activities knew that, without the law professor's free legal assistance, the clients would not be able to find other qualified counsel); E-mail from William Luneburg, *supra* note 63 (noting that those who questioned the propriety of University of Pittsburgh law professors and students providing free legal assistance did not identify any alternative source of legal representation for the clients); E-mail from Michael Axline, *supra* note 45; E-mail from Mark S. Squillace, Professor, University of Wyoming College of Law, to Author (Feb. 11, 2000) (on file with the Harvard Environmental Law Review) (stating that no discussion of how the client groups might find other legal assistance took place during the attack on Wyoming law professor's pro bono environmental activities).

<sup>150</sup> LeBlanc, *supra* note 98, at 234.

C. *The Legal Profession's Pro Bono Publico Responsibilities*

The longstanding professional responsibility of every lawyer to assist in making legal services fully available<sup>151</sup> is also implicated by attacks that seek to deny certain clients and causes access to legal representation on environmental matters. The Model Rules remind all lawyers to be mindful “of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.”<sup>152</sup> Ethics rules declare that every lawyer should discharge this responsibility not only by providing professional services at no fee or a reduced fee to persons of limited means, but also by supporting programs that provide free legal services to persons of limited means<sup>153</sup> and devoting “civic influence” on behalf of those who cannot afford adequate legal assistance.<sup>154</sup>

As the ABA Commission on Ethics and Professional Responsibility stated, it is the ethical responsibility of lawyers “to do the best we can to provide appropriate and competent legal representation for indigent persons” and to “take all necessary actions to prevent the abandonment of indigent clients.”<sup>155</sup> The ABA House of Delegates recently identified “the lawyer’s duty to promote access to justice” as one of the six core values of the legal profession.<sup>156</sup> Recognizing the lack of available legal representation for those advancing environmental concerns, the House of Delegates also passed a resolution urging increased delivery of legal services to persons and communities raising environmental justice claims and the expansion of law school clinical programs to address environmental justice problems.<sup>157</sup>

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<sup>151</sup> See MODEL RULES OF PROF’L CONDUCT R. 6.1 (1999); MODEL CODE OF PROF’L RESPONSIBILITY Canon 2 (1986).

<sup>152</sup> MODEL RULES OF PROF’L CONDUCT Preamble (1999).

<sup>153</sup> *Id.* at R. 6.1 & cmt.; MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1986). This professional responsibility does not originate in the Sixth Amendment right to representation in a criminal case and, therefore, applies even to those seeking legal assistance on civil matters. As such, efforts to deny legal assistance cannot be justified on the ground that there is no constitutional right to free legal representation in civil cases. See, e.g., *Morning Edition: Rules on Law School Clinics*, *supra* note 141 (reporting that Louisiana Governor Mike Foster’s Legal Advisor, Terry Rider, supports new law clinic restrictions because “individuals don’t have a constitutional right to have free legal representation in civil cases”).

<sup>154</sup> See MODEL RULES OF PROF’L CONDUCT Preamble (1999); see also MODEL CODE OF PROF’L RESPONSIBILITY EC 2-25 (1986) (stating that every lawyer should support all proper efforts to meet the need for legal services of those unable to pay reasonable fees).

<sup>155</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 399 (1996) (stating that all members of the bar should support organizations providing free legal services where they exist and establish them where they do not); ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 347 (1981).

<sup>156</sup> ABA House of Delegates, Resolution 10F (July 11, 2000), *reprinted in* L. Harold Levinson, *Collaboration Between Lawyers and Others: Coping with the ABA Model Rules After Resolution 10F*, 36 WAKE FOREST L. REV. 133 app. A (2001).

<sup>157</sup> See ABA House of Delegates, Resolution on Environmental Justice (Aug. 11, 1993), *reprinted in* 118 ANN. REP. A.B.A., No. 2, at 43–44 (1993) (approving the joint resolution proposed by the ABA Standing Committee on Environmental Law, Commission

Thus, rules of professional conduct impose two pro bono publico responsibilities on all members of the bar—to render pro bono services and to support the efforts of other attorneys to provide such services.<sup>158</sup>

As noted above, attorneys leading the attacks on lawyers providing environmental services never demonstrated that any of the clients could have found alternative representation, nor did they explain how potential clients would find representation if their lawyers were driven off the case or discouraged from taking future cases.<sup>159</sup> In the case of the attack on the Tulane Environmental Law Clinic, those attacking the law professors and students suggested that Louisiana law clinics should cease representing individuals and community organizations that cannot afford attorneys and instead begin representing businesses.<sup>160</sup> While this extreme argument may not have been publicly advanced by attorneys in other states, the lawyers leading or supporting attacks in those states likewise did not provide an alternative source of legal representation for the clients or causes they sought to delayer.

This failure to provide alternative legal assistance strongly suggests that denial of access to legal representation is indeed the result usually sought by attorneys who attack the pro bono work of other environmental attorneys, a violation of the “clear responsibility” under rules of professional responsibility to respond to the difficulty of finding adequate legal representation by providing alternative legal services or support for the attorneys or programs providing such assistance.<sup>161</sup> Again, the precatory nature of pro bono ethical precepts may immunize a lawyer from disciplinary action. However, the actions of lawyers who attack other attorneys providing pro bono environmental representation, thereby seeking to deny certain clients and causes access to legal representation and the courts, have, nonetheless, engaged in conduct contrary to applicable ethics rules.

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on Homelessness and Poverty, ABA Section of Individual Rights and Responsibilities, National Bar Association, Inc., and Hispanic National Bar Association).

<sup>158</sup> One goal of law clinics is to assist the bench and bar in fulfilling its responsibility “for providing competent legal services for all persons, including those unable to pay for these services.” *See, e.g.*, ABA Model Student Practice Rule § I, reprinted in BAR ADMISSION RULES AND STUDENT PRACTICE RULES 993 (Fannie J. Klein et al. eds., 1978). Where they exist, law clinics often provide a significant portion of the pro bono environmental law services available in a state. *See* Kuehn, *supra* note 14, at 36 n.11, 96 – 97 (detailing the contributions of the Tulane Environmental Law Clinic); E-mail from William Luneburg, Professor, University of Pittsburgh School of Law, to Author (Mar. 13, 2002) (on file with the Harvard Environmental Law Review) (opining on the contributions of the University of Pittsburgh School of Law’s environmental law clinic).

<sup>159</sup> *See supra* note 149 and accompanying text.

<sup>160</sup> Proposal to Amend and Enforce Rule XX, attachment to letter from Daniel L. Juneau, Louisiana Association of Business and Industry, to Pascal F. Calogero, Jr., Chief Justice, Louisiana Supreme Court (Sept. 9, 1997) (on file with the Harvard Environmental Law Review); Supplemental Comments on Proposed Amendments to Law Student Practices Rules, *supra* note 98.

<sup>161</sup> *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 347 (1981).

*D. The Duties Not To Prejudice the Administration of Justice or Use Means that Have No Substantial Purpose Other than To Embarrass, Harass or Delay a Third Person*

Attacks intended to deter or deny an attorney from providing legal representation to certain clients or causes, or to impede the independent judgment of an attorney, threaten the accomplishment of justice. For, as the introduction of this Article sets forth, without legal representation in complex environmental disputes, the right to be heard on matters affecting the environment and public health is rendered meaningless and even-handed access to justice is denied. "The [f]air administration of justice requires the availability of competent lawyers."<sup>162</sup>

Both the Model Rules and Model Code state that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."<sup>163</sup> Case law generally holds that this phrase does not require that the attorney's conduct take place in court or in the presence of the judge, nor must it affect an ongoing proceeding or arise out of the attorney's representation of a particular client.<sup>164</sup> Further, words alone can be deemed "prejudicial to the administration of justice."<sup>165</sup>

A lawyer's role as a zealous advocate for a client does not excuse violations of the rule.<sup>166</sup> Thus, verbal attacks on lawyers with the intent to prevent certain persons or causes from obtaining legal representation or with the intent to interfere with a lawyer's independent professional judgment, even if done at the request of a client, may constitute actions "prejudicial to the administration of justice."<sup>167</sup>

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<sup>162</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 8-3 (1986).

<sup>163</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1999); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1986).

<sup>164</sup> GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* 65-22 n.5 (3d ed. 2001) (citing *Hirschfeld v. Superior Court*, 908 P.2d 22 (Ariz. Ct. App. 1985), *Black v. Blount*, 938 S.W.2d 394 (Tenn. 1996), and *In re A.M.E.*, 533 N.W.2d 849 (Minn. 1995)); see also *LAWYERS' ETHICS: A COMMENTARY ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, supra note 84, at 101:504 (noting that an attorney may violate the rule regardless of whether the action directly interferes with a legal proceeding (citing *In re Keller*, 502 N.W.2d 504 (N.D. 1993), and *In re Manson*, 676 N.E.2d 347 (Ind. 1997))).

<sup>165</sup> See, e.g., *Fla. Bar v. Saylor*, 721 So.2d 1152, 1155 (Fla. 1998) (holding that rule prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice requires lawyers to refrain from making statements that knowingly disparage or humiliate other lawyers); *In re Edwall*, 557 N.W. 2d 343 (Minn. 1997) (disciplining a lawyer for harassing and threatening phone calls and letters to his wife's attorney and for threatening to sue her attorney); *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 329 (W. Va. 1988) (observing that most of the disciplinary cases involving attorneys speaking critically of the judiciary or judicial system are brought under the "prejudicial to the administration of justice" misconduct rule).

<sup>166</sup> CENTER FOR PROFESSIONAL RESPONSIBILITY, AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROF'L CONDUCT, 598-99 (4th ed. 1999) (citing *In re Williams*, 414 N.W.2d 394 (Minn. 1987), and *In re Vincenti*, 704 A.2d 927 (N.J. 1998)).

<sup>167</sup> MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1999). The Model Code provides

A number of problems may prevent the application of this rule to attacks on attorneys. The Model Rules and some state rules of professional conduct require that for bias or discrimination to prejudice justice, it must be manifested in the course of representing a client.<sup>168</sup> A number of court decisions also require a showing that the conduct or words adversely affected the administration of justice in a particular legal proceeding.<sup>169</sup> However, a number of states prohibit bias or prejudice in the practice of law. This broad language covers employment decisions and actions of a lawyer that are not related to the representation of a particular client or to a particular proceeding.<sup>170</sup>

The “prejudicial to the administration of justice” prohibition in the Model Rules was recently extended by the ABA explicitly to prohibit knowing bias or prejudice based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status where such actions are prejudicial to the administration of justice.<sup>171</sup> As interpreted by the comment, this rule generally prohibits actions or speech that are also regulated by other laws, but it does not address bias or prejudice toward the political or social views of a client or cause. Nevertheless, in prohibiting derogatory comments about a person’s socioeconomic status, the ABA has indicated that otherwise protected speech can merit disciplinary action when a lawyer, acting in a professional capacity, knowingly uses words or conduct for the purpose of interfering with the ability of the judicial system to administer justice.

### 1. *Constitutional Concerns*

Application of the rule to punish lawyers for what they say as opposed to what they do raises significant First Amendment problems.<sup>172</sup>

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that “[h]aranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.” MODEL CODE OF PROF’L RESPONSIBILITY EC 7-37 (1986). Professor Leora Harpaz observed: “An argument can be made that the refusal to represent a client in a situation where no other competent attorney is available might impact on the integrity of the judicial process.” Leora Harpaz, *Compelled Lawyer Representation and the Free Speech Rights of Attorneys*, 20 W. NEW ENG. L. REV. 49, 58 n.44 (1998).

<sup>168</sup> See MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt. (1999).

<sup>169</sup> See, e.g., *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996); *State v. Nelson*, 504 P.2d 211, 215 (Kan. 1972).

<sup>170</sup> See, e.g., CAL. RULES OF PROF’L CONDUCT 2-400(B) (2001) (prohibiting discrimination in the management or operation of a law practice); FLA. RULES OF PROF’L CONDUCT 4-8.4(d) (1999) (prohibiting discriminatory conduct in connection with the practice of law); N.Y. CODE OF PROF’L RESPONSIBILITY DR 1-102(A)(6) (2001) (prohibiting lawyers from discriminating in the practice of law); OHIO CODE OF PROF’L RESPONSIBILITY DR 1-102(B) (2000) (prohibiting a lawyer from engaging in professional conduct involving discrimination).

<sup>171</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4 cmt (1999).

<sup>172</sup> Ronald D. Rotunda, *Can You Say That?*, TRIAL, Dec. 1994, at 19; see also HAZARD & HODES, *supra* note 164, at 65-23 n.6.

Though public criticism of an opposing attorney would generally be protected speech,<sup>173</sup> false statements, or those made with reckless disregard as to their truth or falsity, and statements intended to harass, threaten, or ridicule other attorneys may not be protected.<sup>174</sup> Reviewing the case law on lawyer speech, Professor Kathleen Sullivan observed, “When speaking in clearly public capacities . . . lawyers receive relatively robust free speech protection . . . . When speaking in capacities that might adversely implicate the administration of justice or perception of administration of justice by the government . . . the Court has regarded the government as freer to place conditions on its sponsorship.”<sup>175</sup>

Application of the rule to attacks on other lawyers also is susceptible to arguments that it is unconstitutionally vague or overbroad. Generally, courts have held that the “prejudicial to the administration of justice” standard is not unconstitutionally vague because the standard is considered in light of the traditions of the legal profession and its established practices and, as a rule written by and for members of the bar, it need not meet the precise standards of clarity that might be required for rules of conduct for laymen.<sup>176</sup> This justification depends, in part, on the argument that lawyers “have the benefit of guidance [as to the term’s scope] provided by case law, court rules and the ‘lore of the profession.’”<sup>177</sup>

<sup>173</sup> *In re Snyder*, 472 U.S. 634, 646 (1985) (stating “We do not consider a lawyer’s criticism of the administration of the [Criminal Justice] Act or criticism of inequities in assignments under the Act as cause for discipline or suspension.”); *In re Hinds*, 449 A.2d 483, 499 (N.J. 1982) (holding that “the standard for invoking the [disciplinary] rule’s sanctions against [out of court statements criticizing a judge’s conduct] should be that of a ‘clear and present danger’ or, to use an alternative formulation, a ‘serious and imminent threat’ to the fairness and integrity of the judicial system”); *State ex rel Okla. Bar Ass’n v. Porter*, 766 P.2d 958, 965 (Okla. 1988) (noting that “an attorney is free to criticize the institution of the law in this country or the wisdom and efficacy of the rules of law which control the exercise of judicial power”).

<sup>174</sup> *Fla. Bar v. Saylor*, 721 So.2d 1152, 1154–55 (Fla. 1998) (holding that First Amendment does not protect attorneys “who make harassing or threatening remarks about the judiciary or opposing counsel”); *Comm. on Legal Ethics v. Douglas*, 370 S.E.2d 325, 332 (W. Va. 1988) (noting “that statements [of lawyers] that are outside of any community concern, and are merely designed to ridicule or exhibit contumacy toward the legal system, may not enjoy First Amendment protection”).

<sup>175</sup> Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569, 587 (1998); see also *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1442 (9th Cir. 1995) (observing that the Supreme Court has held that speech otherwise entitled to full constitutional protection may be sanctioned if it prejudices the administration of justice but the prejudice must be shown to be highly likely).

<sup>176</sup> *In re Keiler*, 380 A.2d 119, 126 (D.C. 1977), *overruled on other grounds by In Re Hutchinson*, 534 A.2d 919 (D.C. 1987); *Comm. on Legal Ethics of W. Va. State Bar v. Douglas*, 370 S.E.2d 325, 328–29 (W. Va. 1988); *LAWYERS’ MAN. ON PROF. CONDUCT*, *supra* note 84, at 101 : 502 (stating, “in general, courts have upheld this provision against attacks of unconstitutional vagueness and overbreadth”); *HAZARD & HODES*, *supra* note 164, at 65–12 (“The debate leading to adoption of Rule 8.4(d) of the ABA House of Delegates made clear that it was intended to address violations of well-understood norms and conventions of practice only.”)

<sup>177</sup> *Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir. 1988) (quoting *In re Sny-*

Ethics rules' longstanding position that unpopular clients and causes should not be denied legal representation, and clear proscription against efforts to interfere with an ongoing attorney-client relationship, should provide attorneys with fair notice that attacks may subject the attorney to discipline. However, it could also be argued that in the absence of previous court or ethics decisions finding attacks on other attorneys to be improper, application of the "prejudicial to the administration of justice standard" is unfair.<sup>178</sup>

Consequently, where the words or conduct are aimed at interfering with an ongoing legal relationship, attacks by an attorney that are intended to deny or deter another attorney from providing independent legal advice could be considered prejudicial to the administration of justice and disciplinary action resulting from such attacks might survive a constitutional challenge. Nonetheless, a review of reported cases and state ethics opinions did not uncover any instance where an attorney's attempt to induce another attorney to reject or diminish the representation of a defenseless or controversial client was alleged to be prejudicial to the administration of justice, an absence that is not surprising given the lack of a specific ABA ethics comment condemning such attacks and the potential First Amendment concerns mentioned above.

Where an attorney is engaging in attacks in the course of representing a client, a related ethical prescription also may apply.<sup>179</sup> The Model Rules provide that in the course of representing a client, "a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person."<sup>180</sup> Similarly, the Model Code prohibits a lawyer from taking action on behalf of a client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.<sup>181</sup>

der, 472 U.S. 634, 645 (1985)); *see also In re Bithoney*, 486 F.2d 319, 324 (1st Cir. 1973). *See also* ABA House of Delegates, *supra* note 156 (identifying the lawyer's duties to exercise independent legal judgment for the benefit of the client and to promote access to justice as two of the six core values of the legal profession).

<sup>178</sup> *See In re Ruffalo*, 390 U.S. 544, 556 (1968) (White, J., concurring) (arguing that a court "may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct"); *In re Finkelstein*, 901 F.2d 1560, 1565 (11th Cir. 1990) (holding that while the conduct of the lawyer in writing a threatening and disruptive letter to opposing counsel may have been an act of "unlawyerlike rudeness" and offensive to the trial court, disbarment was improper because the lawyer was not on notice that such conduct would lead to his suspension).

<sup>179</sup> Courts have shown a readiness to find that certain kinds of verbal attacks encompassed within Model Rule 4.4 also fall within prohibitions on conduct prejudicial to the administration of justice. LAWS. MAN. ON PROF. CONDUCT, *supra* note 84, at 71:103 (citing numerous cases).

<sup>180</sup> MODEL RULES OF PROF'L CONDUCT R. 4.4 (1999); *see also id.* at Preamble (stating that "a lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others").

<sup>181</sup> MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10 (1986) ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat

These prohibitions are not limited to litigation or the courtroom,<sup>182</sup> and include conduct directed at opposing counsel.<sup>183</sup> Because these professional responsibilities are stated in the form of imperative ethics rules, extra-judicial attacks on other attorneys that are intended to embarrass, delay, or burden the other attorney or her client could constitute misconduct under the Model Rules or Model Code, although the attacking attorney may argue under the Model Rules language that the attack had some other “substantial purpose” and, therefore, does not subject the attacking attorney to discipline.<sup>184</sup>

#### IV. PROPOSALS FOR CURTAILING ATTACKS ON ENVIRONMENTAL REPRESENTATION

The lack of respect for professional obligations evidenced by attacks on those providing environmental representation demonstrates the need for a number of reforms.

To deter attorneys from interfering with legal representation of indigent or unpopular persons or organizations, ethics rules should adopt an explicit responsibility not to interfere in such representation. An attorney could interpret the present rule to mean only that an attorney cannot reject an unpopular prospective client who seeks that particular attorney’s assistance.<sup>185</sup> While the explicit responsibility to ensure that those unable to afford an attorney are represented implies an equal duty not to interfere with such representation when provided by other attorneys, the ethical rules are silent on this countervailing obligation of non-interference.<sup>186</sup>

with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”). *See also* *id.* at DR 7-102(A)(1).

<sup>182</sup> CENTER FOR PROFESSIONAL RESPONSIBILITY, *supra* note 166, at 424; HAZARD & HODES, *supra* note 164, at 40-3. *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 (2000) (limiting the duty of an advocate to avoid harassing a third person to situations when “representing a client in a matter before a tribunal”).

<sup>183</sup> *See, e.g.*, *Castillo v. St. Paul Fire & Marine Ins. Co.*, 828 F. Supp. 594, 602-03 (C.D. Ill. 1992); *Fla. Bar v. Adams*, 641 So.2d 399, 400 (Fla. 1994); *In re Belue*, 766 P.2d 206, 209 (Mont. 1988); *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 187-88 (N.Y. Sup. Ct. 1992).

<sup>184</sup> *See* LAWS. MAN. ON PROF. CONDUCT, *supra* note 84, at 71:103-04 (identifying cases where attorneys have been sanctioned under Model Rule 4.4 for harassing or intimidating opposing counsel); MODEL RULES OF PROF’L CONDUCT Terminology (1999) (defining “substantial” in the Model Rules as a “material matter of clear and weighty importance”); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 106 cmt. e (stating that a delay in a trial date in order to gather additional relevant evidence is permissible, but a delay to permit a client to extract a nuisance-value settlement is improper as it lacks a substantial purpose). Likewise, attacks intended solely to aid a client in delawyer-ing the opposing party or to induce the opposing party’s attorney to render less than independent professional representation would lack a substantial purpose.

<sup>185</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 1.2 cmt. (1999); MODEL CODE OF PROF’L RESPONSIBILITY Canon 2, EC 2-26, 2-27, 2-28 (1986).

<sup>186</sup> *See* MODEL RULES OF PROF’L CONDUCT R. 6.1 (1999); *see also* MODEL CODE OF PROF’L RESPONSIBILITY Canon 2 (1986). *But see* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 334 (1974) (stating “all lawyers” should seek to avoid imposing

Rules of professional responsibility need to state that a lawyer's duties to assist those unable to afford legal assistance and not to deny legal services based on a person's views or activities also mean that an attorney should not seek to interfere with the efforts of other attorneys to provide representation to these clients and causes.<sup>187</sup> Moreover, this duty should be adopted as a rule of professional conduct, not simply as an interpretory comment.<sup>188</sup> A joint, but dated, report of the ABA and AALS already decided that public criticism of other lawyers who have undertaken the representation of causes in disfavor should not occur.<sup>189</sup> However, absent the authority and prominence of a rule, an attorney could claim ignorance or read the duties to assist needy clients and not to deny legal services to disfavored causes as less important than explicit provisions in the rules of professional conduct.

Even if this responsibility of non-interference were made explicit, there is still the problem that it is prefaced with the language that legal representation "should not," rather than "shall not," be denied. Noncom-

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restraints on the availability of legal services for indigents and should seek to remove such restraints where they exist).

<sup>187</sup> Professor Wayne Thode proposed a new lawyers' oath to create a duty to support attorneys who represent unpopular clients or causes: "I recognize that it is sometimes difficult for clients with unpopular causes to obtain proper legal representation. I will do all that I can to assure that the client with the unpopular cause is properly represented and that the lawyer representing such a client receives credit from and support of the bar for handling such a matter." E. Wayne Thode, *The Ethical Standard for the Advocate*, 39 TEXAS L. REV. 575, 592, 596-97 (1961).

The proposed rule of professional conduct could read: "A lawyer should seek to ensure that legal representation is not denied to a person or organization who is unable to afford legal services or whose cause is controversial or the subject of popular disapproval and should support the efforts of other lawyers to provide such legal representation."

<sup>188</sup> The text of the rules of professional responsibility are authoritative and create duties, while the comments are intended as guides to interpreting the rules. MODEL RULES OF PROF'L CONDUCT Preamble (1999). An additional problem with ethics precepts stated in comments is that many states that follow the Model Rules have not explicitly adopted the comments, making it difficult for some attorneys to recognize and comply with the scope of the explicit rules. However, even in those states that have not explicitly adopted the Model Rule comments, courts and bar disciplinary committees still use the comments to interpret and apply their state rules of professional responsibility. *See, e.g.*, *Farrington v. Law Firm of Sessions, Fishman*, 687 So.2d 997, 999 (La. 1997); *Cronin v. Eighth Judicial Dist. Court*, in and for County of Clark, 781 P.2d 1150, 1153 (Nev. 1989).

<sup>189</sup> *See supra* note 96 and accompanying text. In addition, in 1953 the ABA House of Delegates, at the urging of the Committee on Individual Rights as Affected by National Security, adopted a resolution that read, in part:

2. That the Association will support any lawyer against criticism or attack in connection with such representation [of unpopular defendants], when, in its judgment he has behaved in accordance with the standards of the Bar.
3. That the Association will continue to educate the profession and the public on the rights and duties of a lawyer in representing any client, regardless of the unpopularity of either the client or his cause.

*Proceedings of the House of Delegates: Diamond Jubilee Meeting, August 23-28, 1953*, ABA J., Nov. 1953, at 1024, 1028-29.

pliance, therefore, would not give rise to a disciplinary action.<sup>190</sup> While the specter of disciplinary action would surely enhance lawyer respect for any new rule of non-interference, First Amendment problems counsel against a mandatory prohibition on efforts to deny legal services to those whose cause is controversial, at least where the attacks are merely verbal.<sup>191</sup>

To address the problem of employment blacklisting, the AALS should explicitly prohibit law firms from discriminating against law schools and students in their hiring practices. The AALS already bars a legal employer from recruiting at law schools if the firm discriminates on the basis of race, color, religion, national origin, sex, age, disability, or sexual orientation.<sup>192</sup> A similar rule is needed to prohibit employers from discriminating on the basis of a law student's participation in a law school course or program, such as a law clinic, or on the basis of a law school's offering of a particular course or program.<sup>193</sup> Employers have the right to interview and hire students based on what class or program they have participated in or, conversely, to exclude students based on what class or program they have not participated in, where such decisions are related to bona fide qualifications for the job. However, excluding students from interviews or employment based on what class or program they have participated in does not demonstrate a lack of legal knowledge, training, or skill, nor of the ability to zealously and faithfully represent their clients' interests.

In short, a firm's freedom to hire its choice of applicants should not be a license to discriminate within the hiring process based on participation in various law school activities or courses.<sup>194</sup> Since the decision not

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<sup>190</sup> See MODEL RULES OF PROF'L CONDUCT Preamble (1999) (casting imperatives in "shall not" defines proper conduct for purposes of professional discipline; others, such as "may," are permissive and define areas in which the lawyer has professional discretion).

<sup>191</sup> See *supra* notes 172–174 and accompanying text.

<sup>192</sup> American Association of Law Schools, Executive Committee Regulations 6.19 (2001), available at <http://www.aals.org/chapter6.html> (stating that each member school "shall require employers, as a condition of obtaining any form of placement assistance . . . to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b)") (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review). Bylaw 6-4(b) reads, in part: "A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation." American Association of Law Schools, Bylaw Sec. 6-4(b) (2001), available at <http://www.aals.org/bylaws.html> (last visited Apr. 30, 2002) (on file with the Harvard Environmental Law Review).

<sup>193</sup> The proposed AALS rule could read: "A member school shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance that the employer does not discriminate in hiring against a law student or law school graduate on the basis of the student's or graduate's participation in a law school course or program or on the basis of a law school's offering of a course or program."

<sup>194</sup> However, firms would remain free to discriminate among candidates if they were willing to give up their access to law schools' placement resources.

to interview or hire a student because of a controversial course or law clinic is based on bias and prejudice and not linked to bona fide qualifications for employment, the AALS should prohibit such practices.<sup>195</sup> Though firms may admittedly be able to mask their hiring biases, the AALS prohibition would stand as both a statement against such bias and as a reminder to those involved in the hiring process.

Unless the bar and law schools take a strong position, backed up by clear and enforceable rules, that interference with efforts to ensure that all persons have access to legal representation will not be tolerated, a lawyer may rationalize that the profession's commitment to legal representation for controversial clients and causes is less important than explicit rules of professional conduct, such as the obligation to zealously represent the client.<sup>196</sup>

## V. CONCLUSION

Attacks by lawyers on the efforts of other attorneys to provide legal representation on environmental matters reflects poorly not just on the lawyers making such attacks, but on the legal profession's commitment to equal access to justice. It may be understandable, though regrettable, that the public sometimes does not respect the objective that all persons, even those advancing unpopular points of view, have access to legal representation. But as a fundamental tenet of the legal profession, that principle deserves the unwavering respect of all lawyers.

In a case involving efforts by the Association of the Bar of the City of New York and the New York County Lawyers' Association to disbar an attorney because of an alleged excess of zeal in representing a member of the communist party, Judge Charles Clark, former dean of Yale Law School, asked, "why must the most serious wounds to justice be self-inflicted?"<sup>197</sup> The ethics and employment discrimination rule changes proposed herein will not, of course, stop all attacks by lawyers on other attorneys providing controversial environmental representation. But at least the changes will make clear the profession's position that the proper role for all lawyers is to advance the notion that all clients and causes, even unpopular ones, are entitled to legal representation and not, as

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<sup>195</sup> E-mail from Peter Joy, Professor, Washington University School of Law, to Antionette Lopez, Professor, University of New Mexico School of Law (May 3, 2000) (on file with the Harvard Environmental Law Review) (including recommendation that the AALS adopt a rule prohibiting prospective employers from discriminating against students on the ground of their participation in law school courses or programs).

<sup>196</sup> See generally David Fagelson, *Rights and Duties: The Ethical Obligations to Serve the Poor*, 17 *LAW & INEQ.* 171, 172 (1999) (arguing that failure to make explicit the ethical principles that impose an obligation to serve the poor has led to skepticism about the existence of such an obligation).

<sup>197</sup> *In re Sacher*, 206 F.2d 358, 366 (2d. Cir. 1953) (Clark, J., dissenting), *rev'd*, 347 U.S. 388 (1954).

Judge Clark cautioned, to further wound this important aspect of equal justice under law.