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DISCLOSING THE DANGER: STATE ATTORNEY ETHICS RULES MEET CLIMATE CHANGE

Victor B. Flatt*

Abstract

This Article suggests a novel concept in climate change law and attorney ethics law by proposing that many states' attorney ethics laws could be interpreted to require, or at least permit, attorneys to disclose client activity relating to greenhouse gas emissions. Every state has some form of ABA Model Rule 1.6(b), either requiring or allowing attorneys to disclose client activities that result in death or substantial bodily harm. This Article asserts that precedent surrounding this disclosure rule indicates that the rule could be applicable to harms caused by greenhouse gas emissions. Attorney disclosures, in turn, could impact a wide swath of greenhouse gas-emitting activities, making it more transparent and, in certain cases, requiring attorneys to counsel cessation of such activities or withdraw from representation. Because climate advocacy organizations are seeking to use all legal tools at their disposal to slow or stop greenhouse gas emissions, attorney ethics law could present an additional strategic tool to try and control greenhouse gas emissions activities. Thus, attorneys from the private sector and in government should be aware of the potential ethical issues they may face when handling greenhouse gas-related legal work.

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*[Climate change] impacts include greater likelihood of injury and death due to more intense heat waves and fires . . . foodborne and waterborne diseases . . . and . . . undernutrition in poor regions. (high confidence)*¹

I. INTRODUCTION

Imagine that you are an attorney working for ExxonMobil in 2014. ExxonMobil's shareholders have just won a victory requiring the company to analyze and disclose financial risks to the company related to greenhouse gas regulation.² This comes four years after the Securities and Exchange Commission (SEC) issued a guidance document detailing how climate change impacts that affect a company's bottom line, including risks related to regulatory controls, should be disclosed in publicly traded filings.³

Your client wishes to respond by putting out an online "one-pager" noting that the company expects no significant regulation of carbon or greenhouse gases⁴ for the next forty years; in other words, any financial risks from regulation are minimal. You know that between 2010 and 2014, the United States Department of Transportation and the United States Environmental Protection Agency (EPA) have put in place regulations mandating large gains in fuel economy for new motor

¹ Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*, at 68 (Core Writing Team, R. K. Pachauri and L.A. Meyer eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/05/SYR_AR5_FINAL_full_wcover.pdf [<https://perma.cc/B8LM-YAF7>] [hereinafter IPCC, *Climate Change 2014*].

² See Natasha Lamb & Danielle Fugere, *Exxon Mobil's Commitment to Carbon Asset Risk Is Just the Beginning*, THE GUARDIAN (Mar. 24, 2014, 12:59 PM), <https://www.theguardian.com/sustainable-business/exxon-mobil-carbon-asset-risk-pressure-oil-gas-investors> [<https://perma.cc/W8TQ-LA5T>] (discussing how a shareholder proposal prompted ExxonMobil to voluntarily committed, in exchange for withdrawal of the proposal, to publish a report on how it assesses carbon asset risk).

³ Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290 (Feb. 8, 2010).

⁴ Greenhouse gases are so-named because their chemical composition causes heat to be trapped in Earth's atmosphere, creating an aptly named "greenhouse effect." While greenhouse gases are a significant part of what allows life to flourish on the planet, human-made greenhouse gas emissions, primarily carbon dioxide and methane from the industrial, energy, and transportation sectors, are the primary drivers of anthropogenic climate change. See IPCC, *Climate Change 2014*, *supra* note 1, at 4, 44–49.

vehicles;⁵ the European Union has expanded its greenhouse gas regulation;⁶ California has adopted an economy-wide greenhouse gas cap and trade regulatory system;⁷ and international negotiations have now focused on all countries, including the United States, submitting greenhouse gas reduction targets.⁸ You are also familiar with the latest Intergovernmental Panel on Climate Change (IPCC) report, which ties specific deaths to increasing impacts of climate change from greenhouse gas emissions, including deaths from heatwaves, disease vectors, wildfires, droughts, and possibly extreme weather events.⁹

What do you advise your client about its proposed one-page explanation that it will not face any significant greenhouse gas regulations during the next 40 years? What if you advise your client that perhaps the disclosure should be more nuanced about the possibility of regulation, yet the client refuses to change its proposal? Are you required to disclose to relevant authorities (in this case the SEC and the New York State Attorney General) that you believe this one-page disclosure might be misleading, and that the failure to adequately disclose risks might facilitate the emission of more greenhouse gases that could kill or injure more people?

Or imagine that you are an EPA attorney working in the Agency's Office of Air Quality Planning and Standards at Research Triangle Park in North Carolina during the Trump Administration.¹⁰ Contrary to generally accepted economic data, and a prior guidance estimating the social cost of carbon (the harm carbon emissions

⁵ Eyder Peralta, *Obama Administration Unveils New Fuel-Efficiency Standards*, NAT'L PUB. RADIO (Aug. 28, 2012, 12:19 PM), <https://www.npr.org/sections/thetwo-way/2012/08/28/160172356/reports-obama-administration-will-unveil-new-fuel-efficiency-standards> [<https://perma.cc/82G7-NTTN>].

⁶ Toni Johnson, *The Debate over Greenhouse Gas Cap-and-Trade*, COUNCIL ON FOREIGN REL. (Nov. 3, 2011), <https://www.cfr.org/backgrounder/debate-over-greenhouse-gas-cap-and-trade> [<https://perma.cc/LW6R-UA4T>] ("The European Union, meanwhile, continues to expand its Emissions Trading Scheme (ETS)--created in 2005 and credited with helping it meet Kyoto targets.").

⁷ Felicity Barringer, *California Adopts Limits on Greenhouse Gases*, N.Y. TIMES (Oct. 20, 2011), <https://www.nytimes.com/2011/10/21/business/energy-environment/california-adopts-cap-and-trade-system-to-limit-emissions.html> [<https://perma.cc/E73U-UU6R>].

⁸ David Biello, *Climate Talks Consensus: All Countries Should Cut Greenhouse Gas Emissions--In Future*, SCI. AM. (Dec. 11, 2011), <https://www.scientificamerican.com/article/climate-talks-consensus-a/> [<https://perma.cc/S2CF-2BSZ>].

⁹ See Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014: Impacts, Adaptation, and Vulnerability, Part A: Global and Sectoral Aspects*, (Christopher B. Field et al., eds., 2014), https://www.ipcc.ch/site/assets/uploads/2018/02/WGIIAR5-PartA_FINAL.pdf [<https://perma.cc/8Y9Q-QNX6>].

¹⁰ For more information about this EPA office and its role, see *Office of Air Quality Planning and Standards (OAQPS)*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/about-epa/about-office-air-and-radiation-oar#oaqps> [<https://perma.cc/B79B-2Y42>] (last visited Jan. 9, 2019).

cause) at around forty dollars per ton,¹¹ political appointees at the EPA have informed you that in new notice and comment rulemakings¹² regarding regulation of greenhouse gas emissions at electricity generating units, you should assume the social cost of carbon is only one dollar per ton.¹³ This reduction is based on the new government policy to only count greenhouse gas emission harms in the United States (not international harms) and not to incorporate certain future harms, due to “uncertainty.”¹⁴ You know that notice and comment rulemaking is subject to the Administrative Procedure Act requirement that agency actions cannot be “arbitrary” or “capricious,”¹⁵ and you believe the proposal to be both arbitrary and capricious. Do you have to advise your political superiors that using the one dollar per ton figure would be a direct misstatement of all available evidence and contrary to prior government precedent requiring the EPA to examine costs and benefits of future generations?

If your superiors still insist upon you employing the one dollar per ton figure as justification for reducing greenhouse gas regulation, must you withdraw from representing the government in this case? Even though the rulemaking process will be fully public, do you have to disclose any confidential information you are aware of about industry lobbying or conversations on lessening emphasis of scientific and economic data? Do you have to report this to the authorities because it could endanger human life? Who would be the authority that could take action to prevent harm from occurring?

The two fact patterns presented above have occurred. ExxonMobil posted an online risk disclosure report about the impact of climate change on its business operations and assets in 2014, claiming that its outlook had not changed and that

¹¹ Interagency Working Group on Social Cost of Greenhouse Gases, *Technical Support Document: Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866*, U.S. ENVTL. PROT. AGENCY 16 (Aug. 2016), https://www.epa.gov/sites/production/files/2016-12/documents/sc_co2_tsd_august_2016.pdf [<https://perma.cc/R4LK-CTDQ>].

¹² Under Section 503 of the Administrative Procedure Act, when promulgating a new regulation or changing an existing regulation, an agency is required to go through several procedural steps, including providing the public with “[g]eneral notice” of the proposed rule and furnishing the “opportunity to participate . . . through submission of written data, views, or arguments”—i.e., comment—on the proposal. 5 U.S.C. § 553(b)–(c) (2018). In accord with these requirements, this process is often referred to as notice and comment rulemaking. See, e.g., WILLIAM F. FUNK ET AL., *ADMINISTRATIVE PROCEDURE AND PRACTICE: A CONTEMPORARY APPROACH* 73–74 (6th ed. 2019).

¹³ See, e.g., Chris Mooney, *New EPA Document Reveals Sharply Lower Estimate of the Cost of Climate Change*, WASH. POST (Oct. 11, 2017, 5:00 AM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/10/11/new-epa-document-reveals-sharply-lower-estimate-of-the-cost-of-climate-change/> [<https://perma.cc/UX4K-9GCF>].

¹⁴ See *id.*

¹⁵ 5 U.S.C. § 706(2)(A).

climate change would have no impact on the company.¹⁶ In 2017, the Trump Administration issued a regulatory impact analysis to be used in rulemaking, which suggests that the harm or cost from greenhouse gas emissions is much lower than available evidence would suggest.¹⁷ We do not have full information about who was involved in pressing for the rule's alteration.

Both of these actions have been or will be legally challenged by state attorneys general. The New York Attorney General sued ExxonMobil for deliberately misleading its current and prospective investors about the company's value by its "longstanding fraudulent scheme" to misstate the likely impact of climate change regulations on its revenues and assets.¹⁸ Several states plan to challenge the legality of the Trump Administration's proposed changes to the Clean Power Plan, and prominent environmental law experts note that the social cost of carbon proposal would not be justified by science or economics and would thus likely be illegal.¹⁹

¹⁶ KATHY HIPPLE AND TOM SANZILLO, INST. FOR ENERGY ECON. AND FIN. ANALYSIS, EXXONMOBIL'S CLIMATE RISK REPORT: DEFECTIVE AND UNRESPONSIVE 1 (2018) <http://ieefa.org/wp-content/uploads/2018/03/ExxonMobils-Climate-Risk-Report-Defective-and-Unresponsive-March-2018.pdf> [<https://perma.cc/JK6U-KNGF>]; see Press Release, ExxonMobil, ExxonMobil Releases Reports to Shareholders on Managing Climate Risk (Mar. 31, 2014), <https://news.exxonmobil.com/press-release/exxonmobil-releases-reports-shareholders-managing-climate-risk> [<https://perma.cc/V68N-H8D3>] (referencing the report, which is no longer publicly available on the Internet); see also Ken Cohen, *Managing Climate Risk*, ENERGYFACTOR BY EXXONMOBIL: PERSPECTIVES BLOG (Mar. 31, 2014), <https://energyfactor.exxonmobil.com/perspectives/managing-climate-risk/> [<https://perma.cc/B4DY-345A>]; *Exxon Mobil Shrugs Off Climate Change Risk to Profit*, BBC (Apr. 1, 2014), <https://www.bbc.com/news/business-26830555> [<https://perma.cc/82LX-JE2J>] ("Exxon Mobil, . . . said in a new report that world climate policies are 'highly unlikely' to stop it from producing and selling fossil fuels in the near future.").

¹⁷ Mooney, *supra* note 13; see *Regulatory Impact Analysis for the Review of the Clean Power Plan: Proposal*, EPA (Oct. 2017), https://www.epa.gov/sites/production/files/2017-10/documents/ria_proposed-cpp-repeal_2017-10.pdf [<https://perma.cc/5SF3-MVQY>].

¹⁸ Complaint at 1, *New York v. Exxon Mobil Corporation*, No. 452044/2018 (N.Y. Sup. Ct., filed Oct. 24, 2018); see also John Schwartz, *New York Sues Exxon Mobil, Saying it Deceived Shareholders on Climate Change*, N.Y. TIMES (Oct. 24, 2018), <https://www.nytimes.com/2018/10/24/climate/exxon-lawsuit-climate-change.html> [<https://perma.cc/22QG-9NLZ>]. In December 2019, the court ruled against the state of New York on its claim that Exxon violated the Martin Act, a state law designed to combat shareholder fraud. John Schwartz, *New York Loses Climate Change Fraud Case Against Exxon Mobil*, N.Y. TIMES (Dec. 10, 2019), <https://nyti.ms/2sdIAYF> [<https://perma.cc/6498-BHVJ>] [hereinafter Schwartz, *New York Loses Climate Change Fraud Case*].

¹⁹ Oliver Millman, *Fightback Begins over Trumps "Illegal and Irresponsible" Clean Power Appeal*, THE GUARDIAN (Oct. 10, 2017), <https://www.theguardian.com/environment/2017/oct/10/trump-climate-change-clean-power-plan-fightback> [<https://perma.cc/R5NY-AQQW>]; Michael Greenstone & Cass R. Sunstein, *Donald Trump Should Know: This Is What Climate Change Costs Us*, N.Y. TIMES (Dec. 15, 2016), <https://www.nytimes.com/2016/12/15/opinion/donald-trump-should-know-this-is-what-climate-change-costs-us.html> [<https://perma.cc/PX3WC677>]. See generally Montana Env'tl.

But what about the attorneys that surrounded these and similar decisions where greenhouse gas regulatory requirements may not have been followed? The American Bar Association (ABA) has already passed a resolution calling for attorney action to work towards reducing climate change.²⁰ Although attorneys are not bound by ABA resolutions, official ABA recognition of attorneys' responsibility to "address climate change and take action,"²¹ along with attorneys' societal obligations in general,²² suggests that attention should be paid to the issue.

Beyond their general ethical obligations, attorneys may also face concern about specific ethical rules that carry the threat of attorney discipline. Certainly, an attorney assisting the perpetration of a fraud can face serious ethics charges²³—not to mention be criminally prosecuted in some states.²⁴ Additionally, state ethics rules provide that an attorney either may or must disclose client behavior if necessary "to prevent reasonably certain death or substantial bodily harm."²⁵

But what of the attorneys who simply know of significant emissions that might be lessened if disclosed? What about the attorneys in the examples above, who

Info. Ctr. v. U.S. Off. of Surface Mining, 274 F. Supp. 3d 1074 (D. Mont. 2017) (holding that OSMRE's approval of a coal mining project was arbitrary and capricious when it failed to consider the costs of additional greenhouse gas emissions via the social cost of carbon), *amended in part, aff'd in part*, 2017 WL 5047901 (D. Mont. 2017).

²⁰ AM. BAR ASS'N, Resolution 111, <https://johndernbach.com/wp-content/uploads/2019/08/111-annual-2019.pdf> [<https://perma.cc/3YN9-9HWE>]; see also John Dernbach, *American Bar Association Urges Broad Range of Action to Reduce U.S. Greenhouse Gas Emissions "to Net Zero or Below,"* JOHN DERNBACH (Aug. 12, 2019), <https://johndernbach.com/2019/08/american-bar-association-urges-broad-range-of-actions-to-reduce-u-s-greenhouse-gas-emissions-to-net-zero-or-below/> [<https://perma.cc/4ZB9-MDYQ>].

²¹ AM. BAR ASS'N, Resolution 111, <https://johndernbach.com/wp-content/uploads/2019/08/111-annual-2019.pdf> [<https://perma.cc/3YN9-9HWE>].

²² See MODEL RULES OF PROF'L CONDUCT pmbl. (AM. BAR ASS'N 2018) (recognizing that, among other responsibilities "[l]awyers play a vital role in the preservation of society").

²³ ABA Model Rule 1.2(d) states that an attorney cannot assist a client in the commission of a crime or a fraud. According to the American Bar Association's Business Law newsletter, all states have a form of this rule. William Freivogel, *ABA Model Rules and the Business Lawyer*, AM. BAR ASS'N, <http://apps.americanbar.org/buslaw/newsletter/0077/materials/ethics.pdf> [<https://perma.cc/E8TR-XSJW>].

²⁴ See, e.g., Jay Adkisson, *Advising About or Assisting with a Fraudulent Transfer Is About to Get Very Dangerous in California*, FORBES (Oct. 28, 2018, 11:04 PM), <https://www.forbes.com/sites/jayadkisson/2018/10/28/advising-or-assisting-with-a-fraudulent-transfer-is-about-to-get-very-dangerous-in-california/#514bc05f118d> [<https://perma.cc/REZ7-LDVG>] (discussing the recent change to rule 1.2.1 of the California Rules of Professional Conduct that now makes it an offense to "assist a client in conduct that the lawyer knows is criminal . . ." and this rule's potential effects on attorneys practicing in the state, given that fraudulent transfers are criminal offenses under California Penal Code sections 154, 155, and 531).

²⁵ See MODEL RULES OF PROF'L CONDUCT r. 1.6(b). For a full discussion of ABA Model Rule 1.6 and analogous (and varying) state rules, see *infra* Part I.

advise against actions and then stop direct representation? Are they still required to disclose their knowledge and belief regarding the legality of actions? Could they face disciplinary action for failure to do so? The answers to these questions could be yes in many states.

No state supreme courts have yet applied attorney ethical rules to require disclosure of dangerous client activities relating to greenhouse gas emissions. However, given climate activism to reduce greenhouse gas emissions,²⁶ the ease of filing attorney ethics complaints,²⁷ and requirements to disclose potential ethical violations of other attorneys,²⁸ the application of ethical rules to representing greenhouse gas emitters is not only possible but likely.

Ethics rules allowing or requiring disclosure of client confidential information because of threats to human health and life have been considered applicable to hazardous waste releases since the 1990s, despite the fact that harms from hazardous releases often have less definitive timing or less predictable harm as compared to more traditional threats to life.²⁹ Similarly, the threats from greenhouse gas emissions also have indeterminate timing and generalized harm, qualities that distinguish such activities from the threats more traditionally covered by disclosure rules. But certain differences make ethical complaints about failing to disclose clients' impacts on greenhouse gas emissions far more likely.

Few, if any, attorneys have faced ethics complaints because of hazardous waste releases. This lack of ethics complaints is likely due to the fact that the government is legally required to correct such releases upon discovery and reporting.³⁰ Because the government is likely to correct the harms pursuant to its statutory obligations, attorney disclosures would not “prevent any new harm,” meaning the requirement to disclose life-threatening information would not apply.³¹ The same is not true of climate change. Because of the lack of any comprehensive federal regulatory scheme to address major greenhouse gas emissions and the scale of the problem, climate change is fundamentally different from an ethics standpoint than more traditional, heavily regulated pollution like hazardous waste releases.

²⁶ See *infra* Part II.

²⁷ See *infra* Part IV, for a general description of this process in Texas.

²⁸ See MODEL RULES OF PROFESSIONAL CONDUCT r. 8.3(a) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”).

²⁹ See Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney’s Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 413–15 (1997) (discussing Model Rule 1.6 and suggesting changes to the rule to account for situations where attorney silence can exacerbate environmental catastrophes).

³⁰ For instance, Section 3004(u) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6924(u) (2018), directs federal and state authorities to administer “corrective action for all releases of hazardous waste” that may occur at a RCRA-permitted facility.

³¹ See discussion *infra*, Part III.

When the dearth of a government obligation or action is coupled with a sophisticated “climate activism bar,” which is using any and all legal methods in its arsenal to push for reductions in greenhouse gas emissions,³² the future likelihood of ethical complaints increases greatly. Climate activism already includes lawsuits under common law, statutory law, constitutional law, international law, and the public trust doctrine.³³ One litigation avenue that has been missing is the requirements imposed on attorneys by their state bars. As the deadly nature of greenhouse gas emissions and our ethical responsibilities as humans and attorneys becomes more and more discussed in political and regulatory circles,³⁴ that is likely to change.

Though political discussions in the United States might suggest otherwise,³⁵ there is little doubt that climate change has and will continue to cause untold deaths, and many more serious health impacts the world over.³⁶ Given that: (1) greenhouse gas emissions in the aggregate drive climate change,³⁷ (2) credible evidence concerning fraudulent activities surrounding greenhouse gas reporting,³⁸ and (3) recent attempts at the federal level to reverse prior climate policy in the face of all

³² Mark Clarke et al., *Climate Change Litigation: A New Class of Action*, WHITE & CASE 5 (2018), <https://www.whitecase.com/sites/whitecase/files/files/download/publications/thought-leadership-climate-change-litigation-18-single-web.pdf> [https://perma.cc/E5J2-XDP6] (discussing current trends in climate change litigation).

³³ See *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 857–58 (9th Cir. 2012) (holding that federal common law nuisance claims against energy companies for sea level rise are displaced by the Clean Air Act); see also *Humane Soc’y of the United States v. McCarthy*, 209 F. Supp. 3d 280 (D.D.C. 2016) (dismissing an APA claim seeking to compel an EPA response to a rulemaking petition proposing the regulation of CAFOs as a stationary source under the Clean Air Acts); Dana Drugmand, *France, Home of the Paris Agreement, Faces Lawsuit for Lack of Climate Progress*, CLIMATE LIABILITY NEWS (Dec. 20, 2018), <https://www.climateliabilitynews.org/2018/12/20/france-lawsuit-paris-climate-agreement/> [https://perma.cc/SSZ6-QGHZ] (“The upcoming lawsuit says . . . the French government has not adequately addressed climate change, breaching its legal obligations . . . outlined in international agreements such as the European Convention on Human Rights, the [UNFCCC], and the Paris Agreement.”); *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260–62 (D. Or. 2016) (denying defendant’s motions to dismiss the substantive due process and public trust doctrine claims of young environmental activists against the United States for failing to regulate greenhouse gas emissions).

³⁴ See Dernbach, *supra* note 20.

³⁵ John Swartz, *Global Warming Concerns Among Americans Rise in New Poll*, N.Y. TIMES (Jan. 22, 2019), <https://www.nytimes.com/2019/01/22/climate/americans-global-warming-poll.html> [https://perma.cc/S7Q8-3WZ8] (“Political party affiliation is strongly associated with acceptance of the overwhelming scientific consensus on global warming, with Democrats tending to accept it and Republicans tending to reject it.”).

³⁶ See *infra* Part II.

³⁷ See IPCC SPECIAL REPORT (2018), *infra* note 158, at 2–8 and accompanying text.

³⁸ See *infra* Part III.

known evidence,³⁹ attorneys for many large corporate entities and the government may be subject to attorney ethics complaints for failing to disclose activities related to greenhouse gas emissions. Yet because this issue has yet to be fully discussed or explored, an attorney may be woefully unaware of the risk she faces.

While not yet publicly on the radar of legal climate activists, the possibility of pressuring or influencing attorney behavior using state ethics laws is an opportunity that climate activists will likely embrace as another arrow in their quiver to avoid, limit, or publicize greenhouse gas emissions. Even though state supreme courts or administrative bodies will have the final say on whether their state's ethical rules apply to create new disclosure obligations,⁴⁰ and states can also alter ethics rules by statute,⁴¹ it only takes one state applying ethics rules to clients' greenhouse gas emitting activities to create this risk.

This Article examines ABA Model Rule of Professional Conduct 1.6(b)(1) and analogous state rules regarding disclosure of client actions that could cause possible death or serious bodily harm. It argues that there are multiple ways in which client activity dealing with greenhouse gases may expose an attorney to ethical breaches if she fails to report these activities in certain circumstances.⁴² Failure to disclose in certain circumstances may also lead to tort liability and onerous financial exposure of the attorney.⁴³

The ramifications of potential attorney liability for failing to disclose client greenhouse gas emissions cannot be completely explored in this Article, but they are significant. This Article is the first to both articulate greenhouse gas emissions as a new area of attorney ethics law and posit that this concern will provide a legal and practical tool that could ultimately reduce greenhouse gas emissions.⁴⁴ This Article is not a call to file ethics complaints, but rather a recognition that there is a substantial possibility of such actions being filed. If the substantive basis for emissions-based complaints is possible, it is only a matter of time before climate change activists recognize ethical complaints as a new tactic in one or more states. As a climate change attack strategy, attorney ethics complaints avoid many of the more significant impediments to contemporary climate change litigation. Lawsuits

³⁹ See *infra* Part III.

⁴⁰ Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 GA. L. REV. 137, 148 (1994).

⁴¹ Alex Bein, *Writing the Rules of Attorney-Whistleblowing: Who Gets to Decide and How Do We Make the Decision?*, 42 FORDHAM URB. L. J. 967, 1001 (2015).

⁴² Model Rule 1.6(b) is phrased as a permissible disclosure. But several states have mandatory disclosure rules. Moreover, even permissible disclosure might be made mandatory by operation of companion rules. See *infra* Part III.

⁴³ Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE L. REV. 117, 168–69 (1998) [hereinafter Russell, *Unreasonable Risk*].

⁴⁴ Keith W. Rizzardi has an excellent piece on the applications of attorney ethical responsibilities to making factual statements about climate change impacts. Keith Rizzardi, *Sea Level Lies: The Duty to Confront the Deniers*, 44 STETSON L. REV. 75, 75 (2014).

that have sought to compel government action on climate change often face standing barriers, which prompts many courts to dismiss climate litigation for perceived lack of remedy.⁴⁵ Because ethics complaint systems are primarily conducted within state bars and do not have many of the same formal requirements as bringing an action in court, there are less barriers to bringing about the intended changes.

Just as attorneys who worked in the tobacco industry were assailed under legal and ethical standards as more information about tobacco products and marketing came to light,⁴⁶ attorneys representing clients in far larger sectors associated with greenhouse gas emissions—such as energy generation, transportation, and fossil fuel extraction and refining—may find themselves in ethical crosshairs that many never realized existed.

Part I of this Article examines Rule 1.6(b)(1) of the ABA Model Rules of Professional Conduct, its variation among the states, and related model ethics rules. Part I then breaks down the various components that must be present under Rule 1.6(b)(1) in order to trigger the rule in a particular state, Texas. Part II examines how specific client greenhouse gas emissions activity may be considered criminal or fraudulent, even in jurisdictions (including the majority of the United States) where greenhouse gases are ostensibly unregulated. These factual scenarios include emitting greenhouse gases without a permit, failure to quantify and report emissions, failure to fully disclose financial risk from greenhouse gas-related activities in corporate filings, and failure to provide, request, or utilize accurate information regarding the social cost of carbon in environmental reviews in federal or state permitting situations. Part III examines the requirement of the possibility of reasonably certain death or bodily harm and shows that this can be met in numerous situations with greenhouse gas emissions. Part III then examines how the ABA Model Rules and similar state rules have been interpreted so that the death or bodily injury need not be traceable to a specific individual, nor be immediate in its harm, and why reporting would alleviate the threat. Part IV explains how easily ethical complaints could be brought under the theories developed in Parts I–III, and the Article concludes with a warning for attorneys to be prepared or risk their professional careers.

This Article serves as an opening chapter to the application of state attorney ethics rules to lawyers who represent clients that contribute to climate change. There are many aspects of the concept that merit further exploration. Future articles will explore more fully the application of this theory to the specific case of government

⁴⁵ *Native Village of Kivalina v. Exxon-Mobil, Corp.*, 663 F. Supp. 2d 863, 882 (N.D. Cal. 2009) (concluding that because of the political question doctrine and lack of standing under Article III, the case must be dismissed), *aff'd on other grounds*, 696 F.3d 849, 857–58 (9th Cir. 2012); *Comer v. Murphy Oil, Inc.*, 839 F. Supp. 2d 849, 862 (S.D. Miss. 2012) (finding that the plaintiff's claims lacked standing because their alleged injuries were not fairly traceable to the defendants conduct), *aff'd*, 718 F.3d 460 (5th Cir. 2013).

⁴⁶ Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 499 (1999).

attorneys, and other authors are examining the intersection of climate change and the normative ethical requirements of attorneys.

II. ABA MODEL RULE 1.6(B)(1): CLIENT CONFIDENTIALITY AND DISCLOSING DANGER

Every state has a code of ethical conduct for attorneys.⁴⁷ The ABA Model Rules of Professional Conduct have influenced states' rules to varying extents.⁴⁸ Rule 1.6(b)(1) of the ABA Model Rules of Professional Conduct, and the various state versions based on it, require that an attorney either may or must disclose client behavior "to prevent reasonably certain death or substantial bodily harm."⁴⁹ Or, in an earlier version adopted by many states, disclosure is triggered if the client commits a crime that could result in "imminent death or substantial bodily harm."⁵⁰

ABA Model Rule 1.6 sets out the general obligation of attorneys to protect client confidentiality.⁵¹ The requirement of client confidentiality is considered a "bedrock" foundation of justice.⁵² Rule 1.6 provides that a lawyer "shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by" designated exceptions.⁵³ The ethical prohibition against breach of client confidentiality is distinct from the attorney-client

⁴⁷ See Todd A. Berger, *Professional Responsibility of the Criminal Defense Lawyer Redux: The New Three Hardest Questions*, 7 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 96, 104 & n.24 (2017) (noting that the ABA Model Rules of Professional Conduct are the basis for formal ethics rules in every state except California, which has its own set of rules for professional conduct).

⁴⁸ *Id.*

⁴⁹ MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2018) ("A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services" (emphasis added)).

⁵⁰ RUSSELL G. PEARCE ET AL., PROFESSIONAL RESPONSIBILITY: A CONTEMPORARY APPROACH 363 (3d ed. 2017); Russell, *Unreasonable Risk*, *supra* note 43, at 127.

⁵¹ See MODEL RULES OF PROF'L CONDUCT r. 1.6; *see also* Russell, *Unreasonable Risk*, *supra* note 43, at 124.

⁵² Gary Rowe, Note, *Potential Expansion, or Modification, to the Permissive Exceptions of Model Rule 1.6: Client-Lawyer Confidentiality in Criminal Law and "The Gap,"* 39 J. LEGAL PROF. 291, 295 (2015).

⁵³ MODEL RULES OF PROF'L CONDUCT r. 1.6(a); *see also* PEARCE ET AL., *supra* note 50, at 363.

privilege.⁵⁴ In some cases, when ethical rules require or allow attorney disclosure to prevent harm, the attorney-client privilege may also be waived—though there is wide variation among the states.⁵⁵

The prohibition against disclosure of confidential information is broad, despite the exceptions.⁵⁶ As this Part will discuss in detail, attorneys must balance the requirement of client confidentiality with the importance of the exceptions to the requirement—including the exceptions provided in Model Rule 1.6(b), as well as other rules—and the variation of this model rule in the states.⁵⁷

Model Rule 1.6(b)(1) provides that an attorney may reveal her client’s confidential information “to prevent reasonably certain death or substantial bodily harm.”⁵⁸ The ABA changed this rule in 2002 from the prior disclosure exception “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”⁵⁹ This change broadened the exception and made clearer its application to accidental dangers.⁶⁰

Every state has adopted some form of the “death or substantial bodily harm” exception, although some states have retained the pre-2002 qualifier that the exception is only triggered by a client’s criminal act.⁶¹ Twelve states mandate disclosure, while thirty-seven states permit disclosure.⁶² Massachusetts has a hybrid version.⁶³ Of the states that mandate disclosure, five (Florida, Illinois, North Dakota, Tennessee, and Washington) mandate disclosure if an attorney “reasonably believes that a client’s actions may result in reasonably certain death or substantial bodily harm.”⁶⁴ Seven states, including New Jersey, Connecticut, and Texas, have a form of this rule that mandates disclosure if there is a likelihood of death or substantial bodily injury when it results from a possible criminal or fraudulent act. For instance, Rule 1.05(e) of the Texas Disciplinary Rules of Professional Conduct states:

When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result

⁵⁴ See PEARCE ET AL., *supra* note 50, at 295; see MODEL RULES OF PROF’L CONDUCT r. 1.6(a) cmt. 3.

⁵⁵ Laws. Man. on Prof. Conduct 55:1004 (ABA/BNA, Bloomberg Law 2019); see, e.g., *Aviles v. State*, 165 S.W.3d 437, 439 (Tex. App. 2005) (“We hold that this communication of an intent to commit a crime is not covered by the attorney-client privilege . . .”).

⁵⁶ Russell, *Unreasonable Risk*, *supra* note 43, at 124.

⁵⁷ PEARCE ET AL., *supra* note 50, at 291.

⁵⁸ MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1).

⁵⁹ See MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2001); MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2002); see also Russell, *Unreasonable Risk*, *supra* note 43, at 123.

⁶⁰ MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS’N 2018).

⁶¹ See *infra* Appendix A.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.⁶⁵

Model Rule 1.6(b)(1) does not exist in a vacuum and must be interpreted with other ethical rules as well. For example, ABA Model Rule 1.2(d) states that a lawyer may not assist a client in the commission of a crime or fraud.⁶⁶ All states have adopted a version of Rule 1.2(d).⁶⁷ ABA Model Rule 1.16(a)(1) provides that a lawyer must withdraw from representing a client if continuing representation would violate any ethics rule.⁶⁸ Thus, if a lawyer's conduct would assist a client in the commission of a crime or fraud, the lawyer must withdraw. Moreover, Model Rule 4.1(b) provides that:

In the course of representing a client a lawyer shall not knowingly: . . .
(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.⁶⁹

This suggests that, in certain circumstances, an attorney *must* disclose information due to Model Rule 4.1(b), even if the state's version of Model Rule 1.6 merely *permits* disclosure. Thus, even in the thirty-seven states that merely permit disclosure, there is the possibility that the operation of the state's Rule 4.1(b) equivalent will then require disclosure.

Many states have also adopted ABA Model Rules 1.6(b)(2) and 1.6(b)(3),⁷⁰ which require disclosure of a client's criminal (and sometimes fraudulent) acts that

⁶⁵ TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(e) (1989).

⁶⁶ MODEL RULES OF PROF'L CONDUCT r. 1.2(d) (AM. BAR ASS'N 2018).

⁶⁷ Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. TEX. L. REV. 727, 735–36 (1994).

⁶⁸ MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(1).

⁶⁹ *Id.* r. 4.1(b).

⁷⁰ Information may be disclosed to:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Id. r. 1.6(b)(2)–(3).

cause economic damage, even if such acts would not be expected to result in death or serious bodily harm.⁷¹

The states vary in how they interpret the extent of either the requirement or the privilege to disclose information, both in the extent of the disclosure and in how certain the attorney has to be concerning the criminal actions or death or substantial bodily harm.⁷² Model Rule 1.6(b)(1) limits disclosure to what is *necessary* to prevent the harm.⁷³ The related exception in Model Rule 1.6(b)(2) and 1.6(b)(3) allowing disclosure for criminal or fraudulent acts are limited to the extent necessary to “prevent, mitigate or rectify” the client’s wrongful acts “in furtherance of which the client has used the lawyer’s services.”⁷⁴ In Texas, the requirement to disclose is predicated upon the attorney having “information ‘clearly establishing’ the likelihood of such acts and consequences.”⁷⁵ In evaluating the disclosure requirement in its Model Rule 1.6(b)(1) equivalent (Rule 1.05(e)), Texas defers to how the situation “reasonably appears” to the lawyer, and also protects the attorney’s disclosure by operation of the lesser standard to *allow* (rather than mandate) disclosure under the separate “criminal or fraudulent” act exception noted above.⁷⁶

Because the purpose is to avoid harm, disclosures are theoretically limited to what is necessary to prevent a future or continuing occurrence, rather than to simply announce client actions or violations that have wholly occurred in the past.⁷⁷ Ongoing violations that will continue the harm would thus be subject to the disclosure rule. In terms of past events, related ethical rules governing prohibitions against attorney assistance in illegal or fraudulent activity can allow or require disclosure if the attorney was involved in the action.⁷⁸ The ethical rule prohibiting

⁷¹ Weinstein, *supra* note 67, at 736. The model rules added this expanded disclosure exception in 2002 as a response to multiple recent corporate frauds, such as Enron. ABA, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013 139–42 (2013) [hereinafter “ABA, A LEGISLATIVE HISTORY”]. Additionally, in any state, the failure to disclose information about harms may make an attorney liable in tort if there is a specific victim of the harm. *See generally* Kevin H. Michels, *Third-Party Negligence Claims Against Counsel: A Proposed Unified Liability Standard*, 22 GEO. J. LEGAL ETHICS 143 (Winter 2009) (addressing when attorneys are liable to nonclients for negligence). Though specific tort claims in greenhouse gas emissions may be unlikely. *See* discussion *infra* Part III.

⁷² *See infra* Appendix A.

⁷³ MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(1); *see also* Laws. Man. on Prof. Conduct, *supra* note 55, at 55:1002; Connecticut Informal Ethics Op. 08-06; Maryland Ethics Op. 94-27 (1994).

⁷⁴ *See* MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(2), 1.6(b)(3); *see also* Laws. Man. on Prof. Conduct, *supra* note 55, at 55:905.

⁷⁵ TEX. DISCIPLINARY RULES PROF’L CONDUCT r. 1.05 (c)(4) cmt. (1989).

⁷⁶ *Id.*

⁷⁷ *See* McClure v. Thompson, 323 F.3d 1233, 1245 (9th Cir. 2003).

⁷⁸ For example, Model Rule 1.6(b)(3) allows disclosure when the lawyer believes such disclosure is reasonably necessary to “mitigate or rectify substantial injury to the financial interests or property of another that . . . has resulted from the client’s commission of a crime

attorney assistance in criminal or fraudulent acts may also come into play if subsequent occurrences render prior actions newly illegal.⁷⁹

To recap, depending upon the state, an attorney *must or may* disclose confidential information in situations where the attorney reasonably believes the disclosure is necessary to avoid some form of danger of potential death or serious bodily harm.⁸⁰ Further, the states vary in whether or not they require disclosure only if death or substantial bodily harm would result from a client's fraudulent or criminal act.⁸¹

Though most states have a Model Rule 4.1(b) counterpart which prohibits attorney actions aiding a criminal or fraudulent act,⁸² these rules do not address situations in which an attorney merely has *knowledge* of—and has done nothing to *actively aid*—a client's activity that is criminal, fraudulent, or likely to result in death or substantial bodily harm. This can occur in two distinct situations. First, the attorney may be aware of dangerous criminal or fraudulent actions because they occur without or despite attorney advice. For example, an attorney may advise a client to follow Clean Air Act reporting requirements, but the client might demur. Since the Clean Air Act requirements apply to the permittee itself rather than on any person with knowledge of the permittee's emissions, the attorney would herself not have aided a criminal act.⁸³

In the second situation, the ethics rule prohibiting an attorney from engaging in criminal or fraudulent activity is narrower than what a non-attorney might consider fraudulent or criminal activity. For instance, an attorney's zealous representation of a client or legal advice based on an interpretation of whether something is legal does not mean that the attorney has committed criminal or fraudulent activity under this ethical rule.⁸⁴ In other words, as Professors Riesel and Treanor note:

This prohibition [on knowingly counseling or assisting a client to commit a crime] does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from the client's

or fraud in furtherance of which the client has used the lawyer's services"). MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(3). In addition, Model Rule 1.16(b)(3) provides that "a lawyer may withdraw from representing a client if the client has used the lawyer's services to perpetrate a crime or fraud." *Id.* Further, Model Rule 1.16(a)(1) requires withdrawal if the representation will result in a violation of rules or other law. *Id.* r. 1.16(a)(1); *see also* Laws Man. on Prof. Conduct, *supra* note 55, at 55:905; TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 1.05 (c)(4) cmt. (1989).

⁷⁹ MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 10.

⁸⁰ *See supra* notes 47–79 and accompanying text; Pearce, *supra* note 53, at 363.

⁸¹ Laws Man. on Prof. Conduct, *supra* note 55, at 55:902; Aviles v. State, 165 S.W.3d 437, 439 (Tex. App. 2005); Russell, *supra* note 29, at 124.

⁸² MODEL RULES OF PROF'L CONDUCT r. 4.1(b).

⁸³ Daniel Riesel & Victoria Shiah Treanor, *Ethical considerations for the Clean Air Act Attorney*, 30(5) THE PRACTICAL REAL EST. LAW. 5, 9 (Sept. 2014).

⁸⁴ *See* Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 483 (Tex. 2015).

conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action.⁸⁵

However, even if an attorney's advice on particular laws may be shielded from attorney ethics obligations, that is unrelated to whether the client later commits a criminal or fraudulent act which causes harm that can be rectified by disclosure.

This Article cannot cover every permutation of these rules in the diversity of states. Instead, an analysis of the law in Texas, which has one of the narrowest rules about mandated disclosure, will demonstrate that even when the rule is restricted to actions that derive from criminal or fraudulent acts, an attorney could face ethical disclosure requirements with client decisions regarding the emissions of greenhouse gases. If the Texas standard is satisfied, the requirements in 11 other states would potentially require disclosure as well. Further, even in the 37 permissive disclosure states, clients who emit greenhouse gases would still need to be concerned about the potential disclosure of this behavior.

The remainder of this Article uses the elements of the Texas version of Model Rule 1.6(b)(1) as an outline to provide an in-depth discussion of the rule's applicability to greenhouse gas emissions in many states. In Texas, disclosure of confidential information under the Model Rule 1.6(b)(1) exception requires the presence of three elements: 1) a criminal or fraudulent act that is 2) likely to result in death or substantial bodily harm 3) that could be prevented by the disclosure.⁸⁶ Part III discusses the applicability of the first element to greenhouse gas-related activities in and Part IV applies the second and third elements to harms caused by such activities.

III. CRIMINAL OR FRAUDULENT ACTIONS RELATED TO GREENHOUSE GAS EMISSIONS

A. *Criminal Actions Related to Greenhouse Gas Emissions*

1. *Unauthorized Emissions*

When exactly would a client's emission of greenhouse gases be considered criminal or fraudulent? Federal laws have criminalized a wide range of harms to the environment, such as certain unauthorized disposals or emissions, or knowing

⁸⁵ Riesel & Treanor, *supra* note 83, at 13 (quoting MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 9 (AM. BAR ASS'N 2013)).

⁸⁶ TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 1.05(e) (2019). Note that the Texas rule mandates that the act be criminal or fraudulent and requires disclosure while the new Model Rule does not mandate criminal or fraudulent activity but is permissive. Texas does not require that the death be "imminent," as some states do, though this Article will demonstrate how this is not necessarily a substantial restriction on the application of the disclosure rules.

failure to keep or report proper information. For example, the Clean Water Act, a typical statute, establishes four categories of criminal violations for unauthorized discharges of pollutants into waters of the United States: negligent violations, knowing violations, knowing endangerments, and knowing false statements.⁸⁷

Although there is no general federal greenhouse gas limitation for emissions sources, several states have adopted such standards. California and the Regional Greenhouse Gas Initiative (RGGI) states⁸⁸ limit the emission of greenhouse gases by specific entities in certain circumstances. In these states, similar to federal environmental laws regulating other pollutants, emissions may occur but only pursuant to the terms of a valid permit.⁸⁹ The emitting entities are also responsible for properly tracking and surrendering their emission permits at the appropriate time.⁹⁰ This applies to all fossil fuel-fired power plants in the RGGI states, as well as multiple greenhouse gas emission sectors in California.⁹¹

This Article will expand on California's system as an economy-wide program. California's program includes very specific limitations and penalties. The California greenhouse gas cap and trade program sets an emissions cap that declines every year.⁹² Covered entities include large emitters, like heavy industry and power generators, and smaller emitters, like commercial natural gas producers and transportation fuel providers.⁹³ Under this program, each covered entity has an emissions allowance for every metric ton of carbon dioxide-equivalent (CO₂e) that the source emits.⁹⁴ Allowances are allocated to an entity by the government or

⁸⁷ Clean Water Act §§ 309(c)(1)–(4), 33 U.S.C. §§ 1319(c)(1)–(4) (2018).

⁸⁸ Currently Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, Delaware, and Maryland. New Jersey may also rejoin. Dana Bate, *New Jersey looks to rejoin regional cap-and-trade program*, STATEIMPACT PA. (Jan. 24, 2019, 9:14 PM), <https://stateimpact.npr.org/pennsylvania/2019/01/24/new-jersey-looks-to-rejoin-regional-cap-and-trade-program/> [<https://perma.cc/B8ZH-WJ4G>].

⁸⁹ CAL. CODE REGS. tit. 17 § 95820 (2019); REG'L GREENHOUSE GAS INITIATIVE MODEL RULE § XX-1.5, 3.1 (2017); For the statutory requirements of individual RGGI participant states, see *State Statutes & Regulations*, REG'L GREENHOUSE GAS INITIATIVE (2019), <https://www.rggi.org/program-overview-and-design/state-regulations>. [<https://perma.cc/EYT4-GJZB>].

⁹⁰ CAL. CODE REGS. tit. 17 § 95856 (2019); REG'L GREENHOUSE GAS INITIATIVE MODEL RULE § XX-6.5(b) (2017).

⁹¹ CAL. CODE REGS. tit. 17, § 95101 (2019); REG'L GREENHOUSE GAS INITIATIVE MODEL RULE § XX-1.4 (REG'L GREENHOUSE GAS INITIATIVE 2017). At the time of this writing, several other states (such as Washington) are considering some sort of greenhouse gas permitting requirement.

⁹² CAL. CODE REGS. tit. 17, § 95891(e)(1) (2019).

⁹³ CAL. CODE REGS. tit. 17, § 95811 (2019).

⁹⁴ See Cal. Air Res. Bd., *Proposed Amendments to the California Cap on Greenhouse Gas Emissions and Market Based Compliance Mechanisms Regulation: Final Environmental Analysis* Dec. 10, 2018, at 3, <https://ww3.arb.ca.gov/regact/2018/capandtrade>

acquired through trading, auctions, or offset projects.⁹⁵ Penalties for failing to comply with California’s emissions permitting are steep, requiring payment of fines that are four times the permitting cost.⁹⁶

The California Air Resources Board (CARB) is given strong enforcement authority under the California Global Warming Solutions Act of 2006, commonly referred to as AB 32, to ensure that the cap and trade program operates successfully.⁹⁷ CARB has the power to enjoin and set penalties for any violations by covered entities.⁹⁸ AB 32 applies the same criminal penalties that are used to enforce non-vehicular air pollution requirements under Division 26 of the Healthy and Safety Code (“Code”).⁹⁹ Criminal penalties under this division include fines and imprisonment, depending on factors like level of knowledge, type of harm, and individual or corporate status.¹⁰⁰ For example, under Section 42400.3.5 of the Code:

[a]ny person who knowingly violates any rule, regulation, permit, order, fee requirement, or filing requirement of the state board or of a district . . . that is adopted for the control of toxic air contaminants . . . is guilty of a misdemeanor and is subject to a fine of not more than ten thousand dollars (\$10,000) or imprisonment in the county jail for not more than six months, or both.¹⁰¹

Willful or intentional emissions of air pollutants in violation of AB 32 have even more stringent criminal penalties.¹⁰² Such a person “is guilty of a misdemeanor and is punishable by a fine of not more than seventy-five thousand dollars (\$75,000), or imprisonment in a county jail for not more than one year, or by both that fine and imprisonment.”¹⁰³ Additionally, there are several other criminal provisions related to negligent emissions of air pollutants, failure to take corrective action, and a general criminal provision for any violations.¹⁰⁴ In conclusion, CARB is given a number of enforcement tools, including criminal penalties, that enable it to effectively implement the requirements of AB 32’s ambitious cap and trade program.¹⁰⁵

18/finalea.pdf [https://perma.cc/E8S9-KR9K]. A carbon dioxide equivalent emission is the greenhouse effect of any greenhouse gas expressed in multiple of the same effect from CO₂ emissions.

⁹⁵ *Id.*

⁹⁶ CAL. CODE REGS. tit. 17, § 95857(b)(2).

⁹⁷ *Id.*

⁹⁸ *Id.*; CAL. HEALTH & SAFETY CODE § 38580 (Deering 2018).

⁹⁹ HEALTH & SAFETY § 38580.

¹⁰⁰ HEALTH & SAFETY §§ 42400–42400.3.5.

¹⁰¹ HEALTH & SAFETY § 42400.3.5(a).

¹⁰² HEALTH & SAFETY § 42400.3(a).

¹⁰³ *Id.*

¹⁰⁴ HEALTH & SAFETY §§ 42400–42400.2.

¹⁰⁵ *See generally* HEALTH & SAFETY § 38580.

In addition, greenhouse gas emissions outside of the United States are subject to legal requirements in specific jurisdictions. As of 2017, sixty-seven jurisdictions, including the European Union, China, Japan, and New Zealand, either currently or soon will require permits for the emission of greenhouse gases.¹⁰⁶ Moreover, in some countries, the removal of or a detrimental impact on carbon sinks (such as rainforests) may be considered criminal acts, as in Brazil.¹⁰⁷

2. Failure to Report Emissions

In states which limit greenhouse gas emissions, such as California, there are extensive rules governing emissions reporting.¹⁰⁸ Outside of California and the RGGI states there are also federal greenhouse gas emissions reporting requirements, even though there are no direct federal greenhouse gas emissions controls.

The U.S. EPA requires entities of certain sizes to report their greenhouse gas emissions or face various penalties.¹⁰⁹ In a rule finalized in October 2009, the EPA required that 30 categories of stationary sources must report their greenhouse gas emissions every year.¹¹⁰ Some must report any emissions, and others must only report emissions of over 25,000 tons per year of CO₂-equivalent.¹¹¹

The EPA promulgated this regulation pursuant to Sections 114 and 208 of the Clean Air Act.¹¹² Section 113(c)(1) criminalizes any knowing violations of Section 114's recordkeeping, monitoring, and inspection requirements.¹¹³ Interestingly, multiple entities have already apparently violated this requirement, though they have yet to face significant enforcement.¹¹⁴ Failure to enforce, however, has no bearing on whether or not an action (or inaction) would be considered criminal for purposes of attorney ethics rules.¹¹⁵ Because the sections of the Clean Air Act mentioned

¹⁰⁶ See RICHARD ZECHTER ET AL., WORLD BANK, STATE AND TRENDS OF CARBON PRICING 10–12 (2017), https://openknowledge.worldbank.org/bitstream/handle/10986/28510/wb_report_171027.pdf?sequence=7&isAllowed=y [<https://perma.cc/6MFF-RLNF>].

¹⁰⁷ Nicholas S. Bryner, *Brazil's Green Court: Environmental Law in the Superior Tribunal de Justiça (High Court of Brazil)*, 29 PACE ENVTL. L. REV. 470, 507–08 (2012).

¹⁰⁸ See generally CAL. CODE REGS. tit.17, §§ 95101–95103, 95111, 95115, 95118, 95152–95153 (2019).

¹⁰⁹ See generally 40 C.F.R. Part 98 (2019).

¹¹⁰ Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260, 56374 (Oct. 30, 2009) (codified as amended at 40 C.F.R. §§ 98.1–98.9 (2019)).

¹¹¹ 40 C.F.R. § 98.2 (2019).

¹¹² Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. at 56263.

¹¹³ See 42 U.S.C. §§ 7413(c), 7414 (2018).

¹¹⁴ Victor Flatt et al., *Governance 102: Understanding the Legal/Policy Landscape & Determining the Best Strategy for Your Organization*, ASSOCIATION OF CLIMATE CHANGE OFFICERS (ACCO) (July 18–20, 2016).

¹¹⁵ Cf. TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 1.05(e) (2019), <https://www.texasbar.com/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=27271> [<https://perma.cc/HB9A-BDSP>] (requiring that a lawyer “shall reveal confidential information to the extent revelation reasonably appears necessary

above also require records to be “maintained,” if a reporting requirement has been violated, the crime may still exist until that violation is remedied.¹¹⁶ Federal law is currently split on whether the failure to report emissions under the Clean Air Act is a one-time violation or whether the violation continues until the failure to report is corrected.¹¹⁷ Some courts view a party’s failure to report a known violation as a continuing violation that begins when the defendant is initially obligated to self-report its non-compliance and only ends on the day when the defendant reports its violation.¹¹⁸ Thus, even when a violation is simply a failure to report, there could still be ongoing harm that requires disclosure.¹¹⁹

B. *Fraudulent Actions Related to Greenhouse Gas Emissions*

Fraud is defined generally as a knowing “material misrepresentation” for the purpose of inducing behavior.¹²⁰ The Texas Disciplinary Rules of Professional Conduct define fraud as conduct that is furthered by using intentionally untrue statements or with a purpose to deceive.¹²¹ Many companies have been accused of posting misleading or untrue statements about the impact of greenhouse gas emissions on the company’s bottom line.¹²²

to prevent the client from committing the criminal or fraudulent act”). In other words, this is a prospective or preventative requirement, lacking any ties to whether the government has sought to enforce or will seek to enforce the client’s indiscretions.

¹¹⁶ 42 U.S.C. § 7414(a)(1)(A); *see also* James Miskiewicz & John S. Rudd, *Civil and Criminal Enforcement of the Clean Air Act After 1990 Amendments*, 9 PACE ENVTL. L. REV. 281, 336–37 (1992).

¹¹⁷ Ivan Lieben, *Catch Me If You Can – The Misapplication of the Federal Statute of Limitations to Clean Air Act PSD Permit Program Violations*, 38 ENVTL. L. 667, 668 (2008) (discussing how “numerous courts ruling on this issue have been sharply divided”).

¹¹⁸ JOEL MINTZ ET AL., ENVIRONMENTAL ENFORCEMENT: CASES AND MATERIALS 149 (2007) (citing *United States v. Smithfield Foods, Inc.*, 972 F.Supp. 338, 353 (E.D. Va. 1997) (holding that for each day the facility had incomplete records in violation of the Clean Water Act, additional fines were added)).

¹¹⁹ Even if a violation is wholly past, failure to report may allow or encourage emissions of more greenhouse gases that contribute to harm, meeting the “prevent harm” standard.

¹²⁰ RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 10 (AM. LAW. INST., Tentative Draft No. 2, 2014).

¹²¹ TEX. DISCIPLINARY RULES PROF’L CONDUCT, Terminology at 8 (“‘Fraud’ or ‘Fraudulent’ denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.”).

¹²² Irina Ivanova, *Investors Say Facebook, Tesla, and Many Other Companies Are Hiding Climate Impact*, CBS NEWS (June 17, 2019, 8:24 PM), <https://www.cbsnews.com/news/climate-change-700-companies-tesla-amazon-facebook-carbon-footprin> [https://perma.cc/K8JT-2298]; Danielle Haynes, *New York AG Sues Exxon Mobil for Misleading Investors*, UPI (Oct. 24, 2018, 4:02 PM), <https://www.upi.com/Energy-News/2018/10/24/New-York-AG-sues-ExxonMobil-for-misleading-investors/1921540402974/> [https://perma.cc/JJ53-5TYB].

Attorney ethics cases can give “fraudulent” a broad meaning. For example, under Texas’s attorney ethics rules, a corporate client’s breach of a fiduciary duty to creditors is considered fraudulent for purposes of the disclosure exception.¹²³

The federal Securities Act of 1933 requires that investors in publicly traded companies receive all material information about those securities and prohibits deceit, misrepresentation, and any fraud related to the sales of such securities.¹²⁴ Thus, mischaracterizing or failing to include material information on a required report or document may be a fraudulent act. According to a seminal U.S. Supreme Court case:

The question of materiality, it is universally agreed, is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor. Variations in the formulation of a general test of materiality occur in the articulation of just how significant a fact must be or, put another way, how certain it must be that the fact would affect a reasonable investor’s judgment.¹²⁵

In the early 1970s, the SEC noted that environmental regulation could be important to a company’s business prospects and required disclosure of these regulations that were material.¹²⁶ In 2010, an SEC interpretive guidance document addressed disclosure requirements related to the impact of public companies’ operations and products on greenhouse gas emissions.¹²⁷ In this guidance, the SEC noted that climate change risks could affect company value through asset exposure as well as through regulation.¹²⁸ Because of investment in companies that profit from fossil fuel sales, the financial risks of a quick move away from fossil fuels could also cause financial disruption across a wide array of companies.¹²⁹ In September 2018, the United Kingdom’s banking governor, Mark Carney, again sounded the alarm on risks of economic impacts from a fossil fuel transition to the financial stability of banks.¹³⁰

¹²³ Prof’l Ethics Comm. for the State Bar of Texas, Texas Ethics Op. 603 (2010), <https://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-603> [<https://perma.cc/9DX6-ETSX>].

¹²⁴ 15 U.S.C. §§ 77d-1(a)(4)–(5) (2018).

¹²⁵ T.S.C. Industries, Inc. v. Northway Industries, Inc., 426 U.S. 438, 445 (1976).

¹²⁶ Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6290, 6292 (Feb. 8, 2010).

¹²⁷ *See generally id.*

¹²⁸ *Id.* at 6291.

¹²⁹ TOM SANZILLO ET AL., INST. FOR ENERGY ECON. & FIN. ANALYSIS, THE FINANCIAL CASE FOR FOSSIL FUEL DIVESTMENT 4–5 (2018), http://ieefa.org/wp-content/uploads/2018/07/Divestment-from-Fossil-Fuels_The-Financial-Case_July-2018.pdf [<https://perma.cc/56N4-WKCH>].

¹³⁰ Benjamin Hulac, *Climate Is ‘Mainstream’ Risk in Banks, Regulator Says*, E&E NEWS: CLIMATEWIRE (Sept. 27, 2018), <https://www.eenews.net/climatewire/2018/09/27/>

After the publication of the SEC's 2010 guidance, many companies did include climate change reporting in disclosure documents.¹³¹ But in 2016, the Sustainability Accounting Standards Board found that compliance in these first few years had been limited and was "mostly boilerplate," especially with respect to regulatory risks.¹³² Further, the Trump Administration revoked the 2010 guidance.¹³³ However, this guidance revocation does not repeal the statutory requirement that all material risks, including any risks from climate change, be disclosed. Further, the maturation of understanding of the risks of climate change means the disclosure requirements may be expanding rather than shrinking. In fact, reports of companies' disclosures in recent years reflect such an expanding interpretation. The private Task Force on Climate-Related Financial Disclosure reported in 2018 that more and more companies are expanding the breadth of what they disclose, and especially disclosure of financial risk from climate change regulation.¹³⁴

In addition to SEC disclosure requirements, greenhouse gas disclosure requirements could be required under state anti-fraud statutes.¹³⁵ In 2015, the New York State Attorney General moved aggressively to demand more climate-related regulatory and legal risk disclosure to comply with the New York anti-fraud statute¹³⁶ and investigated ExxonMobil for possibly lying to investors about climate change risk.¹³⁷ As noted above, this investigation led to an indictment of

stories/1060099897 [https://perma.cc/5UPZ-VYYJ].

¹³¹ SUSTAINABILITY ACCOUNTING STANDARDS BOARD, CLIMATE RISK TECHNICAL BULLETIN 86–87 (2016), https://www.eenews.net/assets/2016/10/20/document_cw_01.pdf [https://perma.cc/7U7R-L6GR].

¹³² *Id.*

¹³³ See Caitlin Meagher, *Leaving Investors in the Dark: The SEC's Growing Silence on Guidance Related to the Business and Legal Developments on Climate Change*, GEO. ENVTL. L. REV. (Feb. 7, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/leaving-investors-in-the-dark-the-secs-growing-silence-on-guidance-related-to-the-business-and-legal-developments-on-climate-change/> [https://perma.cc/5M48-EDKJ].

¹³⁴ TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURES, TASK FORCE ON CLIMATE-RELATED FINANCIAL DISCLOSURES: STATUS REPORT 1 (2018), <https://www.fsb-tcfd.org/wp-content/uploads/2018/08/FINAL-2018-TCFD-Status-Report-092518.pdf> [https://perma.cc/EWL2-UWXE].

¹³⁵ Tom Mounteer et al., Dialogue, *Informing Investors of Climate Risk: The Impact of Securities Laws in the Environmental Context*, 46 ENVTL. L. REP. NEWS & ANALYSIS 10455, 10455 (2016).

¹³⁶ Martin Act, N.Y. GEN. BUS. LAW §§ 352, 352-C (McKinney 2019).

¹³⁷ Justin Gillis & Clifford Krauss, *Exxon Mobil Investigated for Possible Climate Change Lies by New York Attorney General*, N.Y. TIMES (Nov. 5, 2015), <https://www.nytimes.com/2015/11/06/science/exxon-mobil-under-investigation-in-new-york-over-climate-statements.html> [https://perma.cc/7KEB-46U9].

ExxonMobil for intentionally deceiving its shareholders and investors about the various financial risks posed to the company by climate change regulations.¹³⁸

The decision not to disclose information or provide misinformation may also be considered fraud in some circumstances. In the wave of litigation against tobacco companies during the 1990s, attorneys were involved in schemes to shield relevant information by attorney-client privilege.¹³⁹ In those cases, the very attempt at shielding was determined to be fraudulent because it was designed to keep material information from going public.¹⁴⁰

Legal scholars who have recently analyzed this question opine that the answer to whether assisting in deliberate misinformation by a client violates ethics rules is “frustratingly opaque.”¹⁴¹ Though uncertain, considering the aggressive stances of some state attorneys general,¹⁴² in at least some circumstances, an attorney’s assistance or knowledge of the misstatement or failure to state relevant facts could be an ethics violation, even without the requirement to report a client activity that would endanger human health.

In sum, failure to have proper emissions permits, failure to report emissions pursuant to EPA and state rules, and failure to adequately report financial risk from a firm’s greenhouse gas emissions or impacts could be considered criminal, fraudulent, or both.¹⁴³

C. *The Special Case of the Government Regulatory Attorney*

What of the attorney at the EPA Office of Air Quality Planning and Standards in Research Triangle Park, North Carolina? Even defining the client is difficult:

¹³⁸ Schwartz, *supra* note 18. In December 2019, the court ruled against the state of New York on its claim that Exxon violated the Martin Act. *See* Schwartz, *New York Loses Climate Change Fraud Case*, *supra* note 18.

State anti-fraud statutes could also apply to greenhouse gas offset sales if the offsets do not deliver reductions as advertised and the purveyor knew or had reason to know this. *See, e.g.*, Alan Ramo, *The California Offset Game: Who Wins and Who Loses?*, 20 HASTINGS W. NW. J. ENVTL. L. & POL’Y 109, 148 (2014) (discussing potential fraud in California offsets).

¹³⁹ Ciresi et al., *supra* note 46, at 499.

¹⁴⁰ *Id.* at 498–99.

¹⁴¹ Katrina Fischer Kuh, *Malignant Normality*, LAW PROFESSOR BLOGS NETWORK (Nov. 11, 2018), https://lawprofessors.typepad.com/environmental_law/2018/11/malignant-normality.html [<https://perma.cc/78E6-W884>].

¹⁴² *See* Gillis & Krauss, *supra* note 137.

¹⁴³ In addition to U.S. reporting requirements, significant requirements exist in other jurisdictions in which large American corporations do business. For example, the European Union’s Non-financial Reporting Directive (Directive 2014/95/EU) mandates disclosure of greenhouse gas emissions without regarding to financial materiality. GRI & CSR EUROPE, MEMBER STATE IMPLEMENTATION OF DIRECTIVE 2014/95/EU 12–13 (2018), https://www.globalreporting.org/resourcelibrary/NFRpublication%20online_version.pdf [<https://perma.cc/TU9U-ARFL>].

For example, the client of the government lawyer can be characterized as the public as a whole, the government as a whole, the branch of government served by the lawyer, an agency or entity advised by the lawyer, or an officer or decision-maker advised by the lawyer.¹⁴⁴

Regardless of whoever the client is, attorney ethics rules apply to government attorneys as well.¹⁴⁵ Moreover, the issue here is not so much the disclosure of a change in government policy regarding dangerous greenhouse gas emissions—in our example, that information would most likely be public. But the attorney may have non-public information that, if known, could make the rulemaking (and the concomitant increase in greenhouse gases) less likely. For example, the attorney may have information (such as internal debates or outside influences) related to the rulemaking discussed in the introduction that might violate the APA or enabling statute. Similarly, the extensive suppression of scientific information under the Trump Administration that is often required for rulemaking¹⁴⁶ might merit disclosure, as it would impact final agency decisions and court rulings on such decisions. In any event, even if a government attorney had no new information to disclose, ethics might impose an obligation to withdraw,¹⁴⁷ which could accomplish much the same purpose of stymying the improper action.

Does misstating or omitting information during federal notice-and-comment rulemaking rise to the level of “criminal or fraudulent activity”? In most cases in the history of the U.S. administrative state, the answer to this question would surely have been “no,” simply because of the difficulty in defining misinformation. Even as various presidential administrations have sought to bring about their own policy priorities through interpretations of existing rules, the worst that was said before the Trump Administration was that the proposed rule was not consistent with the statute. For instance, the U.S. Court of Appeals for the D.C. Circuit held that the Bush Administration’s proposed changes to the Routine Maintenance Repair Exception (RMRR) in New Source Review under the Clean Air Act violates the Clean Air

¹⁴⁴ Rizzardi, *supra* note 44, at 76 (revealing that the question of who government attorneys represent is a controversial one under ethics law); see Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 163 (2007) (discussing whether attorney-client privilege extends to government entities).

¹⁴⁵ Rizzardi, *supra* note 44, at 76.

¹⁴⁶ See JACOB CARTER ET AL., CTR. FOR SCIENCE & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, THE STATE OF SCIENCE IN THE TRUMP ERA 1, 10–13 (2019), <https://www.ucsusa.org/sites/default/files/attach/2019/01/ucs-trump-2yrs-report.pdf> [<https://perma.cc/KA76-TFFE>].

¹⁴⁷ See MODEL RULES OF PROF’L CONDUCT r. 1.16(a)(1) (AM. BAR ASS’N 2018) (requiring withdrawal or termination of representation if continuing “the representation will result in violation of the rules of professional conduct or other law”).

Act.¹⁴⁸ Many scholars have argued that the Obama Administration's Clean Power Plan (CPP) also exceeded statutory authority, but no appellate court decision has been rendered on that specific claim as of March 2020.¹⁴⁹ But while political actors may use hyperbolic words such as "usurpation" of authority, none have characterized these actions as criminal or illegal.¹⁵⁰

As in many other ways, it is possible that the Trump Administration is different and has crossed a line in determining the social cost of carbon in the new climate change rule for power plants discussed in the introduction or in other rulemakings. Much evidence exists that many administrative actions taken by various agencies under the Trump Administration are done with complete knowledge that they are neither legally tenable nor factually accurate.¹⁵¹ The Trump Administration is also the first to retain business entanglements in the White House.¹⁵² While the U.S. Supreme Court has shown little appetite for tarnishing government policy because of President Trump's intent,¹⁵³ it is unknown how any number of state supreme courts would view some of the Trump Administration's activities.

¹⁴⁸ *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006), *cert denied*, 550 U.S. 928 (2007).

¹⁴⁹ *See* *West Virginia v. EPA*, No. 15-1363, 2019 U.S. App. LEXIS 29593 (D.C. Cir. Sept. 17, 2019) (dismissing set of cases initiated in 2015 challenging CPP as moot because of forthcoming EPA rulemaking that will repeal and replace the CPP); *see also* *Repeal of Clean Power Plan*, 84 Fed. Reg. 32,520 (July 8, 2019); Juan Carlos Rodriguez, *EPA Poised to Replace Clean Power Plan*, *DC Circ. Hears*, LAW360 (Sept. 17, 2018, 8:45 PM), <https://www.law360.com/articles/1083348> [<https://perma.cc/UEX7-633V>] ("The litigation has been on hold since April 2017, when the D.C. Circuit issued its first 60-day stay."); *Petition for Review*, at 2, *West Virginia v. EPA* (D.C. Cir., 2015) (No. 15-1363), [https://ago.wv.gov/publicresources/epa/Documents/File-stamped%20petition%2015-1363%20\(M0108546xCECC6\).pdf](https://ago.wv.gov/publicresources/epa/Documents/File-stamped%20petition%2015-1363%20(M0108546xCECC6).pdf) [<https://perma.cc/SN3N-GXKX>] (arguing that "Petitioners will show that the final rule is in excess of the agency's statutory authority, goes beyond the bounds set by the United States Constitution, and otherwise is arbitrary, capricious, an abuse of discretion and not in accordance with law.").

¹⁵⁰ *See, e.g.*, Sabrina Siddiqui, *Marco Rubio Attacks EPA and Pledges to Reverse Key Obama Climate Moves*, *THE GUARDIAN* (Sept. 2, 2015), <https://www.theguardian.com/us-news/2015/sep/02/marco-rubio-energy-policy-epa-climate-change> [<https://perma.cc/Q4L2-FAUN>] (finding that: "You can read [the Clean Power Plan] as a usurpation of states' rights.").

¹⁵¹ Tal Axelrod, *Tillerson: Trump Would Ask Me to Do Things I Couldn't Legally Do*, *THE HILL* (Dec. 7, 2018, 9:42 AM), <https://thehill.com/homenews/administration/420221-tillerson-trump-would-ask-me-to-do-things-that-i-couldnt-legally-do> [<https://perma.cc/6JS-C-5DF7>].

¹⁵² David Leonhardt & Ian Prasad Philbrick, *Trump's Corruption: The Definitive List*, *N.Y. TIMES* (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/opinion/trump-administration-corruption-conflicts.html> [<https://perma.cc/RZZ8-XEJQ>].

¹⁵³ *See* Adam Liptak & Michael D. Shear, *Trump's Travel Ban Is Upheld by Supreme Court*, *N.Y. TIMES* (June 26, 2018), <https://www.nytimes.com/2018/06/26/us/politics/supreme-court-trump-travel-ban.html> [<https://perma.cc/8LSV-6RLN>]. *But see* Adam Liptak, *Supreme Court Leaves Census Question on Citizenship in Doubt*, *N.Y. TIMES* (June 27,

In his seminal article on climate science and public officials, Professor Rizzardi noted that it should be a clear ethical violation for an attorney to deliberately misstate accepted scientific facts about climate change.¹⁵⁴ Attorneys are the primary drafters of notice-and-comment rulemaking.¹⁵⁵ If these same government attorneys would be considered as assisting in spreading disinformation by rulemaking they may face a responsibility to withdraw from representation or be in violation of ethical rules.¹⁵⁶

IV. LIKELY TO RESULT IN DEATH OR SUBSTANTIAL BODILY HARM THAT IS PREVENTABLE

A. *The Harms from Greenhouse Gas Emissions*

Even if a particular facility that emits greenhouse gases is a small contributor to the overall amount of greenhouse gases in the air, there is no doubt that climate change as a whole will create the danger of death and substantial bodily injury. Overall, the process of global warming has been strongly linked to future serious harm to persons across the globe. According to the Climate Vulnerability Monitor, climate change is estimated to kill over 400,000 persons worldwide every year, and the total number of deaths attributable to carbon pollution (including deaths from air pollution and workers, for example) raises the toll to 4.5 million.¹⁵⁷ These direct and indirect climate change impacts can be explored in several different categories.

1. *Direct Human Health Impacts*

According to the Intergovernmental Panel on Climate Change Special Report on the impacts of global warming of 1.5 degrees Celsius above pre-industrial temperature levels (“IPCC Report”), there is no question that any increase in global temperatures will affect human health.¹⁵⁸ Specifically, if global average

2019), <https://www.nytimes.com/2019/06/27/us/politics/census-citizenship-question-supreme-court.html> [<https://perma.cc/YC9U-698K>] (noting that the Supreme Court did look beneath the proffered reason for the Trump administration action).

¹⁵⁴ Rizzardi, *supra* note 44, at 116.

¹⁵⁵ Thomas O. McGarity, *The Role of Government Attorneys in Regulatory Agency Rulemaking*, 61 LAW AND CONTEMP. PROBS. 19, 19 (1998).

¹⁵⁶ Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L. J. 1671, 1748–49 (2012).

¹⁵⁷ DARA & CLIMATE VULNERABLE FORUM, CLIMATE VULNERABILITY MONITOR 2ND EDITION: A GUIDE TO THE COLD CALCULUS OF A HOT PLANET 17 (2012), <https://daraint.org/wp-content/uploads/2012/10/CVM2-Low.pdf> [<https://perma.cc/CJ83-LPT7>]. *But see Climate Change and Health*, WORLD HEALTH ORGANIZATION (Feb. 1, 2018), <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health> [<https://perma.cc/MKT3-HL4R>] (estimating that climate change causes 250,000 deaths per year).

¹⁵⁸ INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SPECIAL REPORT: GLOBAL WARMING OF 1.5°C, at 180 (2018), <https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06>

temperatures rise 1.5 degrees Celsius, there will be increases in heat-related morbidity and mortality, ozone-related mortality, and an exacerbated transmission of vector-borne diseases.¹⁵⁹ Additionally, undernutrition will increase as global food security is undermined from the impacts of climate change on food-producing regions.¹⁶⁰ For example, fisheries and aquaculture will be negatively impacted by ocean acidification, and agriculture will be negatively impacted by increases in extreme weather events and pests.¹⁶¹

2. Droughts, Fires, and Floods

The IPCC Report also indicates high confidence in dryness trends in some regions, particularly in the Mediterranean region, southern Europe, northern Africa, and the Near East.¹⁶² Furthermore, the report also projects that river flooding and extreme runoff are expected to increase on a global scale.¹⁶³ Increases in both droughts and floods are going to have countless negative impacts on human health, from stressing global food security to decreasing freshwater drinking supplies.¹⁶⁴ The IPCC additionally predicts that wildfires will increase as global temperatures rise.¹⁶⁵ Wildfires will also have a variety of impacts, such as human mortality, destruction of homes and infrastructure, and destruction of forests and vegetation (which are important carbon sinks).¹⁶⁶

3. Coastal Vulnerabilities: Sea Level Rise and Storms

Increased heat in the upper layers of the ocean has already exacerbated the intensity of tropical storms and hurricanes, and as the global temperatures continue to rise, these storms are only expected to increase in severity.¹⁶⁷ Additionally, with the melting of land and marine-based ice sheets due to increased global temperatures, sea levels are expected to continue to rise.¹⁶⁸ Thus, our planet's heavily populated coastal regions will be particularly vulnerable to climate change.¹⁶⁹

/SR15_Full_Report_High_Res.pdf [https://perma.cc/87EV-BL2D] [hereinafter IPCC SPECIAL REPORT (2018)].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.* at 211.

¹⁶³ *Id.* at 203.

¹⁶⁴ *Id.* at 239.

¹⁶⁵ *Id.* at 219.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 203.

¹⁶⁸ *Id.* at 257.

¹⁶⁹ *Id.* at 231.

4. *Geo-Political Security Issues: Migration & Conflict*

The IPCC Report reveals that human retreat and migration are increasingly being considered as a form of adaptation to climate change.¹⁷⁰ For example, the IPCC Report states that “[t]ropical populations may have to move distances greater than 1,000 km if global mean temperature rises by 2°C from 2011–2030 to the end of the century.”¹⁷¹ This increased human displacement will cause significant political and economic strain on regions, both in those that are losing and those that are gaining in population.¹⁷²

Additionally, the IPCC Report finds that the increase in drought due to climate change “increases the likelihood of sustained conflict for particularly vulnerable nations or groups, owing to the dependence of their livelihood on agriculture.”¹⁷³ Furthermore, studies have found that “[a] 1°C increase in temperature or more extreme rainfall increases the frequency of intergroup conflicts by 14%.”¹⁷⁴ Thus, nations will not only have to grapple with changes in their climate and health but also those social and economic changes that come with human displacement and conflict.¹⁷⁵

Since 2018, the reporting, specificity, and linkage of catastrophic harms to greenhouse gas emissions has also increased.¹⁷⁶ Though not a scientific body, the ABA House of Delegates passed a resolution recognizing the danger of climate change in 2019, calling on all levels of government and the private sector to reduce greenhouse gas emissions.¹⁷⁷ This resolution should translate to constructive knowledge on the part of all U.S. attorneys of the dangers of greenhouse gases.

¹⁷⁰ *Id.* at 233.

¹⁷¹ *Id.* at 245.

¹⁷² *Id.* at 244.

¹⁷³ *Id.* at 245.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 180, 245.

¹⁷⁶ *See, e.g.*, 2018 YEAR END RETROSPECTIVE, MEDIA AND CLIMATE CHANGE OBSERVATORY 2–5 (2018) https://sciencepolicy.colorado.edu/icecaps/research/media_cover_age/summaries/special_issue_2018.pdf [<https://perma.cc/FX7X-4ZSE>] (describing an overall increase in media attention to climate change and noting global greenhouse gases make heat waves more frequent and intense).

¹⁷⁷ John Dernbach, *American Bar Association Urges Broad Range of Actions to Reduce U.S. Greenhouse Gas Emissions “to Net Zero or Below,”* JOHN DERNBACH BLOG (Aug. 12, 2019), <https://johndernbach.com/2019/08/american-bar-association-urges-broad-range-of-actions-to-reduce-u-s-greenhouse-gas-emissions-to-net-zero-or-below/> [<https://perma.cc/HHZ6-YXRX>]; ABA Resolution 111 (Aug. 13, 2019), <https://www.americanbar.org/content/dam/aba/images/news/2019/08/am-hod-resolutions/111.pdf> [<https://perma.cc/GD66-K7W9>].

B. Climate Change Impacts from Greenhouse Gas Emissions May Trigger a Duty to Disclose, Even If the Harms Are Not Temporally Immediate or Traceable to a Specific Victim

When Model Rule 1.6(b) was created in 1983, the paradigmatic case of revealing client confidences to prevent the taking of life or infliction of substantial bodily harm was when an attorney knew of a specific threat by a client to kill or harm persons directly.¹⁷⁸ However, early on, the ABA and courts recognized that more temporally remote harms, such as harm from hazardous waste, or other environmental harms, also constituted a situation in which there would be a substantial threat of a loss of life or serious bodily injury.¹⁷⁹ The amendment to Model Rule 1.6(b)(1) in 2002 was specifically done to ensure coverage of more remote environmental harms, and to expand the privilege of disclosure beyond situations where the harm results from a criminal or fraudulent act, to even to apply to environmental harms and breaches that are accidental.¹⁸⁰ The comment on Model Rule 1.6(b)(1) makes its application to disclosure of environmental harms that threaten human life or substantial bodily harm crystal clear, stating:

[A] lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.¹⁸¹

Moreover, the impacts of the harm do not have to be immediate, but simply foreseeable. The alteration of Model Rule 1.6(b)(1) in 2002, replacing the word "imminent" with "reasonably certain," was designed to make sure the disclosure exception included both a present and a substantial threat of a *future* injury.¹⁸²

Several courts have similarly recognized the timing disconnect of cause and effect in the hazardous substances context, and have broadened the ordinary meaning of "imminence" to cover temporally remote harm from hazardous substances.¹⁸³ For example, in *Village of Wilsonville v. SCA Services, Inc.*, the Illinois Supreme Court held that the operation of a hazardous waste site in an

¹⁷⁸ Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499, 506–08 (2011).

¹⁷⁹ Russell, *supra* note 29, at 413–15.

¹⁸⁰ MODEL RULES OF PROF'L CONDUCT r. 1.6; (AM. BAR ASS'N 2018); ABA, A LEGISLATIVE HISTORY, *supra* note 71, at 131.

¹⁸¹ MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 6.

¹⁸² ABA, A LEGISLATIVE HISTORY, *supra* note 71, at 131.

¹⁸³ Nicholas Targ, *Attorney Client Confidentiality in the Criminal Environmental Law Context: Blowing the Whistle on the Toxic Client*, 14 PACE ENVTL. L. REV. 227, 256–57 (1996).

inappropriate location was a “serious” and “imminent” threat to public health, even if it was unclear when or whether the harm would occur.¹⁸⁴ In other similar cases, courts have held that a small probability of harm in the short term does not foreclose the concept of a high probability of dangerous harm in the long term.¹⁸⁵ The meaning of “imminent” is thus defined by the likelihood of harm as opposed to the immediacy of the harm.¹⁸⁶

C. Harms from Only Some Disclosed Greenhouse Gas Emissions Need Not Be the Sole Cause of the Harm

Obligations to disclose information about dangerous hazardous waste parallel greenhouse gases in another way: in both cases, harm may arise not just because of the impact of one client’s dangerous release, but rather from a combination of releases, either because of cumulative risk or synergistic risks. Because liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)¹⁸⁷ is often joint and several or cumulative, Nicholas Targ wrote in the 1990s that an attorney should have discretion to report a release of hazardous wastes that could lead to death or serious bodily harm, even if the harm could not be directly traced to the client’s release.¹⁸⁸

It is similarly difficult to separate harm caused by even a significant amount of greenhouse gas emissions with respect to any other sources. But as Targ suggested under ethics rules, the fact that certain emissions combine with others to form harm does not absolve the party who partially caused the injury from responsibility.¹⁸⁹ Case law in other contexts, as discussed below, has also suggested that the cumulative nature of greenhouse gases should not defeat the ability to hold someone responsible for or to regulate greenhouse gas emissions.

Though several common law nuisance cases have been halted because of the “universal effect” of greenhouse gases,¹⁹⁰ other cases have recognized that merely

¹⁸⁴ *Village of Wilsonville v. SCA Services, Inc.*, 426 N.E. 2d 824, 838 (Ill. 1981).

¹⁸⁵ Targ, *supra* note 183, at 257–58, 257 n.195.

¹⁸⁶ *Id.* at 258.

¹⁸⁷ Comprehensive Environmental Response, Compensation, and Liability Act, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601–9675 (2018)).

¹⁸⁸ Targ, *supra* note 183, at 260.

¹⁸⁹ *Id.* at 260–61.

¹⁹⁰ Mark Belleville & Katherine Kennedy, *Cool Lawsuits - Is Climate Change Litigation Dead after Kivalina v. ExxonMobil?*, 7 APPALACHIAN NAT. RES. L.J. 51, 64–66 (2011) (“For many, there is a fundamental logical disconnect with suing a particular entity over climate change when, in a very real sense, the entire global population contributes to [greenhouse gas] emissions.”); *see also* *Comer v. Murphy Oil USA, Inc.*, 839 F.Supp.2d 849, 860–61 (S.D. Miss. 2012) (“It is insufficient for the plaintiffs to allege that the defendants’ emissions contributed to the kinds of injuries that they suffered.”); *Native Village of Kivalina v. ExxonMobil Corp.*, 663 F.Supp.2d 863, 879–80 (N.D. Cal. 2009) (“[E]specially given the extremely attenuated causation scenario alleged in Plaintiffs’ Complaint, it is entirely

because a specific actor's contribution may be small relative to the total amount of greenhouse gas emissions worldwide does not mean that the source cannot be considered or that responsibility for that harm cannot be attributed to a subset of all sources that emit greenhouse gas.

For instance, in August 2017, the U.S. Court of Appeals for the District of Columbia Circuit ordered federal regulators to closely consider downstream greenhouse gas emissions from the Sabal Trail pipeline, even though the Federal Energy Regulatory Commission (FERC) argued against that interpretation, claiming that analyzing emissions from natural gas sent through the pipeline was too speculative.¹⁹¹ The court posited:

What are the “reasonably foreseeable” effects of authorizing a pipeline that will transport natural gas to Florida power plants? First, the transported gas will be ultimately burned to produce energy in power plants. This is not just “reasonably foreseeable,” it is the project’s entire purpose, as the pipeline developers themselves acknowledged. . . . It is just as foreseeable, and FERC did not dispute, that burning natural gas will release exactly the type of carbon compounds that will contribute to climate change.¹⁹²

This reasoning was echoed by a Tenth Circuit decision in September 2017 looking at the requirements for environmental reviews of federal coal leases.¹⁹³ That court excoriated the Bureau of Land Management’s (BLM) position that emissions must not be considered from coal leasing because the emissions will come from other coal mined elsewhere, if not the coal that was to be leased in the decision at issue.¹⁹⁴ The court noted the economic falsity of the BLM’s argument, held the agency’s decision to be arbitrary and capricious, and, in so doing, relied on the incremental effects of greenhouse gas emissions from the leases on the climate.¹⁹⁵ Two more district court cases from the Tenth Circuit have followed this reasoning,

irrelevant whether any defendant ‘contributed’ to the harm because a discharge, standing alone, is insufficient to establish injury.”), *aff’d on other grounds*, 696 F.3d 849 (9th Cir. 2012), *cert. denied* 569 U.S. 1000 (2013).

¹⁹¹ *Sierra Club v. FERC*, 867 F.3d 1357, 1371–72 (D.C. Cir. 2017).

¹⁹² *Id.*

¹⁹³ *WildEarth Guardians v. Bureau of Land Management*, 870 F.3d 1222, 1234–35 (10th Cir. 2017).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 1236 (“Even if we could conclude that the agency had enough data before it to choose between the preferred and no action alternatives, we would still conclude this perfect substitution assumption arbitrary and capricious because the assumption itself is irrational (i.e., contrary to basic supply and demand principles) . . . Second, the BLM’s carbon emissions analysis seems to be liberal (i.e., underestimates the effect on climate change”).

noting that the incremental effects of federal fossil fuel leasing likely culminated in a significant environmental impact that should be considered.¹⁹⁶

The U.S. Supreme Court has also recognized that disparate greenhouse gas emission sources work together to cause climate change and that even a small percentage amount is enough to satisfy the harm and redressability prongs of standing. In *Massachusetts v. EPA*, the Supreme Court rejected the government's argument that the plaintiffs should not have standing because the emissions that were complained of were such a small portion (6% of global CO₂ emissions) of the global impact of greenhouse gas emissions on climate change.¹⁹⁷ The court noted that it is the fact that the law can do something, even if it is a "tentative first step," that allows a court to find causation and redressability.¹⁹⁸

While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means [impacts] whether EPA has a duty to take steps to *slow* or *reduce* it Because of the enormity of the potential consequences of climate change, the fact that the effectiveness of a remedy might be delayed is essentially irrelevant A reduction in domestic emissions would slow the pace of global emissions increase, no matter what happens elsewhere.¹⁹⁹

Common law torts also support attaching responsibility to even small contributors to a harm. If it becomes impossible to causally disentangle one party's actions from the cumulative harm, according to common law, tort liability attaches to all parties.²⁰⁰ When joint actors cause indivisible harm, they are all equally responsible for the damages caused under the theory of "joint and several" liability.²⁰¹

"Joint and several" liability from torts has been applied to CERCLA liability when there are intermingled hazardous wastes in which the impact of one contributor cannot be legally separated from that of another.²⁰² Liability can attach even if the

¹⁹⁶ *Montana Env'tl. Info. Ctr. v. U.S. Off. of Surface Mining*, 274 F. Supp. 3d 1074, 1094–99 (D. Mont. 2017) ("The Mining Plan [Environmental Assessment] failed to adequately address the indirect and cumulative impacts of greenhouse gas emissions from expansion of the Mine."); *San Juan Citizens Alliance v. Bureau of Land Management*, 326 F. Supp. 3d 1227, 1248–50 (D.N.M. 2018) ("Because the cumulative impact analysis must be conducted anew given BLM's failure to consider downstream greenhouse gas emissions, the Court declines to consider whether BLM's 'site-specific' within the [Environmental Assessment] is sufficient.").

¹⁹⁷ *Massachusetts v. EPA*, 549 U.S. 497, 524 (2006).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1387 (7th Cir. 1984).

²⁰¹ DAVID ROBERTSON ET AL., *CASES AND MATERIALS ON TORTS* 154 (5th ed. 2017).

²⁰² *O'Neil v. Picillo*, 883 F.2d 176, 176 (1st Cir. 1989).

specific potentially responsible party (PRP) is a relatively small contributor.²⁰³ Though much of CERCLA case law in this area is dependent on the expansive intent of the CERCLA statute, the sharing of liability, even liability attributable to relatively minor contributors, is grounded in the common law theories which underlie the joint and several liability standard.²⁰⁴

D. Where Is the Line Drawn?

Assuming reporting of greenhouse gas emissions may be required under some circumstances, is there a minimum level of greenhouse gas emissions that would *not* require an attorney to report? Or are any client's emissions of the smallest magnitude a potential ethical issue? There are two different ways to look at this question. Is there a legal minimum threshold below which there is no harm that can be defined? Or alternatively, is there a practical limit?

First, it is important to note that so-called natural emissions of CO₂ would not legally qualify as a potential human harm requiring reporting since natural emissions do not contribute to anthropogenic climate change per se. The Earth requires a certain amount of greenhouse gases in the atmosphere to make the planet habitable at all.²⁰⁵ The dangers humanity faces from greenhouse gas emissions is in the change and the rate of change of the greenhouse gas concentration in Earth's atmosphere.²⁰⁶ This accelerating rate of concentration began during the Industrial Revolution, and is therefore attributable to modern human societies.²⁰⁷ Thus, emissions from animal and human respiration, or the natural water cycle, should not be identifiable as cognizable harms under Model Rule 1.6 because they are not attributable to post-industrial technologies.

This leaves us with greenhouse gases that were produced through a multitude of anthropogenic sources since the Industrial Revolution. As noted in the discussion in Section III.C, if the reasoning of the tort cases and CERCLA cases on joint and several liability is applied in the greenhouse gas context, there would seem to be no specific legal minimum for any of these emissions which do contribute to climate change. Any amount of greenhouse gas emissions contribute to the injuries caused by climate change, and thus any amount of emissions could be deemed dangerous. The Supreme Court had no problem finding a 6% annual contribution to global carbon dioxide emissions as a cause of harm.²⁰⁸ Certainly, the comment to Model

²⁰³ CRAIG N. JOHNSTON ET AL., *LEGAL PROTECTION OF THE ENVIRONMENT* 718 (4th ed. 2018).

²⁰⁴ ROBERTSON ET AL., *supra* note 201, at 154.

²⁰⁵ Saby Ghoshray, *Charting the Future Trajectory for Fracking Regulation: From Environmental Democracy to Cooperative Federalism*, 38 T. MARSHALL L. REV. 199, 217 n.73 (2013).

²⁰⁶ *Id.*

²⁰⁷ IPCC SPECIAL REPORT (2018), *supra* note 158, at 4.

²⁰⁸ *See Massachusetts v. EPA*, 549 U.S. 497, 524 (2006).

Rule 1.6 concerning the discharge of hazardous substances into a public water supply does not specify a minimum limit as long as there is, in fact, a hazard.²⁰⁹

This suggests that for a company's emissions not to reach the level of deadly harm, the emitted quantity would have to be such that it would not rise to the percentage where it would harm even one human life. For example, if climate change currently causes 400,000 deaths per year (as noted in the DARA report),²¹⁰ and the quantity of greenhouse gas emissions annually is around 53.5 billion tons,²¹¹ then it would take 132,500 tons of greenhouse gases to be responsible for one statistical death. In 2007, the Scherer coal-fired power plant in Juliette, Georgia emitted 25,300,000 tons of CO₂ in one year,²¹² or enough for approximately 190 deaths. For comparison, the average automobile in the United States emits about 6 tons of CO₂ every year,²¹³ meaning that an individual car would have to operate for around 22,000 years to cause one death using this simple metric and calculation.

Of course, such calculations are not specific and are beset by many caveats. The UN estimate of deaths per year that climate change may cause is just that: an estimate. The amount of emissions in any given year is also an estimate, and the accepted figure used above includes land-use changes as well as direct emissions from industrial and transportation sources. Moreover, climate change impacts happen not just because of one year's emissions of greenhouse gases, but because of the cumulative impact from emissions that have built up in the atmosphere.²¹⁴ The current level of anthropogenic carbon dioxide equivalent in the atmosphere has been building for some time—though over half of these emissions have occurred since 1988.²¹⁵

²⁰⁹ MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. (AM. BAR ASS'N 2018).

²¹⁰ DARA & CLIMATE VULNERABLE FORUM, *supra* note 157, at 17 (estimating in 2012 that climate change causes 400,00 deaths per year).

²¹¹ UNITED NATIONS ENVTL. PROGRAMME, EMISSIONS GAP REPORT 2018 XV (2018), http://wedocs.unep.org/bitstream/handle/20.500.11822/26895/EGR2018_FullReport_EN.pdf?isAllowed=y&sequence=1 [<https://perma.cc/R8JJ-6FFM>].

²¹² *Carbon Dioxide Emissions from Power Plants Rated Worldwide*, SCIENCE DAILY (Nov. 15, 2007), <https://www.sciencedaily.com/releases/2007/11/071114163448.htm> [<https://perma.cc/2848-5Y3E>].

²¹³ *Global Warming and Your Car*, CAR TALK, <https://www.cartalk.com/content/global-warming-and-your-car-0> [<https://perma.cc/R5AY-LUMG>] (Dec. 22, 2019).

²¹⁴ See Matthew P. Reinhart, *The National Environmental Policy Act: What Constitutes an Adequate Cumulative Environmental Impacts Analysis and Should It Require an Evaluation of Greenhouse Gas Emissions?*, 17 U. BALT. J. ENVTL. L. 145, 154 (2010) (“[E]vidence is increasing that the most devastating environmental effects may result not from the direct effects of a particular action, but from the combination of individually minor effects of multiple actions over time.”).

²¹⁵ Peter Frumhoff, *Global Warming Fact: More than Half of All Industrial CO₂ Pollution Has Been Emitted Since 1988*, UNION OF CONCERNED SCIENTISTS BLOG (Dec. 15, 2014, 1:14 PM EDT), <https://blog.ucsusa.org/peter-frumhoff/global-warming-fact-co2-emissions-since-1988-764> [<https://perma.cc/A3JW-MSJK>].

All of these concerns indicate that some kind of bright-line legal threshold, while technically possible to develop, is difficult to calculate. By way of example, however, it highlights the workability of a standard that mirrors the scale of magnitude between large industrial sources of CO₂ and smaller ones associated with individual actions, such as driving a car. Tort law can hold a party responsible for one death or harm, even if it only contributed to a small percentage cause of that death.²¹⁶ However, this considerable difference in scale for emitters of greenhouse gases exemplifies that attorney ethics law should not recognize harm from every single source of greenhouse gas emissions, but only major sources. A practical minimal harm threshold may therefore be more workable, which is also supported by most tort cases. Though technically any number of tortfeasors could combine in one causal set to harm another, in actual cases, the number of responsible parties is typically relatively small. While tort cases may have thousands or more plaintiffs in class action suits, it is rare to have as large a number of defendants as the plethora of greenhouse gas emitters.²¹⁷

In tort cases, potential defendants identified for liability tend to be the largest or major causes of a particular harm, even if they are among a larger group of potential joint tortfeasors.²¹⁸ The same is true of CERCLA. The EPA will shield from liability any *de micromis* settler, defined as a contributor of less than 110 or 200 gallons of a waste in certain circumstances, or less than 0.002% of the waste by volume.²¹⁹

All of this suggests that some kind of rule of reason can be developed that identifies which greenhouse gas emitters should be considered as causing imminent death or serious harm. As stated in the tort context, a determination of whether it is “worth it” to become a plaintiff depends on: “(1) the perception of a harm, (2) the perceived knowledge of compensability for that harm, (3) a desire to participate in the tort system, and (4) access or an opportunity to participate in the tort system without major impediments.”²²⁰

²¹⁶ ROBERTSON ET AL., *supra* note 201, at 130–40 (discussion of tortfeasor A, B, and C example).

²¹⁷ See Francis E. McGovern, *Toward an Understanding of the Mass Tort Litigation Environment*, 8 NAT'L FOUND. JUD. EXCELLENCE 127, 129, 136–37 (2012). In asbestos litigation, for instance, there were over 6,000 potential defendants but only a few hundred bore most of the liability. *Companies Liable for Asbestos Exposure*, BANNER LEGAL, <http://www.asbestosnews.com/exposure/companies.html> [<https://perma.cc/X32W-E6KM>] (last visited Oct. 30, 2019).

²¹⁸ Gerald W. Boston, *Toxic Apportionment: A Causation and Risk Contribution Model*, 25 ENVTL. L. 549, 564–66 (1995).

²¹⁹ Memorandum from Director Barry Breen, Office of Site Remediation Enf't, U.S. EPA & Chief Bruce S. Gelber, Env'tl. Enf't Section, Env't and Nat. Res. Div., U.S. Dep't of Justice to Regional Directors (Nov. 6, 2002), <https://www.epa.gov/sites/production/files/2013-09/documents/wv-exmpt-dmicro-mem.pdf> [<https://perma.cc/YSA7-WZDR>].

²²⁰ McGovern, *supra* note 217, at 129–30.

Similarly, whether it is “worth it” for an attorney to face a risk of failing to report information that would be required to avert human death or serious harm will depend on multiple factors, though most important will be the potential harm that the client’s action causes. Since, in Texas and some other states, the ethical disclosure requirement can only be triggered if the client has committed a fraud or crime,²²¹ that alone can serve as a triggering threshold for identifying harm. If an action is demonstrably fraudulent or constitutes a legal violation, perforce it is of concern to society, presumably because the legal requirement is needed to prevent some danger. While in the case of fraud the danger may be tied to a financial or property interest, rather than a mortal danger, these harms still speak to the significance of the unlawful action.

E. Reporting to Avoid Harm

One other standard that must be present to require an attorney to report client behavior that could result in death or serious bodily injury is that the reporting can be expected to assist in averting that harm.²²²

As noted in Part II.A.2, courts are split on whether environmental reporting violations constitute an ongoing harm or a past harm.²²³ One court that has found an ongoing harm noted that the failure to report can lead to demonstrable harm long after the reporting date has passed, since a failure to report would continuously hobble an agency’s enforcement ability.²²⁴ Information deemed material at one time may still be material in the future. For any of the violations discussed in this Article, one could arguably claim that exposing the violation is likely to either encourage some amelioration of harm or discourage continued violations in the future.

The mere presence of public information may itself reduce harmful emissions or risk.²²⁵ Emission reporting statutes, such as the Emergency Planning and Community Right-to-Know Act (EPCRA)²²⁶ are predicated on the observed trend that entities will voluntarily reduce the amount of legal emissions to avoid public scrutiny.²²⁷ EPCRA requires companies to report toxic chemicals to the EPA, and the information is stored in a publicly accessible database called the federal Toxics Release Inventory (TRI).²²⁸ “TRI aims squarely at measuring and disclosing the environmental performance of those parties most directly responsible for significant

²²¹ See *supra* Part II.

²²² McClure v. Thompson, 323 F.3d 1233, 1245 (9th Cir. 2003).

²²³ MINTZ ET AL., *supra* note 118, at 149.

²²⁴ U.S. v. Smithfield Foods, 972 F. Supp. 338, 348 (E.D. Va. 1997).

²²⁵ Jamie Grodsky, *Genetics and Environmental Law: Redefining Public Health*, 93 CAL. L. REV. 171, 250–51 (2005).

²²⁶ Emergency Planning and Community Right to Know Act, Pub. L. No. 99-499, 100 Stat. 1728 (codified as amended at 42 U.S.C. §§ 11001–11050 (2018)).

²²⁷ Bradley Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking*, 89 GEO. L. J. 257, 287 (2001).

²²⁸ 42 U.S.C. §§ 110233(a), (j).

environmental impacts, with the aim of thereby improving performance outcomes.”²²⁹

Mark Latham has suggested that treating greenhouse gases the same as toxics for reporting purposes under EPCRA would encourage companies to lessen those emissions, which in turn would lessen the potential harm in the future.²³⁰

The importance of reporting is also the reason for many voluntary greenhouse gas emission reporting program standards, such as those required for members of the Carbon Disclosure Project (CDP).²³¹ As the CDP states: “We must act urgently to prevent dangerous climate change and environmental damage. That starts by being aware of our impact so that investors, companies, cities and governments can make the right choices now.”²³²

Companies themselves often recognize and tout greenhouse gas reductions, ostensibly to benefit their business outcomes and bottom lines.²³³ If that is the case, then the converse—that failing to disclose to avoid scrutiny will increase greenhouse gas emissions—may also be true.

The constitutional standing doctrine supports the assumption that allowing cases for statutory violations to proceed itself will encourage the avoidance of future violations. Merely the risk of repeating a violation can confer standing, even if a violation is not ongoing.²³⁴ In *Friends of the Earth v. Laidlaw*, the Fourth Circuit found a case to be moot because the violation of a National Pollutant Discharge Elimination System (NPDES) permit was wholly in the past.²³⁵ On appeal at the Supreme Court reversed, holding that the case was not moot.²³⁶ Justice Ginsburg, writing for the 7-2 majority, opined that, for a party to establish that its voluntary compliance renders a past violation moot, the party must make it “absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.”²³⁷ The Court also held that civil penalties for “wholly past violations” could supply redress for standing analysis by deterring similar future injuries if violations are

²²⁹ Karkkainen, *supra* note 228, at 287.

²³⁰ Mark Latham, *Environmental Liabilities and the Federal Securities Laws: A Proposal for Improved Disclosure of Climate Change-Related Risks*, 39 ENVTL L. REV. 647, 652 (2009).

²³¹ *What We Do*, CDP, <https://www.cdp.net/en/info/about-us/what-we-do> [<https://perma.cc/9JFA-5HEL>] (last visited Oct. 29, 2019).

²³² *Id.*

²³³ *See, e.g.*, Mathew Carr & Kelly Gilblom, *Shell, Total Are Anomaly, Allowing Investors to Track Carbon*, BLOOMBERG (Nov. 7, 2018, 7:00 AM), <https://www.bloomberg.com/news/articles/2018-11-07/shell-total-are-big-oil-standouts-as-investors-can-track-carbon> [<https://perma.cc/9GDG-9MCU>].

²³⁴ *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 189 (2000).

²³⁵ *Id.* at 173.

²³⁶ *Id.* at 189–194.

²³⁷ *Id.* at 189.

“ongoing,”²³⁸ taking care to distinguish the redressability inquiry from mootness analysis.²³⁹

With respect to attorneys working in government agencies, material information that could affect a federal agency’s decision is required to be disclosed and explained during APA notice and comment rulemaking.²⁴⁰ Information regarding greenhouse gas emissions would, by definition, be material because of the impacts of climate change, and could therefore affect the agency’s final substantive rule language. For example, using an incorrect and misleading social cost of carbon in an APA Section 553 rulemaking to support an agency’s record of decision will result in an understatement of the impacts of greenhouse gases. Taking action to promote a more accurate estimate should affect or change the agency’s decision, which in turn should lead to fewer emissions and, consequently, lessen harm caused by those emissions.

In the particular case of a government lawyer who has been asked to use incorrect or false data to justify a new rule that will lead to an increase in greenhouse gas emissions—especially of the magnitude that would be at stake under a broad federal rule such as restrictions on coal-fired power plants—participating in such work could facilitate a substantial contribution to climate change-related harms. Rather than perpetrate a public fraud that could cause death or substantial bodily harm, the attorney could withdraw and disclose her opinion about the legality of the agency’s action.²⁴¹ In turn, withdrawal and disclosure could “prevent” harm from occurring.

Whether withdrawal and disclosure are required or merely permitted depends on whether using unquestionably false materials in specific administrative activities, such as an APA Section 553 rulemaking, would constitute a criminal or fraudulent act under a particular state’s construction of this definition—regardless of the characterization under federal law.²⁴² The operation of Model Rules 1.2(d),

²³⁸ *Id.* at 185–88.

²³⁹ *Id.* at 190.

²⁴⁰ *See supra* discussion Section II.C (introducing requirements of APA).

²⁴¹ *See, e.g.,* *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206, 1209 (Cal. 1981) (holding that “the [California] Attorney General cannot be compelled to represent state officers or agencies if he believes them to be acting contrary to law, and he may withdraw from his statutorily imposed duty to act as their counsel, but he may not take a position adverse to those same clients.”). *But see* Maureen A. Sanders, *Government Attorneys and the Ethical Rules: Good Souls in Limbo*, 7 *BYU J. PUB. L.* 39, 43 (1992). (observing that “[t]he ability to withdraw from representation is an avenue not always open” to a government attorney due to statutory obligations to represent particular agencies). Of course, in some cases a withdrawal from representation of a government attorney could effectively be quitting the job entirely.

²⁴² *See* Tonia Lucio, *Standards and Regulations of Professional Conduct in Federal Practice*, *FED. LAW.* 52 (July 2017), http://www.fedbar.org/Resources_1/Federal-Lawyer-Magazine/2017/July/Features/Standards-and-Regulation-of-Professional-Conduct-in-Feder

1.16(a)(1), 1.6(b), and 4.1(b) could then take over. According to the ABA Model Rule commentary:

Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.²⁴³

Therefore, by lessening future greenhouse gas emissions, attorney disclosure and/or withdrawal would prevent at least some of the harm from occurring.

V. REPORTING ETHICAL VIOLATIONS COULD BE A VERY EFFECTIVE TOOL TO TARGET GREENHOUSE GAS EMISSIONS

Unlike the process of bringing a court case, making an ethical violation claim against an attorney is both easy in most states and incentivized by the ethical rules themselves.

A. Ease of Reporting Against an Offending Attorney

1. Initial Reporting

“Each state has its own agency that performs [disciplinary investigations and actions] in regard to lawyers practicing in that state.”²⁴⁴ The burden of filing a complaint alleging a lawyer's legal ethical violation is not high in most states, with proponents typically having to show only a “belief” in misconduct.²⁴⁵

The process in Texas is illustrative and fairly typical of most states' processes of reporting and resolving ethics complaints against attorneys. According to the Texas State Bar's online portal, anyone who believes they have witnessed attorney misconduct (clients, the public, judges, etc.) can file a grievance against a Texas

al-Practice.aspx?FT=.pdf [https://perma.cc/RP5G-VW6L] (“A federal court's imposition of a disciplinary sanction for ethical violations does not preclude a state disciplinary authority from imposing discipline under the applicable state professional conduct rules based on the same conduct.”).

²⁴³ MODEL RULES OF PROF'L CONDUCT r. 4.1 cmt. 3 (AM. BAR ASS'N 2018).

²⁴⁴ *Resources for the Public—Complaints Against Lawyers*, AMERICAN BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/resources/resources_for_the_public/ [https://perma.cc/YJM7-HDSG] (last visited Oct. 30, 2019).

²⁴⁵ Brian Sheppard, *The Ethics Resistance*, 32 GEO. J. L. & ETHICS 235, 237 (2019).

attorney.²⁴⁶ To do this, a grievance form must be completed, including copies of all supporting documents.²⁴⁷ The complaint is then reviewed by the Texas State Bar Chief Disciplinary Counsel (CDC), which will determine whether the grievance, on its face, alleges professional misconduct.²⁴⁸ This determination, referred to as classification of the grievance, is made within 30 days of the grievance being filed.²⁴⁹ Next, if the alleged facts constitute a violation of the state's attorney ethics rules, the grievance will be classified as a formal "Complaint," and the respondent attorney will be informed and given 30 days from the date of receipt to respond.²⁵⁰

2. *Just Cause Determination*

According to the grievance description on the Texas Bar Association's web site:

Within 60 days of the response deadline, the CDC, through its investigation,²⁵¹ must determine whether there is Just Cause to believe that professional misconduct occurred . . . If the [CDC] determines that there is no Just Cause to proceed on the Complaint, the case is presented to a Summary Disposition Panel, an independent decision maker with the discretion to accept or reject the CDC's determination. [The Panel is comprised] of local grievance committee members composed of two-thirds lawyers and one-third public members. All information and results of the CDC's investigation is presented to the panel at a docket hearing without the presence of either the complainant or respondent. If the panel accepts the CDC's determination, the Complaint will be dismissed. If the

²⁴⁶ *File a Grievance*, STATE BAR OF TEX., https://www.texasbar.com/Content/NavigationMenu/ForThePublic/ProblemwithanAttorney/GrievanceEthicsInfo1/File_a_Grievance.htm [<https://perma.cc/V2UD-LFQ4>] (last visited Oct. 30, 2019).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Grievance Procedure*, STATE BAR OF TEX., https://www.texasbar.com/AM/Template.cfm?Section=Disciplinary_Process_Overview&Template=/CM/HTMLDisplay.cfm&ContentID=29668 [<https://perma.cc/NB6L-2JLD>] (last visited Nov. 4, 2019). This investigation may include the following: requesting additional information from the complainant; obtaining information from corroborative witnesses; receipts; hourly records or billing statements; correspondence to and from client; message slips, telephone logs, or records of long-distance telephone calls; court records, such as pleadings, motions, orders and docket sheets; copies of settlement checks and/or disbursement statements; IOLTA or trust account records, such as monthly bank statements, deposit slips, deposit items and disbursement items; State Bar Membership Department records including records of current or past administrative suspensions; client file; or witness interviews and obtaining sworn statements.

panel rejects the CDC's determination, the panel votes to proceed on the Complaint.²⁵²

3. Referral to Trial

Once a complaint is determined to have possible merit, an attorney can determine "to have the case heard before an evidentiary panel of the grievance committee or by a district court, with or without a jury."²⁵³ The tribunal then reaches a decision of whether the attorney violated an ethical duty.²⁵⁴

B. Requirement of Attorney Disclosure of Other Attorney Ethical Violations

The model rules reflect the uniform requirement that *an attorney who has knowledge of an ethics violation by another attorney must report that to the appropriate authorities, absent other requirements of confidentiality.*²⁵⁵ While historically, this requirement has been considered difficult to enforce,²⁵⁶ and insufficiently utilized²⁵⁷ in the situation where one *wants* to report alleged misconduct, there are few barriers to doing so. Texas explains the rule thusly: "[A] lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authority."²⁵⁸

Commentary to Texas Rule 8.3 makes it clear that when in doubt, an attorney is expected to err on the side of protecting the public:

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigations when they have knowledge not protected by Rule 1.05 that a violation of these rules has occurred . . . Frequently, the existence of a violation cannot be established with certainty until a disciplinary investigation has been undertaken. Similarly, an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Consequently, *a lawyer should not fail to report an apparent disciplinary violation merely because he cannot determine its existence or scope with absolute certainty.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ Nikki Ott & Heather Newton, *A Current Look at Model Rule 8.3: How It Is Used and What Are Courts Doing About It?*, 16 GEO. J. L. & ETHICS 747, 747 (2003) (citing MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 2002)).

²⁵⁶ *Id.* at 748.

²⁵⁷ Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 451–52 (2007).

²⁵⁸ TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 8.03 (2019).

Reporting a violation is especially important where the victim is unlikely to discover the offense.²⁵⁹

The procedural ease in filing ethics complaints, along with the requirement that other attorneys disclose evidence of violations, demonstrates how the system could be used to ultimately accomplish another goal.

In a recent article entitled *The Ethics Resistance*, Brian Sheppard has described the increased use of attorney ethics complaints for political purposes in the Trump era.²⁶⁰ These complaints are uncoupled from traditional complaints by clients or other attorneys.²⁶¹ While his article focuses mostly on the power of political claims to shame public officials, imagine how many more private attorneys could be susceptible to a motivated group of complainants.

This puts the attorney representing clients who contribute to greenhouse gas emissions between a rock and a hard place. Since greenhouse gas emissions have not yet been determined by a state bar association to cause substantial death or bodily harm in a way that triggers the state equivalent of Model Rule 1.6(b)(1), an attorney would worry that to disclose confidential information related to greenhouse gas emissions would itself be a breach of client confidentiality duties. However, if the harms caused by greenhouse gas emissions through concomitant climate change are identified by a state's attorney disciplinary decisionmaker as information about death or substantial bodily harm that must be revealed, the attorney could be subject to disciplinary action for failing to make disclosures related to their client's greenhouse gas emissions.

Attorneys could ask for state attorney general opinions, but these are not binding and would themselves draw attention to client behavior. All of this together may push risk-averse attorneys toward not entering or continuing in practice areas where they would represent greenhouse gas emitters, thereby depriving these parties of the legal representation necessary to navigate their businesses. This is exactly the outcome that climate activists would like to see: depriving the attorney "oxygen" from the greenhouse gas emissions "fire."

VI. CONCLUSION

There is a multitude of entities that either emit major amounts of greenhouse gases or facilitate the emission of greenhouse gases. The same greenhouse gases, in turn, are causing an unprecedented and rapid change in the climate of the entire Earth, resulting in massive impacts on all sectors of society, leading to over 100,000

²⁵⁹ TEX. DISCIPLINARY RULES PROF'L CONDUCT r. 8.03 cmt 1 (2019) (emphasis added).

²⁶⁰ Sheppard, *supra* note 245, at 259.

²⁶¹ *Id.* at 261.

attributable deaths per year.²⁶² And the impacts are only going to accelerate.²⁶³ Every state in the United States has promulgated attorney ethical laws that may require or allow disclosure of otherwise confidential client activities if the activities could cause imminent death or substantial bodily harm. As this Article has explained, greenhouse gas emissions causing climate change could meet that standard of harm.

Faced with relative inaction and even hostility on the part of the United States federal government in addressing the greenhouse gas emissions and the harms the country causes, climate activists in the United States and around the world have gone beyond legislative debates and are increasing their use of alternative methods to change behavior and curb the harms caused by climate change. Climate activists are using existing legal regimes—from common law to statutes not specifically designed for greenhouse gas emissions—to curb climate change. These methods have been directed at private corporations and governments.

Given that greenhouse gas emissions could trigger attorney ethical responsibilities, it is only a matter of time before attorney ethics rules become another legal tool that climate advocacy organizations use to try and lessen continued greenhouse gas emissions. Practicing attorneys have a duty to stay abreast of relevant ethical rules and their application to the ever-evolving practice of law. The climate activism emerging now, coupled with the recent judicial recognition of the harms caused by climate change and their connection to greenhouse gases, suggests caution. Therefore, attorneys should be aware of this possibility and react accordingly. Whether in the employ of a large multinational firm or the government, ethical obligations exist. This Article reveals the possible coming vulnerability of attorneys for failing to disclose the dangers of client activity related to climate change.

²⁶² See discussion *supra* Part III.

²⁶³ See WORLD METEOROLOGICAL ORGANIZATION, THE GLOBAL CLIMATE IN 2015–2019, at 3 (2019), https://library.wmo.int/doc_num.php?explnum_id=9936 [<https://perma.cc/C8CR-FLQL>] (describing “[c]ontinuing and accelerating trends” in major greenhouse gas emissions, global temperature increases and “other key climate indicators.”).

Appendix A: *State versions of ABA Model Ethics Rule 1.6(b) regarding disclosure of confidential client information in face of death or substantial bodily harm*

State that Requires Disclosure if Attorney Would be Assisting a Criminal or Fraudulent Act

Massachusetts Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information:

(1) to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another²⁶⁴

Rule 4.1(b):

In the course of representing a client a lawyer shall not knowingly:

...

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.²⁶⁵

The 12 States that Require Disclosure

Arizona Rules of Professional Conduct, ER 1.6(b):

(b) A lawyer shall reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.²⁶⁶

²⁶⁴ MASS. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2020), <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-16-confidentiality-of-information> [<https://perma.cc/P9V9-2QLU>].

²⁶⁵ MASS RULES OF PROF'L CONDUCT r. 4.1(b) (2020), <https://www.mass.gov/supreme-judicial-court-rules/rules-of-professional-conduct-rule-41-truthfulness-in-statements-to> [<https://perma.cc/8FLG-9ER9>]. In other words, Massachusetts Rule 1.6(b)(1) and 4.1(b) should be read together to require that if an attorney is considered to be assisting in a criminal or fraudulent act relating to the GHG emissions, then the attorney *must* disclose.

²⁶⁶ ARIZ. RULES OF PROF'L CONDUCT ER 1.6(b) (2019), <http://www.azbar.org/Ethics/RulesofProfessionalConduct/ViewRule?id=26> [<https://perma.cc/LB8M-EZ6N>].

Connecticut Rules of Professional Conduct, Rule 1.6(b):

(b) A lawyer shall reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.²⁶⁷

Florida Rules of Professional Conduct, Rule 4-1.6(b)(2):

(b) A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.²⁶⁸

Illinois Rules of Professional Conduct, Rule 1.6(c):

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.²⁶⁹

New Jersey Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

- (1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another²⁷⁰

²⁶⁷ CONN. RULES OF PROF'L CONDUCT r. 1.6(b) (2020), <https://www.jud.ct.gov/Publications/PracticeBook/PB.pdf> [<https://perma.cc/RM7Q-YM38>].

²⁶⁸ R. REGULATING FLA. BAR 4-1.6(b)(2) (2019), https://www-media.floridabar.org/uploads/2019/09/Ch-4-from-2020_03-SEP-RRTFB-9-19-19-3.pdf [<https://perma.cc/25HG-KSDP>].

²⁶⁹ ILL. RULES OF PROF'L CONDUCT 1.6(c) (2010), http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VIII/ArtVIII_NEW.htm#1.6 [<https://perma.cc/UYP5-ZRRK>].

²⁷⁰ N.J. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), <https://www.njcourts.gov/attorneys/assets/rules/rpc.pdf> [<https://perma.cc/2J84-U4EJ>].

North Dakota Rules of Professional Conduct, Rule 1.6(b):

(b) A lawyer is required to reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily harm.²⁷¹

Tennessee Rules of Professional Conduct, Rule 1.6(c)(1):

(c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

(1) to prevent reasonably certain death or substantial bodily harm²⁷²

Texas Rules of Professional Conduct, Rule 1.05(e):

(e) When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.²⁷³

Vermont Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer must reveal information relating to the representation of a client when required by other provisions of these rules or to the extent the lawyer reasonably believes necessary:

(1) to prevent the client or another person from committing a criminal act that the lawyer reasonably believes is likely to result in the death of, or substantial bodily harm to, a person other than the person committing the act²⁷⁴

²⁷¹ N.D. RULES OF PROF'L CONDUCT r. 1.6(b) (2016), <https://www.ndcourts.gov/legal-resources/rules/ndrprofconduct/1-6> [<https://perma.cc/U5EL-K8JN>].

²⁷² TENN. SUP. CT. R. 8, RPC 1.6(c)(1) (2017), <http://www.tsc.state.tn.us/rules/supreme-court/8> [<https://perma.cc/Y9UX-QRFH>].

²⁷³ TEX. RULES OF PROF'L CONDUCT r. 1.05(e) (1995), <https://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/I--CLIENT-LAWYER-RELATIONSHIP/1-05-Confidentiality-of-Information> [<https://perma.cc/MG2Z-FMDN>].

²⁷⁴ VT. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2009), <https://www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf> [<https://perma.cc/Z5NY-Z3SF>].

Virginia Rules of Professional Conduct, Rule 1.6(c)(1):

- (c) A lawyer shall promptly reveal:
- (1) the intention of a client, as stated by the client, to commit a crime reasonably certain to result in death or substantial bodily harm to another or substantial injury to the financial interests or property of another and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless thereupon abandoned. However, if the crime involves perjury by the client, the attorney shall take appropriate remedial measures as required by Rule 3.3²⁷⁵

Washington Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer to the extent the lawyer reasonably believes necessary:
- (1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm²⁷⁶

Wisconsin Rules of Professional Conduct, Rule 1.6(b):

- (b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.²⁷⁷

²⁷⁵ VA. RULES OF PROF'L CONDUCT r. 1.6(c)(1) (2020), http://www.vsb.org/pro-guidelines/index.php/main/print_view [<https://perma.cc/V2NS-29SP>].

²⁷⁶ WASH. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), https://www.courts.wa.gov/court_rules/ [<https://perma.cc/47S6-8LT2>].

²⁷⁷ WIS. S. CT. R. 20:1.6(b) (2017), <https://docs.legis.wisconsin.gov/misc/scr/20> [<https://perma.cc/4RYA-XKUY>].

The 37 States that Permit Disclosure

Alabama Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary:

- (1) To prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm²⁷⁸

Alaska Rules of Professional Conduct, Rule 1.6(b)(1)(A)-(B):

(b) A lawyer may reveal a client's confidence or secret to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain
 (A) death [or]
 (B) substantial bodily harm²⁷⁹

Arkansas Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary:

- (1) to prevent the commission of a criminal act;

. . . .
 [Comment 6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. For instance, in becoming privy to information about a client, a lawyer may foresee that the client or a third person intends to commit a crime and may reveal that information to prevent the crime. The overriding value of life and physical integrity permits disclosure reasonably necessary to prevent death or bodily harm. Other future harms as a result of a criminal act, such as fraud, damage to economic interests, or loss of property which are reasonably certain to occur, also permit disclosure if necessary to eliminate the threat.²⁸⁰

²⁷⁸ ALA. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), http://judicial.alabama.gov/docs/library/rules/cond1_6.pdf [<https://perma.cc/AP3M-P6EB>].

²⁷⁹ ALASKA RULES OF PROF'L CONDUCT r. 1.6(b)(1)(A)-(B) (2009), <https://public.courts.alaska.gov/web/rules/docs/prof.pdf> [<https://perma.cc/SDJ7-3V8Y>].

²⁸⁰ *Id.* r. 1.6 cmt 6.

California Rules of Professional Conduct, Rule 3-100(B):

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.²⁸¹

Colorado Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 (1) to prevent reasonably certain death or substantial bodily harm²⁸²

Delaware Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
 (1) to prevent reasonably certain death or substantial bodily harm²⁸³

Georgia Rules of Professional Conduct: Rule 1.6(b)(1)(ii)

“A lawyer may reveal information [gained in the professional relationship with a client] which the lawyer reasonably believes necessary:
 (i) to avoid or prevent harm or substantial financial loss to another as a result of client criminal conduct or third party criminal conduct clearly in violation of the law;
 (ii) to prevent serious injury or death not otherwise covered by subparagraph (i) above²⁸⁴

²⁸¹ CAL. RULES OF PROF'L CONDUCT r. 3-100(B) (2018), <https://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct/Current-Rules/Rule-3-100> [<https://perma.cc/8PWA-V2DB>].

²⁸² COLO. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2018), <https://www.cobar.org/For-Members/Opinions-Rules-Statutes/Rules-of-Professional-Conduct/Rule-16-Confidentiality-of-Information> [<https://perma.cc/8CCZ-MYSQ>].

²⁸³ DEL. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2020), <https://courts.delaware.gov/rules/pdf/2020DelawareLawyersRulesProfessionalConduct.pdf> [<https://perma.cc/W9KH-QU9A>].

²⁸⁴ GA. RULES OF PROF'L CONDUCT r. 1.6(b)(i)–(ii) (2017), <https://www.gabar.org/Handbook/index.cfm#handbook/rule57> [<https://perma.cc/2TJJ-DPJX>].

Hawaii Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another²⁸⁵

Idaho Rules of Professional Conduct, Rule 1.6(b)(2):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

-
- (2) to prevent reasonably certain death or substantial bodily harm²⁸⁶

Indiana Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm²⁸⁷

Iowa Rules of Professional Conduct, Rule 32:1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm²⁸⁸

²⁸⁵ HAW. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2014), https://www.courts.state.hi.us/docs/court_rules/rules/hrpcond.htm#Rule%201.6 [<https://perma.cc/99LU-5NCQ>].

²⁸⁶ IDAHO RULES OF PROF'L CONDUCT r. 1.6(b)(2) (2014), <https://isb.idaho.gov/wp-content/uploads/irpc.pdf> [<https://perma.cc/93GX-GM4A>].

²⁸⁷ IND. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), https://www.in.gov/judiciary/rules/prof_conduct/#_Toc461714661 [<https://perma.cc/RP8M-P3BP>].

²⁸⁸ IOWA S. CT. R. 32:1.6(b)(1) (2012), <https://www.legis.iowa.gov/docs/ACO/CourtRulesChapter/12-31-2012.32.pdf> [<https://perma.cc/B467-NHJF>].

Kansas Rules of Professional Conduct, Rule 1.6(b)(1), (4):

- (b) A lawyer may reveal such information [relating to representation of a client] to the extent the lawyer reasonably believes necessary:
(1) to prevent the client from committing a crime²⁸⁹

Kentucky Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm²⁹⁰

Louisiana Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain death or substantial bodily harm²⁹¹

Maine Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal a confidence or secret of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent reasonably certain substantial bodily harm or death²⁹²

Maryland Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) An attorney may reveal information relating to the representation of a client to the extent the attorney reasonably believes necessary:

²⁸⁹ KAN. S. CT. R. 226, KAN. R. PROF'L CONDUCT r. 1.6(b)(1) (2019), <https://www.kscourts.org/Rules-Orders/Rules/1-6-Client-Lawyer-Relationship-Confidentiality-of> [<https://perma.cc/DE5Q-7Z2L>].

²⁹⁰ KY. S. CT. R. 3.130(1.6)(b)(1) (2018), [https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_\(1.6\).pdf](https://cdn.ymaws.com/www.kybar.org/resource/resmgr/SCR3/SCR_3.130_(1.6).pdf) [<https://perma.cc/4ZG9-J79M>].

²⁹¹ LA. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2015), <https://lalegaethics.org/louisiana-rules-of-professional-conduct/article-1-client-lawyer-relationship/rule-1-6-confidentiality-of-information/> [<https://perma.cc/N6SX-UFBE>].

²⁹² ME. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2015), https://mebaroverseers.org/regulation/bar_rules.html?id=88169 [<https://perma.cc/2P3B-6EQL>].

(1) to prevent reasonably certain death or substantial bodily harm²⁹³

Michigan Rules of Professional Conduct, Rule 1.6(c)(4):

(c) A lawyer may reveal:

.....

(4) the intention of a client to commit a crime and the information necessary to prevent the crime²⁹⁴

.....

Comment: If the prospective crime is likely to result in substantial injury, the lawyer may feel a moral obligation to take preventive action. When the threatened injury is grave, such as homicide or serious bodily injury, a lawyer may have an obligation under tort or criminal law to take reasonable preventive measures. Whether the lawyer's concern is based on moral or legal considerations, the interest in preventing the harm may be more compelling than the interest in preserving confidentiality of information relating to the client. . . .²⁹⁵

Minnesota Rules of Professional Conduct, 1.6(b)(6):

(b) A lawyer may reveal information relating to the representation of a client if:

.....

(6) the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm²⁹⁶

²⁹³ MD. RULES OF PROF'L CONDUCT r. 19-301.6(b)(1) (2016), [https://govt.westlaw.com/mdc/Document/N43E45F203C0211E69A7981745F9F9D8A?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)&bhcp=1#co_anchor_I80871D10B4CB11E9A0A0D939A11C1D9F](https://govt.westlaw.com/mdc/Document/N43E45F203C0211E69A7981745F9F9D8A?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default)&bhcp=1#co_anchor_I80871D10B4CB11E9A0A0D939A11C1D9F) [<https://perma.cc/2RA7-ZA7A>].

²⁹⁴ MICH. RULES OF PROF'L CONDUCT r. 1.6(c)(4) (2020), <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/Documents/Michigan%20Rules%20of%20Professional%20Conduct.pdf> [<https://perma.cc/4T6H-RNK7>].

²⁹⁵ *Id.* r. 1.6 cmt.

²⁹⁶ MINN. RULES OF PROF'L CONDUCT r. 1.6(b)(6) (2019), https://www.revisor.mn.gov/court_rules/pr/subtype/cond/id/1.6/ [<https://perma.cc/A9SX-KBAP>].

Mississippi Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm²⁹⁷

Missouri Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent death or substantial bodily harm that is reasonably certain to occur²⁹⁸

Montana Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm²⁹⁹

Nebraska Rules of Professional Conduct § 3-501.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm³⁰⁰

²⁹⁷ MISS. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), https://courts.ms.gov/research/rules/msrulesofcourt/rules_of_professional_conduct.pdf [<https://perma.cc/CNA2-DXQQ>].

²⁹⁸ MO. S. CT. R. 4-1.6(b)(1) (2019), <https://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/c0c6ffa99df4993f86256ba50057dcb8/b284eee6f79f447486256ca6005211ee?OpenDocument> [Perma.cc link unavailable].

²⁹⁹ MONT. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2020), https://cdn.ymaws.com/www.montanabar.org/resource/resmgr/attorney_rules_and_regulations/rules_of_prof_conduct.pdf [<https://perma.cc/A28H-S57X>].

³⁰⁰ NEB. CT. R. OF PROF'L CONDUCT § 3-501.6(b)(1) (2019), <https://supremecourt.nebraska.gov/supreme-court-rules/chapter-3-attorneys-and-practice-law/article-5-nebraska-rules-professional-10> [<https://perma.cc/P86E-H2XC>].

Nevada Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm³⁰¹

New Hampshire Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal such information [relating to the representation of a client] to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm or to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interest or property of another³⁰²

New Mexico Rules of Professional Conduct, Rule 16-106(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm³⁰³

New York Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm³⁰⁴

³⁰¹ NEV. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2019), <https://www.leg.state.nv.us/courtrules/RPC.html> [<https://perma.cc/E5BN-5X53>].

³⁰² N.H. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2020), https://www.courts.state.nh.us/rules/pcon/pcon-1_6.htm [<https://perma.cc/ZA7C-RGWW>].

³⁰³ N.M. RULES OF PROF'L CONDUCT r. 16-106(b)(1) (2018), https://laws.nmunesource.com/w/nmos/Rule-Set-16-NMRA#!fragment/zoupio-_Toc32398969/BQCwhgziBcwMYgK4DsDWszIQewE4BUBTADwBdoAvbRABwEtsBaAfX2zgGYAmDgTgA5eANl4BKA DTJspQhACKiQrgCe0AORrxEQmFwIFS1Rq069IAMp5SAIVUAlAKIAZBwDUAggDkAwg-GkwACNoUnZRUSA [<https://perma.cc/VF22-5M4K>].

³⁰⁴ N.Y. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2018), <https://www.nysba.org/DownloadAsset.aspx?id=50671> [<https://perma.cc/5UVB-3AY6>].

North Carolina Rules of Professional Conduct, Rule 1.6(b)(3):

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

.....

(3) to prevent reasonably certain death or bodily harm³⁰⁵

Ohio Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm³⁰⁶

Oklahoma Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm³⁰⁷

Oregon Rules of Professional Conduct, Rule 1.6(b)(2):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

.....

(2) to prevent reasonably certain death or substantial bodily harm³⁰⁸

³⁰⁵ N.C. RULES OF PROF'L CONDUCT r. 1.6(b)(3) (2017), <https://www.ncbar.gov/for-lawyers/ethics/rules-of-professional-conduct/rule-16-confidentiality-of-information/> [<https://perma.cc/TT4C-CDHU>].

³⁰⁶ OHIO RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2017) (emphasis in original), <http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf> [<https://perma.cc/37JB-EXWG>].

³⁰⁷ OKLA. STAT. tit. 5 app. 3-A, Rule 1.6(b)(1) (2016), <http://www.oscn.net/application/s/oscn/DeliverDocument.asp?CiteID=479339> [<https://perma.cc/XBE3-C4RU>].

³⁰⁸ OR. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (2018), https://www.osbar.org/_docs/rulesregs/orpc.pdf [<https://perma.cc/7N9T-HSQ9>].

Pennsylvania Rules of Professional Conduct, Rule 1.6(c)(1):

(c) A lawyer may reveal such information [relating to representation of a client] to the extent that the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm³⁰⁹

Rhode Island Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal such information [relating to representation of a client] to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm³¹⁰

South Carolina Rules of Professional Conduct, Rule 1.6(b)(2):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

. . . .

(2) to prevent reasonably certain death or substantial bodily harm³¹¹

South Dakota Rules of Professional Conduct, Rule 1.6(b)(1):

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm³¹²

³⁰⁹ 204 PA. CODE § 81.4 r. 1.6(c)(1) (2019), <http://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/204/chapter81/chap81toc.html&d=reduce#1.6>. [<https://perma.cc/P2Y7-XW9F>].

³¹⁰ R.I. RULES OF PROF'L CONDUCT r. 1.6(b)(1) (2017), <https://www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf> [<https://perma.cc/8FB2-CBYD>].

³¹¹ S.C. RULES OF PROF'L CONDUCT r. 1.6(b)(2) (2019), <http://www.sccourts.org/courtreg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%201%2E6&ruleType=APP> [<https://perma.cc/P9RS-R4BF>].

³¹² S.D. CODIFIED LAWS ch. 16-18 app, Rule 1.6(b)(1) (2018), http://www.sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A [<https://perma.cc/S2V4-DJG2>].

Utah Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm³¹³

West Virginia Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
- (1) to prevent reasonably certain death or substantial bodily harm³¹⁴

Wyoming Rules of Professional Conduct, Rule 1.6(b)(1):

- (b) A lawyer may reveal such information [relating to representation of a client] to the extent the lawyer reasonably believes necessary:
- (1) to prevent the client from committing a criminal act;
 - (2) to prevent the client from committing a fraud that is reasonably certain to result in substantial injury to the financial interests or property of another³¹⁵

³¹³ UTAH CODE OF JUDICIAL ADMIN R. 1.6(b)(1) (2020), https://www.utcourts.gov/resources/rules/ucja/view.html?title=Rule%201.6.%20Confidentiality%20of%20information.&rule=ch13/1_6.htm [<https://perma.cc/H93E-9HPD>].

³¹⁴ W. VA. RULES OF PROFESSIONAL CONDUCT r. 1.6(b)(1) (2015), <http://www.courtswv.gov/legal-community/court-rules/professional-conduct/pdf/RulesOfProfessionalConductEngrosedFinal.pdf> [<https://perma.cc/V68P-2NK9>].

³¹⁵ WYO. RULES OF PROFESSIONAL CONDUCT r. 1.6(b)(1) (2019), https://www.courts.state.wy.us/wp-content/uploads/2017/05/RULES_OF_PROFESSIONAL_CONDUCT_FOR_ATTORNEYS_AT_LAW.pdf [<https://perma.cc/JA3A-SZG8>].