SEA LEVEL LIES: THE DUTY TO CONFRONT THE DENIERS

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I. INTRODUCTION: THE DENIAL DILEMMA

"I've not been convinced that there's any man-made climate change," Florida Governor Rick Scott once said, echoed by other state governors and candidates.[1] While the Florida governor is not alone in his beliefs,[2] science-minded viewpoints recognize that the problems facing the Sunshine State cannot be ignored:

> Low-lying [S]outh Florida, at the front line of climate change in the [United States], will be swallowed as sea levels rise. Astonishingly, the population is growing, house prices are rising and building goes on. The problem is [South Florida] is run by climate change deniers.[3]

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1. John Frank, *Rick Scott Doesn't Believe in Global Warming*, TAMPA BAY TIMES (July 26, 2010, 5:51 PM), http://www.tampabay.com/blogs/the-buzz-florida-politics/content/rick-scott-doesnt-believe-global-warming; Craig Pittman, *Climate Change Not a Priority in Tallahassee*, MIAMI HERALD (May 21, 2011, 5:46 PM EDT), http://www.freerepublic.com/focus/f-news/2722972/posts; Dan Watson, *Republican Governor Candidates Deny Climate Change*, GRIST (Sept. 28, 2010, 4:10 AM), http://grist.org/article/2010-09-27-republican-governor-candidates-deny-climate-change/full/.

2. A similarly skeptical state attorney general sought to discredit a University of Virginia climate scientist for using state funds to research the subject. Rector & Visitors of the Univ. of Va. v. Cuccinelli, 80 Va. Cir. 657 (16th Cir. 2010), *available at* http://voices.washingtonpost.com/virginiapolitics/2010-08-30%20Opinion%20Granting%20UVA%20Petition.pdf.

3. Robin McKie, *Miami, the Great World City, Is Drowning While the Powers That Be Look Away*, GUARDIAN (July 11, 2014, 3:59 AM EDT), http://www.theguardian.com/

Denial does not change the facts, and the lawyers who serve and represent these elected officials and other clients cannot make false statements about material facts. In matters involving climate change—and sea level rise in particular—the disconnect between science, facts, and a client's beliefs presents a legal and ethical dilemma.

While the dilemma can apply to all lawyers, it becomes particularly acute for the government lawyer. Truth and justice rank among the duties of the government lawyer, but in practice, the government lawyer has a client. In the commentary to Rule 1.13 of the American Bar Association (ABA) Model Rules of Professional Conduct, it states that "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context."[4] 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, the agency or entity served by the lawyer, or an officer and decision-maker advised by the lawyer. Choosing among these options, Rule 1.6(k) of the District of Columbia Rules of Professional Conduct suggests that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order."[5] Yet in the criminal context, the ABA model rules vest prosecutors with a special role, possessing the "responsibility of a minister of justice and not simply that of an advocate."[6] The point is clarified by Rule 1-1.1 of the National District Attorneys Association's National Prosecution Standards, which states that "[t]he prosecutor is an independent administrator of justice. The primary responsibility of a prosecutor is to seek justice, which can only be achieved by the representation and presentation of the truth."[7]

Lurking behind the text of these rules is a long-standing debate over the extent to which the common good or the public

world/2014/jul/11/miami-drowning-climate-change-deniers-sea-levels-rising. Mr. McKie is the science editor for The Observer. *Id.*

4. MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 9 (2013).
5. D. C. RULES OF PROF'L CONDUCT R. 1.6(k) (2014).
6. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1.
7. NAT'L PROSECUTION STANDARDS R. 1-1.1 (Nat'l Dist. Attorneys Ass'n 2009).

interest is itself considered a "client" of the government lawyer.[8] While adhering to applicable professional codes, government lawyers have a fundamental duty to serve the public and to protect justice and truth. With social justice at stake, our judicial system and legal institutions confront lies by criminal defendants, police officers, and prosecutors with severity. Similar injustice and untruths are emerging in the context of global climate change, spoken and written by a different group of lawyers and clients. Society should confront the lies in this context, too.

In cover stories discussing sea level rise, but perhaps drowning in hyperbole, the Rolling Stone declared "Goodbye Miami," and National Geographic sank the Statue of Liberty.[9] Appropriate policy responses have not yet fully emerged, with our elected officials mired in debates over the degree of anthropogenic causation, the scientific complexities, and the frightening economics and inequities of potential responses. Yet facts are facts, and to some degree, oceans are invading the coastlines—regardless of the policy debates over whether or how greenhouse gas and carbon emissions can, should be, or should not be controlled. Over time, and perhaps in mere decades for low-lying Florida, sea level rise will alter coastal fisheries; erode beaches, sea walls, roads, and buildings; and diminish flood control protection.[10] In the worst cases, it could reinvent our coastal economies, as landscapes and tax revenues disappear.

Consider this scenario: an overwhelming consensus of scientific professionals diagnose a patient as sick with a fever. Data shows that the patient's condition is getting worse. With

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8. Catherine J. Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 955, 1016 (1991) (discussing whether and why ethical codes impose different requirements of advocacy on government litigators and consideration of "the public interest," but concluding that "in an imperfect world the government lawyers ordinarily must be governed by the directions of the officials elected to guide the institution and not by an independent assessment of what the public interest requires").

9. Cover Art, NAT'L GEOGRAPHIC (Sept. 2013), http://press.nationalgeographic.com/2013/08/15/national-geographic-magazine-september-2013/; Jeff Goodell, *Goodbye Miami*, ROLLING STONE (June 20, 2013, 1:20 PM EDT), http://www.rollingstone.com/politics/news/why-the-city-of-miami-is-doomed-to-drown-20130620.

10. Fla. Oceans & Coastal Council, *Climate Change and Sea-Level Rise in Florida: An Update of the Effects of Climate Change on Florida's Ocean & Coastal Resources*, FLORIDAOCEANSCOUNCIL.ORG (Dec. 2010), http://www.floridaoceanscouncil.org/reports/Climate_Change_and_Sea_Level_Rise.pdf.

consensus, the scientists agree that some form of treatment is necessary. The professionals cannot agree, however, on an appropriate treatment plan. Some administrators, ignoring their scientific advisors and knowingly disregarding the evidence, simply declare that the patient is not sick. Others, acknowledging that the patient is sick, declare that there is nothing they can do. As a consequence of inaction, the patient's downward spiral continues.

Earth, of course, is the patient. Climate change and its corollary of rising seas are the sickness. The question for the professionals and the administrators is the treatment.

Importantly, the ultimate policy decision on which treatment to adopt is not a decision for the lawyers; it is our clients who define the objectives.[11] However, lawyers still have an essential role to play. Lawyers must ensure that their clients explicitly address the planetary condition and treatment. At a minimum, clients must substantially and meaningfully consider whether, when, how, and why they will—or will not—respond to or adapt to conditions created by rising seas.

Applying the ABA's model rules governing the legal profession, this Article explains how and why lawyers, and government lawyers in particular, must force a dialogue over sea level rise. Parts II and III of this Article consider the law and facts associated with sea level rise, noting the lawyer's ethical duties to disclose adverse authority to the courts and the duty to advise the client of unwelcome facts. Part IV considers how the lawyer's duty of truthfulness to others and the prohibition against false statements of material fact apply to matters involving disputes associated with sea level rise, with particular consideration of the concepts of permitting and other regulatory approvals. Part V then considers the lawyer's duty of candor to the tribunal and how the denial of sea level rise, particularly in ex parte proceedings such as bond proceedings, could violate ethical standards. Seeking a way to reduce the potential for allegations of misconduct against the lawyer, Part VI discusses the duty of the lawyer to confront the problem of sea level rise denial, perhaps by elevating the matter to senior levels of an

11. ABA Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished."

organization, whistleblowing, or withdrawing from representation. In the end, ethical lawyers must uphold their ethics and traditions. In their capacity as advocates, lawyers must be cognizant of the truth, regardless of the positions taken by their clients.

II. THE DUTY OF COMPETENCE

Lawyers possess a fundamental duty to practice law with competence. Elementary notions of competence necessitate thoroughness, preparation, and attention to complexity, as the commentary to the ABA Model Rule 1.1 makes clear:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem . . . . The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence.[12]

Cases involving the controversial subject of sea level rise will frequently involve matters of both greater complexity and greater consequence. Relevant facts may involve complex modeling of coastal topographic chances, detailed regulatory schemes, and existential questions such as whether a particular project or community can or should be completed, insured, or permitted in a particular location. In these matters, lawyers must demonstrate higher levels of attention and preparation.

Sea level rise is complex, but the legal issues related to the lawyer's duty to confront the sea level rise *denier* are simple and stem from elementary legal concepts. In property and environmental law, due diligence is a customary feature of many transactions, requiring the lawyers and other professionals to help clients ascertain whether a course of action should or should not be pursued.[13] In tort law, including malpractice law, parties, including lawyers, may be held liable for negligence if they breach

12. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5 (2013).

13. *See, e.g.*, Ralph A. DeMeo & Lynn S. Scruggs, *All Appropriate Inquiries in Commercial Real Estate Due Diligence: What Inquiring Minds Need to Know*, 81 FLA. B.J., Feb. 2007, at 24 (emphasizing the need for environmental due diligence in commercial real estate transactions).

their duty to a person and that failure causes injury.[14] In matters of administrative law, basic judicial doctrines dictate that although agencies receive deference in complex matters of science,[15] courts will often take a "hard look" at the facts to ensure that the government has not failed to consider an important aspect of the problem, including climate change.[16] Complete failure to consider facts associated with sea level rise and obvious legal doctrines related to property, torts, and administrative law likely constitutes a breach of the lawyer's duty of care to the client.

Given the potential for clients to be exposed to liability in such basic ways, competent lawyering, at a minimum, requires an attorney to ensure adequate inquiry into and analysis of the factual and legal aspects of sea level rise. Indeed, from an American lawyer's perspective, the existence of sea level rise and the associated risk of injury are undeniable, based on both caselaw and statutes.

A. Sea Level Rise Caselaw

In *Massachusetts v. EPA*,[17] a fractured Court considered the constitutional standing of the Commonwealth of Massachusetts and others to challenge the inaction of the United States Environmental Protection Agency (EPA) on a petition asking the EPA to use its Clean Air Act authority to regulate greenhouse gas

14. *See, e.g.*, Douglas A. Kysar, *What Climate Change Can Do About Tort Law*, 41 ENVTL. L. 1, 30 (2011) (referencing the common law rule regarding causation).

15. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Train, 430 U.S. 112, 135 n.25 (1977) (noting the need for deference to the United States Environmental Protection Agency because of the agency's unique "'experience and expertise'" and the "'complexity and technical nature of the statutes and the subjects they regulate'") (quoting Am. Meat Inst. v. EPA, 526 F.2d 442, 450 n.16 (7th Cir. 1975)); *see also* Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 166 (D.C. Cir. 1982).

16. *See, e.g.*, Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 369 (E.D. Cal. 2007) (concluding that "climate change will be 'an important aspect of the problem' meriting analysis" in a biological opinion addressing the water supply coming from the Sierra Nevada snowpack and its effects on endangered species in the Sacramento Bay Delta); *see also* Donald W. Stever, Jr., *Deference to Administrative Agencies in Federal Environmental, Health and Safety Litigation—Thoughts on Varying Judicial Application of the Rule*, 6 W. NEW ENG. L. REV. 35, 46 (1983) (characterizing Nat'l Lime Ass'n v. EPA, 627 F.2d 416 (D.C. Cir. 1980) as "nothing less than a microscopic view of every significant aspect of the agency's rulemaking, a task that required the mastery of the industry's terminology and, indeed, the nature of the lime manufacturing process to an incredible degree").

17. 549 U.S. 497 (2007).

emissions.[18] Finding that Massachusetts had standing, the majority emphasized several core facts, noting uncontroverted statements from the record about the risks created by sea level rise.[19] Sea level changes threatened Massachusetts' coastal property, and a 2001 National Research Council Report,[20] cited by the EPA as an "objective and independent assessment of the relevant science,"[21] identified the already-inflicted significant harms, such as "the global retreat of mountain glaciers, reduction in snow-cover extent, the earlier spring melting of ice on rivers and lakes, [and] the accelerated rate of rise of sea levels during the [twentieth] century relative to the past few thousand years."[22] To the matter of sea level rise, and its relevance to the standing of Massachusetts to sue EPA, the Supreme Court concluded the following:

> In sum[—]at least according to petitioners' uncontested affidavits[—]the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge EPA's denial of their rulemaking petition.[23]

Still, in the Court's divided, 5–4 decision, the forces of climate change denial emerged. The dissenting opinion, authored by Chief Justice Roberts, rejected claims that sea level rise had caused injury to the state of Massachusetts, concluding that any actual loss of coastline was "pure conjecture."[24] But then, engaging in conjecture of its own, and independently second-guessing the uncontested work of the expert scientists who put the evidence before the Court, the dissent disputed "attempts to identify 'imminent' or 'certainly' impending loss of Massachusetts coastal land," citing the margin of error in the models to

18. *Id.* at 505.

19. *Id.* at 520–21.

20. COMM. ON THE SCI. OF CLIMATE CHANGE DIV. ON EARTH & LIFE STUDIES NAT'L RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001), *available at* http://www.gcrio.org/NRC/NRCclimatechange.pdf (citation omitted).

21. 68 Fed. Reg. 52,930 (Sept. 8, 2003).

22. *Massachusetts*, 549 U.S. at 521.

23. *Id.* at 526.

24. *Id.* at 542 (Robert, C.J., with Scalia, Thomas, and Alito, J.J., dissenting).

emphasize that "it is *possible*" that the computer models predicting the land loss could be wrong.[25]

While the dissent rejected the Massachusetts declarations, it did not discuss the facts or science put before the Court by the amici briefs. Those briefs in *Massachusetts v. EPA* document the frightening consequences of sea level rise for the nation's coastlines and rely on scientific support for their factual assertions. Discussing the present-day and future effects of sea level rise, the amicus brief of the states of Arizona, Iowa, Maryland, Minnesota, and Wisconsin noted that "thirty percent of Maryland's coastline undergoes some degree of erosion, which is projected to increase due to climate change from one foot every one hundred years to two to three feet by 2100."[26] The amicus brief of the Ocean and Coastal Conservation Interests notes that past century sea level rise calculations range from 0.10 to 0.20 meters, but the uncertain future includes concern for the unstable West Antarctic ice sheet (WAIS), which contains enough ice to raise sea levels by 6 meters.[27] In California, a twelve inch rise in sea level shifts the one hundred year (once per century) "storm surge-induced flood event to once every [ten] years."[28] Louisiana, Florida, Texas, and North Carolina have more than 46,000 square kilometers of land lying below 1.5 meters above sea

25. *Id.* (explaining that "[a]s an initial matter, if it is possible that the model underrepresents the elevation of coastal land to an extent equal to or in excess of the projected sea level rise, it is difficult to put much stock in the predicted loss of land") (emphasis added).

26. Brief of the States of Arizona, Iowa, Maryland, Minnesota, and Wisconsin, as Amicus Curiae in Support of Petitioners at 3, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/05-1120/05-1120.mer.ami.states.pdf (citing RICHARD H. MOSS ET AL., CLIMATE CHANGE IMPACTS: MARYLAND RESOURCES AT RISK (July 2, 2002), *available at* http://www.globalchange.umd.edu/data/publications/Maryland_at_risk_complete_2July02.pdf).

27. Brief of Amicus Curiae Ocean and Coastal Conservation Interests in Support of Petitioners at 14, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), *available at* http://supreme.lp.findlaw.com/supreme_court/briefs/05-1120/05-1120.mer.ami.oceanconserv.pdf (citing INTERGOVERNMENTAL PLAN ON CLIMATE CHANGE, CLIMATE CHANGE 2001: THE SCIENTIFIC BASIS (J.T. Houghton et al. eds, 2001), *available at* http://www.ipcc.ch/ipccreports/tar/wg1; Richard B. Alley et al., *Ice-Sheet and Sea-Level Changes*, 310 SCI. 456, 456–60 (2005)).

28. *Id.* at 19 (citing DAN CAYAN ET AL., PROJECTING FUTURE SEA LEVEL 18 (2006), *available at* http://www.energy.ca.gov/2005publications/CEC-500-2005-202/CEC-500-2005-202-SF.pdf).

level.[29] And "[f]or the [eighty-five] coastal counties from Massachusetts to Virginia, approximately [1,000] square miles of land area lies below [three] feet."[30]

Without question, the factual statements and references in these "uncontested" affidavits and amicus briefs from a sharply divided Supreme Court decision will not be the final word on the subject. Some Supreme Court Justices[31] and District of Columbia judges[32] have made it clear that they are uncomfortable with sea level rise and the degree of uncertainty associated with it, sharing Chief Justice Roberts' dissenting views.[33] Nevertheless, the majority opinion in *Massachusetts v. EPA* establishes a

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29. *Id.* (citing James G. Titus & Charlie Richman, *Maps of Lands Vulnerable to Sea Level Rise: Modeled Elevations Along the US Atlantic and Gulf Coasts*, 18 CLIM. RES. 205, 205–28 (2001)).

30. *Id.* (citing Shuang-Ye Wu, et al., *Potential Impacts of Sea-Level Rise on the Mid- and Upper-Atlantic Region of the United States*, 95 CLIMATIC CHANGE 121 (2008)).

31. In *American Electric Power Co v. Connecticut*, 131 S. Ct. 2527, 2535 (2011), four members of the Supreme Court would have held "that at least some plaintiffs have Article III standing under *Massachusetts*, which permitted a [s]tate to challenge EPA's refusal to regulate greenhouse gas emissions . . . and, further, that no other threshold obstacle bars review." However, "[f]our members of the Court, adhering to a dissenting opinion in *Massachusetts*, or regarding that decision as distinguishable, would [have held]that none of the plaintiffs have Article III standing. [The Court]therefore affirm[ed], by an equally divided Court, the Second Circuit's exercise of jurisdiction and proceed[ed] to the merits." *Id.* (internal citations omitted).

32. In a dissent to an en banc opinion in *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 U.S. App. LEXIS 25997 (D.C. Cir. Dec. 20, 2012), Judge Brown was highly critical of the Supreme Court's reasoning and the use of sea level rise as a basis for the standing of Massachusetts to sue EPA:

> Bound as I am by *Massachusetts*, I reluctantly concur with the Panel's determination that EPA may regulate GHGs in tailpipe emissions. But I do not choose to go quietly. Because the most significant regulations of recent memory rest on the shakiest of foundations, Part I of this statement engages *Massachusetts*'s interpretive shortcomings in the hope that either Court or Congress will restore order to the CAA.
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> The Supreme Court found standing on the basis of an estimated rise in sea level of 20 to 70 centimeters by the year 2100—a prediction based almost entirely on conjecture. Is it any more speculative to say that specific projections of billions of dollars in actual regulatory costs would not suffice to compel Congress to act?

Id. at *30, *60–61 (citations omitted).

33. *Id.* at *60–61 (stating that "[t]he Supreme Court found standing on the basis of an estimated rise in sea level of 20 to 70 centimeters by the year 2100—a prediction based almost entirely on conjecture" (internal citation omitted)); Krottner v. Starbucks Corp., No. C09-0216RAJ, 2009 U.S. Dist. LEXIS 130634, at *12 n.1 (W.D. Wash. Aug. 14, 2009) (citing Massachusetts v. EPA, 549 U.S. 497, 526 (2007) (majority) (discussing that "[i]n other cases, however, the Court has found standing to address speculative future injuries")).

critical starting point: sea level rise is real, has been recognized by the Supreme Court as injurious, and has real consequences.

Based on the duty of competence and the duty of candor toward the tribunal (as discussed further below), "lawyers must disclose controlling precedent, even when adverse."[34] In other words, as an ethical matter, lawyers must address *Massachusetts v. EPA* in any debate over sea level rise. For example, in a 2013 petition for certiorari *opposing* the merits of EPA's use of the Clean Air Act to regulate carbon and climate change, the state of Texas acknowledged the factual and legal reality of sea level rise:

> In all events, a State need not provide empirical proof of the harms from global climate change after *Massachusetts*, which holds as matter of Article III standing law that "the harms associated with climate change are serious and well regarded," and cites with approval a National Research Council Report that "identifies a number of environmental changes that have already inflicted significant harms" including rising sea levels. Just as the prospect of losses to Massachusetts's coastline caused by global warming was sufficient to afford Massachusetts standing, the prospect of such losses occurring in Texas is equally sufficient to afford standing. And having accepted as true the global-warming theory and rising sea levels as a consequence, one need only note that Texas too has abundant coastline at risk.[35]

While Texas has accepted at least a degree of sea level rise, other sea level rise deniers simply do not. However, at least one federal court, after hearing the evidence from the deniers, still accepted the notion that sea level rise is accelerating. In *Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*,[36] automobile industry representatives and other manufacturers opposed Vermont's efforts to establish greenhouse gas limits. Dr. James

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34. ABA Rule 3.3 requires candor to the tribunal and states that a "lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2013).

35. Petition for a Writ of Certiorari at 8, 24–25, *Texas v. EPA*, https://www.oag.state.tx.us/newspubs/releases/2013/041913_texas_v_epa.pdf (U.S. Apr. 19, 2013) (No. 12-1269) (citations omitted) (appealing *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2013), regarding the EPA Tailoring Rule, 75 Fed. Reg. 31,514, because the "numerical thresholds are set far too low to accommodate rational regulation of carbon dioxide emissions").

36. 508 F. Supp. 2d 295 (D. Vt. 2007).

Hansen, an accomplished space scientist from NASA's Goddard Institute for Space Studies and Columbia University, testified that greenhouse gas (GHG) emissions were causing the planet to approach a "tipping point" and "it is virtually certain that such a large-scale rise will occur if GHG emissions continue to increase."[37] The automobile industry argued that Dr. Hansen's models and testimony "[had] no known error rate and his hypothesis has not been, and cannot be, tested" and further claimed that "his projections regarding the tipping point and sea level rise [found] no objective support in the scientific literature."[38]

The district court disagreed. Importantly, the trial court in *Green Mountain Chrysler* applied careful judicial scrutiny to the climate science based on relevant evidentiary rules and Supreme Court caselaw, finding Dr. Hansen's testimony sufficient.[39] The opinion discusses, at length, the substantial amount of scientific evidence supporting the judicial opinions on the subject.[40] Citing

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37. *Id.* at 314–15 ("Hansen pointed to evidence in the paleoclimate record for such abrupt climate changes. Huge changes, on the scale of one hundred meters of sea level rise, have frequently taken place over the course of only a few thousand years. There are multiple instances in which sea level has risen several meters per century, in response to smaller forcings than those currently underway. Based on this record, Hansen's opinion is that the time scale of the response of an ice sheet depends on the time scale of a forcing. The scale of the GHG forcing currently underway shows that it is virtually certain that such a large-scale rise will occur if GHG emissions continue to increase." (internal citations omitted)).

38. *Green Mt. Chrysler*, 508 F. Supp. 2d at 316.

39. Rule 702 of the Federal Rules of Evidence provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

In one of the preeminent cases discussing that rule, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993), the Supreme Court explained that the party proffering expert testimony has the burden of establishing its admissibility "by a preponderance of proof." *Id.* In addition, *Daubert* set forth a nonexclusive list of four considerations that may bear on whether a theory or technique has sufficient scientific validity to constitute reliable evidence: (1) "whether it can be (and has been) tested"; (2) "whether [it] has been subjected to peer review and publication"; (3) as to a scientific technique, its "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation"; and (4) "widespread acceptance." *Id.* at 593–94.

40. *Green Mt. Chrysler*, 508 F. Supp. 2d at 316–17 ("Hansen's testimony is based on sufficient facts and data and reliable methods, applied reliably to the facts. Hansen cited

the evidence, and despite the uncertainty, the court held that Dr. Hansen's opinions could not be declared unreliable, stating the following:

> As to sea level rise, Hansen acknowledges that no existing mathematical or scientific model can predict the sea level rise that will result from ice sheet disintegration, when it will occur, or the exact sea level rise it will cause. Under these circumstances, Hansen's use of his expertise to make a prediction based on climate history is not an unreasonable choice of methodology. . . . The lack of a model to address ice sheet disintegration does not mean that evidence on that point is de facto unreliable.[41]

The opinion of a single judge in a United States District Court, of course, offers merely persuasive authority on the subject.[42] Also, despite the judicial acceptance of the evidence, Dr. Hansen's testimony is viewed by some as an outlier voice on climate change.[43] Nevertheless, *Green Mountain Chrysler* dem-

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abundant data in support of his theories regarding climate change, including historical data gathered from a number of sources including measured temperatures, ice cores and ocean cores, as well as modeling results. He also cited substantial data regarding the likelihood of ice sheet disintegration, including satellite imagery and the GRACE satellite's gravitational field data showing recent losses of mass in Greenland and Antarctica, increases in ice quakes in Greenland, recent accelerations in ice streams flowing off Greenland, and historical data on sea level rise at other warm periods in paleoclimate history. [As noted in the motion to exclude Hansen's testimony], historical data is not a perfect predictor of what will happen in our current climate. The unprecedented nature of current human-made forcings means that history is not a perfect guide. However, that the situation is unprecedented does not mean that scientists may not testify reliably as to global warming's likely effects.").

41. *Id.* at 317 (citations omitted).

42. The decision of a United States district court has precedential value only within the court's territorial jurisdiction, and is not binding on other federal courts. State courts are not bound by United States district court decisions on federal law, but such rulings are entitled to "substantial deference." Yee v. City of Escondido, 224 Cal. App. 3d 1349, 1351 (1990). Federal court decisions on state law, however, are not binding on state courts at all. Bodell v. Walbrook Ins. Co., 119 F.3d 1411, 1422 (9th Cir. 1997) (Kozinski, J., dissenting) ("The good thing when a federal court misapplies state law is that its opinion can be ignored by the state courts."); Qualified Patients Ass'n v. City of Anaheim, 187 Cal. App. 4th 734, 764 (2010). Also, pursuant to the Federal Rules of Appellate Procedure, citations to the opinion cannot be restricted in the federal court system. FED. R. APP. P. 32.1(a) ("A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like; and (ii) issued on or after January 1, 2007.").

43. Patrick J. Michaels & Paul C. "Chip" Knappenberger, *Current Wisdom: Hansen's Extreme Sea Level Rise Projections Drowning in Hubris*, CATO INSTITUTE (May 29,

onstrates that the science associated with sea level rise, even when *worst case* projections are involved, has withstood judicial scrutiny.

Many other courts, however, have recognized the legitimate global concerns related to sea level rise. The District of Columbia Circuit Court, hearing a direct challenge to EPA's conclusions on sea level rise, held that "the limited inaccurate information developed from the gray literature does not appear sufficient to undermine the substantial overall evidentiary support" for EPA's conclusions.[44] Numerous other federal circuit court cases have validated concerns related to sea level rise,[45] in cases related to

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2013, 12:16 PM), http://www.cato.org/blog/current-wisdom-hansens-extreme-sea-level-rise-projections-drowning-hubris.

44. Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. 2012).

45. Sea level rise has also been prominently debated in other federal circuit court cases, which repeatedly accept the principle of accelerating sea level rise. Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 523 (9th Cir. 2007) (reviewing the administrative record and the Intergovernmental Panel on Climate Change report and stating that "[t]he average earth surface temperature has increased by about 0.6 degree Celsius since the late [nineteenth] century, snow and ice cover have decreased about [ten] percent since the late 1960s, and global average sea level has risen between [ten] to [twenty] [centimeters] during the [twentieth] century" and holding that the National Highway Traffic Safety Administration had a duty under the National Environmental Policy Act to assess the environmental impacts, including the impact on climate change, of its rule governing corporate average fuel economy (CAFE) standards for sport utility vehicles, minivans, and pickup trucks (citations omitted)); Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv., 460 F.3d 1125, 1161 n.10 (9th Cir. 2006) ("Uncertainty as to the accuracy and adequacy of the model is compounded by the impacts of climate change on the Pacific Ocean and Columbia River—how will now-certain rising of sea level impact salinity of the estuarine lower Columbia River? We don't know because the Corps has not considered this significant factor."); City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478, 483 (D.C. Cir. 1990), *overruled on other grounds by* Fla. Audubon Soc'y v. Bentsen, 94 F.3d 658, 669 (D.C. Cir. 1996) (stating that the Natural Resources Defense Council argued that "increase in fossil fuel combustion . . . will . . . lead to a global increase in temperatures, causing a rise in sea level and a decrease in snow cover that would damage the shoreline, forests, and agriculture of California" used by NRDC members, and the "'catastrophic and permanent' change in the global climate would . . . cause a two-foot rise in the sea level, thereby destroying 80% of United States coastal wetlands, forcing salt water into coastal drinking water supplies, and severely damaging shorelines and shoreline-related industries"), *cited in* Citizens for Responsible Equitable Envtl. Dev. v. City of San Diego, 196 Cal. App. 4th 515, 531 (2011).

Although reversed on legal grounds by the United States Supreme Court, the Second Circuit has also acknowledged sea level rise. In *Connecticut v. American Electric Power Co.*, 582 F.3d 309, 316 (2d Cir. 2009), a nuisance case by eight states against multiple power companies seeking "'abatement of defendants' ongoing contributions to a public nuisance," the court accepted a statement that sea level rise caused by global warming will "permanently inundate some low-lying property along coasts and tidal rivers, including property that Plaintiffs own or on which they hold conservation easements" as sufficient showing of future injury for purposes of standing. *Id.* at 316, 342,

Louisiana wetlands and Hurricane Katrina,[46] and in various state court cases.[47] But at a minimum, and even if none of these other state or federal cases are binding on a particular court, based on the ethical duty to disclose adverse precedent from a controlling jurisdiction, lawyers do have a duty to respect and discuss the ruling of *Massachusetts v. EPA* in any courts where a sea level rise dispute emerges.[48]

B. Sea Level Rise Statutes and Orders

Caselaw aside, some lawyers might also be surprised to realize the extent to which statutes openly acknowledge the risks and consequences of global sea level rise. In fact, nearly thirty years ago, the United States Congress spoke to the issue in Section 1102 of the Global Climate Protection Act of 1987, in which Congress found that

> (2) By early in the next century, an increase in Earth temperature could—
>
> (A) so alter global weather patterns as to have an effect on existing agricultural production and

rev'd, Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (rejecting argument that federal common law allowed claim until EPA acted on GHG emissions).

46. The existence of sea level rise, and its role as a contributing factor to the flood damages caused by Hurricane Katrina, were the subject of another series of federal cases. *See, e.g.*, Robinson v. United States, 696 F.3d 436, 448–49 (5th Cir. 2012); Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009) *vacated*, 598 F.3d 208 (5th Cir. 2010), *and appeal dismissed*, 607 F.3d 1049 (5th Cir. 2010); St. Bernard Parish v. United States, 88 Fed. Cl. 528, 530 (Fed. Cl. 2009).

47. State courts have accepted the notion of sea level rise as well. *See, e.g.*, Ballona Wetlands Land Trust v. City of L.A., 201 Cal. App. 4th 455, 475–76 (2011) (upholding a draft revised Environmental Impact Review, rejecting comments demanding specific analysis of the impact of sea level rise on a project site, and accepting the explanation by a professional engineer stating "that more reliable estimates of sea level rise, including an estimate by the Intergovernmental Panel on Climate Change, suggested that the project would not be subject to inundation as a result of sea level rise resulting from climate change"); Gove v. Zoning Bd. of Appeals of Chatham, 831 N.E.2d 865, 868–69, 871 (Mass. 2005) (denying takings claim and recognizing reasonableness of land restrictions for a conservancy district, the purposes of which were "maintaining the ground water supply, protecting coastal areas, protecting public health and safety, [and] reducing the risk to people and property from 'extreme high tides and the rising sea level'").

48. State courts applying federal law are bound by decisions of the United States Supreme Court. Elliott v. Albright, 209 Cal. App. 3d 1028, 1034 (1989). And pursuant to ABA Model Rule 3.3, lawyers must disclose "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel."

> on the habitability of large portions of the Earth; and
>
> (B) cause thermal expansion of the oceans and partial melting of the polar ice caps and glaciers, resulting in rising sea levels.[49]

Some states also have statutory and regulatory provisions acknowledging the potential consequences of or the need to otherwise address sea level rise. Connecticut,[50] Massachusetts,[51] Louisiana,[52] Rhode Island,[53] and Washington[54] all have explicit

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49. Global Climate Protection Act, Pub. L. No. 100-204, § 1102, 101 Stat. 1407, 1408 (1987).

50. In 2012, the governor of Connecticut signed "An Act Concerning the Coastal Management Act and Shoreline Flood and Erosion Control Structures," which established the policy of considering the potential impact of sea-level rise in the planning process for coastal developments. Conn. Public Act No. 12-101, § 1(a)(5) (2012), *available at* http://www.cga.ct.gov/2012/ACT/Pa/pdf/2012PA-00101-R00SB-00376-PA.pdf. Furthermore, the Act requires that any revision made to the general statutes after October 1, 2012 take into consideration the risks associated with increased coastal erosion caused by a rise in sea level. *Id.* § 9(h).

51. The Massachusetts Environmental Policy Act authorizes state entities to "consider reasonably foreseeable climate change impacts, including additional greenhouse gas emissions, and effects, such as predicted sea level rise." MASS. GEN. LAWS ch. 30, § 61 (2014), *cited in* Ten Persons of the Commonwealth v. Fellsway Dev. LLC, 951 N.E.2d 648, 651 (Mass. 2011). Other Massachusetts Department of Environmental Protection regulations require new coastal buildings to "incorporate projected sea level rise during the design life of the buildings; at a minimum, such projections shall be based on historical rates of increase in sea level in New England coastal areas." 310 MASS. CODE REGS. § 9.37(2)(b)(2) (2014).

52. The 2012 *Louisiana's Comprehensive Master Plan for a Sustainable Coast*—which was approved unanimously by the legislature—provides sea level rise as one factor to be considered in the state's coastal investments for the next fifty years. COASTAL PROT. & RESTORATION AUTH. OF LA., LOUISIANA'S COMPREHENSIVE MASTER PLAN FOR A SUSTAINABLE COAST 84 (2012), *available at* http://www.lacpra.org/assets/docs/2012%20Master%20Plan/Final%20Plan/2012%20Coastal%20Master%20Plan.pdf. The plan also notes that newer sea level rise projections will be factored into future project planning and design. *Id.* While state law currently has no requirement for considering sea level rise in project planning and design, the Coastal Protection and Restoration Authority (CPRA) projects account for sea level rise as a matter of practice because of the significant rate of sea level rise. *Id.* In addition, after the 2005 hurricane season, the Louisiana legislature restructured the state's Wetland Conservation and Restoration Authority to create the CPRA within the office of the governor. Coastal Prot. & Restoration Auth., *History*, COASTAL.LA.GOV, http://coastal.la.gov/about/history/ (last visited Feb. 20, 2015). The primary objective of the CPRA is to develop and implement comprehensive coastal protection plans. Coastal Prot. & Restoration Auth., *Master Plan Overview*, COASTAL.LA.GOV, http://coastal.la.gov/a-common-vision/master-plan/ (last visited Feb. 20, 2015). In 2008, Governor Bobby Jindal issued an executive order requiring all state agencies to "administer their regulatory practices, programs, contracts, grants, and all other functions" in a way that is consistent with the state's master plan, if possible. La. Exec. Order No. BJ 2008-7 (Jan. 23, 2008), *available at* dnr.louisiana.gov/assets/docs/conservation/groundwater/Appendix_B.pdf.

statutes requiring planning and adaption measures. California, Maryland, New York, and Washington have executive orders and task forces requiring similar planning efforts.[55] Without mandat-

53. In Rhode Island's Climate Risk Reduction Act of 2010, the legislative findings state that "[c]limate change impacts have already arrived in Rhode Island. . . . Droughts are becoming longer and more frequent, storms cause worse flooding, and the sea level is measurably rising over eight inches . . . since 1930 at an accelerated rate." R.I. GEN. LAWS § 23-84-2(1) (2010). As a result, the state is planning for three types of increasing risks:

> (i) Rising temperatures (which put stress on human health and ecosystems); (ii) More extreme weather (bringing more frequent heavy thunderstorms and flooding, heat waves and more intense coastal storms and hurricanes); and (iii) Flooding and damage to homes, businesses, public infrastructure and coastal habitats along the state's over four hundred (400) miles of coastline by storm surges and rising sea levels.

Id. § 23-84-2(3).

54. In Washington, the legislature found:

> Washington is especially vulnerable to climate change because of the state's dependence on snow pack for summer streamflows and because the expected rise in sea levels threatens our coastal communities. Extreme weather, a warming Pacific Northwest, reduced snow pack, and sea level rise are four major ways that climate change is disrupting Washington's economy, environment, and communities.

WASH. REV. CODE § 80.80.005(1)(a) (2014). Concurrently, the law also required the state to limit emissions of greenhouse gases by reducing emissions. *Id.* § 70.235.020(1)(a) (2014).

55. In 2008, the governor of California issued Executive Order S-13-08, which called on state agencies to develop California's first strategy to identify and prepare for expected climate impacts, and specifically called for statewide consistency in planning for sea level rise. Cal. Exec. Order No. S-13-08 (Nov. 14, 2008), *available at* http://www.waterplan.water.ca.gov/docs/misc/EO_S-13-08.pdf. Senate Bill 461, which is currently in committee, would create the Coastal Adaptation Fund to support state and local efforts to prepare for sea level rise. The Bill's text states:

> The Coastal Adaptation Fund is hereby created in the State Treasury. Moneys in the fund may be expended, in an amount not to exceed ten million dollars ($10,000,000), by the Ocean Protection Council, the Department of Fish and Wildlife, the California Coastal Commission, the State Coastal Conservancy, the State Lands Commission, and the San Francisco Bay Conservation and Development Commission. The moneys are subject to appropriation by the Legislature in the annual Budget Act, to fund activities that prepare, plan, and implement measures, based upon the best available scientific information, that are designed to address and adapt to sea level rise and coastal climate change.

S. 461, 2013–2014 Reg. Sess. § 2(a)(1) (Cal. 2013), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0451-0500/sb_461_bill_20130624_amended_asm_v94.pdf.

Maryland's governor issued an executive order establishing a Climate Change Commission to advise the governor and legislature on matters related to climate change. Md. Exec. Order No. 01.01.2007.07 (Apr. 20, 2007), *available at* http://www.governor.maryland.gov/executiveorders/01.07.07ClimateChange.pdf.

In 2007, the state of New York established a task force on sea level rise. N.Y. Dep't of Envtl. Conservation, *Sea Level Rise Task Force: Assessing Risks and Responses for New York*, ENERGY & CLIMATE, http://www.dec.ny.gov/energy/75794.html (last visited Feb. 20, 2015).

ing action, legislative documents and regulations in New Jersey, South Carolina, and Virginia expressly acknowledge the effects of sea level rise on the coastlines.[56] And even in North Carolina, where the subject of sea level rise has proven politically divisive, the legislature authorized an effort to study and better quantify sea level rise.[57]

Florida is a special case. In the Sunshine State, the political leadership passed climate change laws in 2008, yet the annual report by the state entity implementing the laws barely mentions

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Washington's governor signed an executive order in May 2009 that requires the state to, amongst other initiatives, prepare for rising sea levels and the risk to water supplies caused by climate change impacts. Wash. Exec. Order No. 09-05 (May 21, 2009), *available at* http://www.governor.wa.gov/office/execorders/eoarchive/eo_09-05.pdf. Additionally, the executive order gives direction from the governor to the Director of the Department of Ecology to "evaluate the potential impacts of sea level rise on the state's shoreline areas, including the potential increases in storm surge and coastal flooding, increased erosion, and loss of habitat and ecosystems, and develop recommendations for addressing these impacts." *Id.*

56. In 2007, the New Jersey Global Warming Response Act (GWRA) adopted statewide limits on greenhouse gas emissions. N.J. P.L. 2007, Laws c.112 (2007), *available at* http://www.nj.gov/globalwarming/home/documents/pdf/nj_global_warming_response_act.pdf. The GWRA calls for a reduction in greenhouse gas emissions to 1990 levels by 2020. *Id.* § 2. As part of the GWRA, in December 2009, the state released *Meeting New Jersey's 2020 Greenhouse Gas Limit: New Jersey's Global Warming Response Act Recommendations Report*, which identifies sea level rise due to climate change as a major concern for New Jersey. N.J. DEP'T OF ENVTL. PROT., MEETING NEW JERSEY'S 2020 GREENHOUSE GAS LIMIT: NEW JERSEY'S GLOBAL WARMING RESPONSE ACT RECOMMENDATIONS REPORT 18 (2009), *available at* http://www.nj.gov/globalwarming/home/documents/pdf/njgwra_final_report_dec2009.pdf. As required under the GWRA, "this report specifically provides the [g]overnor, [t]reasurer, and the [s]tate [l]egislature with recommendations for achieving the 2020 statewide [greenhouse gas] limit." *Id.* at 19–20.

South Carolina does not have specific laws or regulations that require policymakers to take sea level rise into account in land use and planning; however, state regulations identify sea level rise as a cause of coastal erosion. South Carolina Code of Regulations 30-1, Section C(4), notes that sea level rise coupled with a "lack of comprehensive beach management planning" and "poorly planned oceanfront development . . . is ultimately going to force those who have built too near the beachfront to retreat."

Identifying sea level rise as a threat to coastal Virginia, the Virginia legislature passed House Joint Resolution No. 50 and Senate Joint Resolution No. 76 in 2012. H.J. Res. 50, 2012 Sess. (Va. 2012); S.J. Res. 76, 2012 Sess. (Va. 2012). The resolutions direct the Virginia Institute of Marine Science to develop and "offer specific recommendations for the detailed investigation of preferred options for adapting to relative sea-level rise" by the start of the 2013 regular legislative session. H.J. Res. 50; S.J. Res. 76.

57. The law in North Carolina, for the moment, prohibits the state from adopting a rate of sea level change for regulatory purposes, instead creating a process for the Coastal Resources Commission and the Division of Coastal Management of the Department of Environment and Natural Resources to define rates of sea level change for regulatory purposes after July 1, 2016. H.R. 819, 2011 Sess. § 2.(a)–(b) (N.C. 2012).

the term "climate change."[58] In 2012, in a piece of legislation whose very title—Florida Climate Protection Act—is an abject lie, lawmakers repealed the state's effort to address greenhouse gas emissions.[59] The terms "climate change" and "sea level rise" do not even appear in the entirety of Chapter 373, Florida Statutes—the portion of Florida law dedicated to water resources.

Yet elsewhere throughout Florida law, the risks of climate change are unquestionably acknowledged. The legislature has found that "the state's energy security can be increased by lessening dependence on foreign oil" and "that the impacts of global climate change can be reduced through the reduction of greenhouse gas emissions."[60] The grant programs of the Florida Energy and Climate Protection Act are intended to stimulate capital investment in renewable energy technologies to help combat or limit climate change impacts[61] and to assist rural and undeveloped areas of the state with the financial burdens of addressing climate change impacts.[62] State land acquisition efforts are required to address the challenges of global climate change by providing opportunities to sequester carbon and to "otherwise mitigate and help adapt to the effects of sea-level rise."[63] State government can include climate change in the

58. In a clear showing of state priorities, the Florida Energy and Climate Protection Act is now being implemented by the Florida Department of Agriculture and Consumer Services (FDACS). FLA. STAT. § 377.6015(2)(f) (2014). Indeed, FDACS is charged by law to "[a]dvocate for energy and climate change issues and provide educational outreach and technical assistance in cooperation with the state's academic institutions." *Id.* § 377.6015(2)(g). Yet remarkably, the 2013 annual report published by the FDACS Office of Energy contains *one* reference to "climate change"—only because it was in the position title of a guest speaker—and contains zero references to "sea level" or "adaptation." FLA. DEP'T OF AGRIC. & CONSUMER SERVS., OFFICE OF ENERGY: 2013 ANNUAL REPORT 16 (2013), *available at* http://freshfromflorida.s3.amazonaws.com/Media%2FFiles%2FEnergy-Files2%2FFINAL+2013+Annual+Report.pdf. Moreover, to the extent that the 2013 annual report includes any discussion of climate-related policies, it focuses on actions being done by local governments or the private sector, or on policy proposals by the Commissioner of Agriculture that did not become law. *See id.* Equally noteworthy is the failure of the Florida Department of Environmental Protection web page to even mention climate change, sea level rise, or adaption, on its front page. Fla. Dep't of Envtl. Prot., *Florida Department of Environmental Protection*, DEP.STATE.FL.US, http://www.dep.state.fl.us/ (last visited on Feb. 20, 2015).

59. Florida's efforts to implement climate change protections through a Department of Environmental Protection regulatory program were repealed in 2012. H.R. 4001, 2012 Leg., Reg. Sess. (Fla. 2012).

60. FLA. STAT. § 377.601(1).

61. *Id.* § 377.802.

62. *Id.* § 377.808(2).

63. *Id.* § 259.105(17)(d).

comprehensive plan,[64] and local governments can define an "'[a]daptation action area'" to identify "one or more areas that experience coastal flooding due to extreme high tides and storm surge and that are vulnerable to the related impacts of rising sea levels for the purpose of prioritizing funding for infrastructure needs and adaptation planning."[65] And a Florida Oceans and Coastal Council—which has been inactive since 2012—was charged to explore ocean-based renewable energy technologies and climate-change-related impacts to Florida's coastal area.[66]

The obfuscation and forked tongue of Florida's lawmakers and leadership make a lawyer's life challenging. Nevertheless, to the extent that a client engages in sea level rise denial, the lawyer must ensure that the client is not ignorant of the full body of law. Indeed, lawyers have an absolute duty to advise their clients of the current state of the law, whether the clients agree with it or not, as the unhesitating ABA Model Rules explain:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.[67]

In sum, even the sea level rise deniers should be advised as to the letter of the law.

III. THE DUTY TO ADVISE THE CLIENT

When rendering competent advice, lawyers can and should go beyond the law. The realities of niche lawyering mean that lawyers often provide their clients with nonlegal expertise, too. The ABA rule on the duty as advisor reinforces the distinction between the lawyer's advisory and advocacy roles and empowers

64. *Id.* § 186.007(3).
65. *Id.* § 163.3164(1).
66. *Id.* § 161.74(2)(k).
67. MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. 1 (2013).

lawyers to advise clients on *nonlegal* matters that are otherwise related to the legal representation. It states:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[68]

Sea level rise, as explained below, involves all of these nonlegal considerations. Lawyers—especially environmental lawyers engaged in an interdisciplinary field that necessitates awareness and understanding of nonlegal matters[69]—may have a professional duty to share their unique knowledge with their clients, as the American Legal Institute's Restatement (Third) acknowledges in its discussion of the "Duty to Inform and Consult with a Client":

> [T]he lawyer typically has knowledge and skill that the client lacks and often makes or implements decisions in the client's absence. The representation often can attain its end only if client and lawyer share their information and their views about what should be done. Articulate and sophisticated clients typically call for frequent communication with their lawyers when a matter is important to them. . . . Discussion may cause both participants to change their beliefs about what should be done. In any event, the client may wish to take into account the lawyer's estimate of the probable results of a course of action.[70]

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68. *Id.* R 2.1. For a detailed discussion of the duty to advise, its history in the rules governing the legal profession, and its application to the practice of environmental law, see Keith W. Rizzardi, *The Duty to Advise the Lorax: Environmental Advocacy and the Risk of Reform*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 25 (2012).

69. Rizzardi, *supra* note 68, at 26–27 (footnotes omitted) ("Environmental law can be a daunting, interdisciplinary field in which complex statutory and regulatory schemes govern equally complex scientific matters, requiring the lawyers to be negotiators, litigators, economists, business visionaries, crisis managers, and even media managers.").

70. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 20 cmt. b (2000). *See also*, Rizzardi, *supra* note 68, at 66–67 (explaining that to fulfill their duty as advisors and to protect their clients from harm, environmental lawyers must be sure to assess their clients' sophistication, objectives, risk tolerance, and advocacy tone).

For these reasons, lawyers should not remain ignorant of the essential factual, moral, economic, social, and political factors associated with sea level rise, some of which are discussed below.

A. Science and Facts

The existence of at least some degree of sea level rise, the recent acceleration of the rate of sea level rise, and the adverse impact of sea level rise are facts that cannot be denied. Scientists and lawyers will continue to reasonably disagree about the amount of and imminence of sea level rise and its rate of acceleration.[71] The degree of acceptable risks and the necessity of action may also be worthy of debate. Ethical lawyers will do their job by learning and disclosing the whole truth.

1. The Intergovernmental Panel on Climate Change

As noted above, to adhere to an ethical duty of competence, a lawyer's handling of a particular matter necessitates "inquiry into and analysis of the factual and legal elements of the problem."[72] For lawyers involved in climate issues, the report by the Nobel Prize-winning Intergovernmental Panel on Climate Change (IPCC), which is a multinational scientific body organized under the auspices of the United Nations,[73] is essential factual background reading. The document synthesizes years of historic facts based on actual data and regional fluctuations. Although some aspects of the report have been criticized, the IPCC report methodically separates facts like these from opinions, and many members of the scientific community have rejected the critiques

71. As EPA explained in its Endangerment Finding, "[i]t is not clear whether the increasing rate of sea level rise is a reflection of short-term variability or an increase in the longer-term trend. Nearly all of the Atlantic Ocean shows sea level rise during the last [fifty] years with the rate of rise reaching a maximum (over [two millimeters] per year) in a band along the [United States] east coast running east-northeast." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,518 (Dec. 15, 2009).

72. MODEL RULES OF PROF'L CONDUCT R 1.1 cmt. 5.

73. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, UNDERSTANDING CLIMATE CHANGE: 22 YEARS OF IPCC ASSESSMENT (2010) (explaining the structure of the IPCC and summarizing the reports and progress made since its inception). Over time, the IPCC has issued four reports (1990, 1995, 2001, and 2007), and "[t]housands of scientists and experts from all over the world contribute to the preparation of IPCC reports as authors, contributors, review editors and expert reviewers; none of them paid by the IPCC." *Id.* at 2, 5–7.

as minor distractions.[74] Recognizing these uncertainties of the planetary climate, the IPCC acknowledges that 125,000 years ago, sea level was four to six meters higher than at present,[75] but that the global mean sea level rose at an average rate of only about 1.7 ± 0.5 millimeters each year during the twentieth century.[76] Earth, however, has undergone wild shifts in temperature and sea level over the course of its geologic history. At its peak ocean levels, Earth was eighteen degrees warmer, and polar ice caps in the Earth's ocean were comparable to a forty-seven story building, while the current levels of the ocean rest at approximately the thirtieth floor.[77]

Analyzing and explaining vast amounts of information, the IPCC report offers a data-based account of the subject of sea level rise, addressing thermal expansion of the ocean,[78] changes in salinity and ocean density,[79] glacial and ice cap melting,[80] and the effects on surface temperatures and precipitation,[81] all while attempting to account for the dynamic climate system.[82] In part, based on "Direct Observations of Recent Climate Change," the

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74. For example, an open letter from United States scientists states as follows:

> Many in the popular press and other media, as well as some in the halls of Congress, are seizing on a few errors that have been found in the Fourth Assessment Report (AR4) of the Intergovernmental Panel on Climate Change (IPCC) in an attempt to discredit the entire report. None of the handful of misstatements (out of hundreds and hundreds of unchallenged statements) remotely undermines the conclusion that 'warming of the climate system is unequivocal' and that most of the observed increase in global average temperatures since the mid-twentieth century is very likely due to observed increase in anthropogenic greenhouse gas concentrations.

Open Letter from Gary W. Yohe, Wesleyan Univ. & Yale Univ. Sch. of Forestry & Envtl. Studies, et al., to Stakeholders, *An Open Letter from Scientists in the United States on the Intergovernmental Panel on Climate Change and Errors Contained in the Fourth Assessment Report: Climate Change 2007* (May 12, 2010), *available at* https://www.law.upenn.edu/institutes/regulation/papers/YoheOpenLetter.pdf (internal reference omitted).

75. Richard B. Alley et al., *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 1, 9 (Susan Solomon et al. eds., 2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4_wg1_full_report.pdf.

76. Kevin E. Trenberth et al., *Observations: Surface and Atmospheric Climate Change*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 75, at 237, 318.

77. Alley et al., *supra* note 75, at 7–11 (explaining the 612-foot vertical range of sea level movement).

78. Gerald A. Meehl et al., *Global Climate Change Projections*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 75, at 747, 812..

79. Meehl et al., *supra* note 78, at 812–13.

80. *Id.* at 814.

81. *Id.* at 814–15.

82. *Id.* at 815–16.

IPCC concludes that "[w]arming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global average sea level."[83]

This paragraph merely summarized actual data and evidence set forth in the IPCC report.[84] Moreover, when these facts turned specifically to sea level rise, the IPCC report shows, as a factual matter based on actual data, that the ocean is warming, expanding, and rising, and doing so at an accelerating rate.[85]

In 2013, in an updated report specifically addressing sea level rise, the IPCC increased the estimates for sea level rise in this century.[86] Notably, the report concluded that "[i]t is virtually certain that global mean sea level rise will continue beyond 2100, with sea level rise due to thermal expansion to continue for many centuries."[87] The report also emphasized that risks are localized because sea level change will have strong regional patterns.[88]

Critics even warn that these reports are too conservative. John Englander, author of *High Tide on Main Street*, after careful

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83. Alley et al., *supra* note 76, at 5.

84. For example, the IPCC uses data from National Oceanic and Atmospheric Administration (NOAA) spanning more than 150 years from tide stations operating on all United States coasts. Ctr. for Operational Oceanographic Prods. & Servs., *Sea Level Trends*, TIDES AND CURRENTS, http://tidesandcurrents.noaa.gov/sltrends/index.shtml (last updated Oct. 15, 2013). Based on that data, the acceleration of sea level rise is not a projection. Even after accounting for and removing the influences of storm surges, the data shows an upward sea level trend for the entire contiguous United States. *Id.* Much of the nation has experienced one foot or less of sea level rise. *Id.* Data for coastal Louisiana, Texas, and the Mid-Atlantic, however, show sea level rise of one to two feet. *Id.* Sea levels in Alaska are recorded as decreasing; this is partly because of tectonic plate shifting, which is causing the land mass of Alaska to rise. *Id.*

Notably, eleven of the twelve years from 1995–2006 ranked "among the [twelve] warmest years in the instrumental record of global surface temperature (since 1850)." Moreover, data showed that the warming was accelerating, because the warming trend over the prior fifty years (0.13°C [0.10°C to 0.16°C] per decade) was nearly twice that for the prior one hundred years. Alley et al., *supra* note 75, at 5.

85. "Observations since 1961 show that the average temperature of the global ocean has increased to depths of at least 3000 [meters] and that the ocean has been absorbing more than [eighty percent] of the heat added to the climate system. Such warming causes seawater to expand, contributing to sea level rise . . . . Global average sea level rose at an average rate of 1.8 [1.3 to 2.3] [millimeters] per year over 1961 to 2003. The rate was faster over 1993 to 2003: about 3.1 [2.4 to 3.8] [millimeters] per year." Alley et al., *supra* note 75, at 5.

86. John A. Church et al., *Sea Level Change*, *in* CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS, 1137, 1142 (T.F. Stocker et al. eds., 2013), *available at* http://www.climatechange2013.org/ images/report/_WG1AR5_Chapter13_FINAL.pdf.

87. *Id.* at 1140.

88. *Id.*

review of the IPCC scientific protocols and assumptions, argues that IPCC was "misleading to the point of being irresponsible" because the IPCC failed to adequately account for the potentially radical consequences of tipping points; the IPCC report assumes no dramatic changes to the ice conditions in Greenland or Antarctica and wholly ignores the potential impacts of methane.[89] In other words, the reality of sea level rise, and its effects on humanity, may be much, much worse than the IPCC predicts.

2. The United States Government and Military

Years have passed since both the 2007 IPCC report and *Massachusetts v. EPA*. In response to the Supreme Court's dicta, EPA reassessed the facts and issued an "Endangerment Finding" pursuant to the Clean Air Act. The Administrator of EPA found that six well-mixed greenhouse gases in the atmosphere—carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF_6)[90]—collectively "endanger both the public health and the public welfare of current and future generations."[91] To support that conclusion, EPA relied not only on the IPCC but also on major assessments by the United States Global Climate Research Program (USGCRP)[92] and the National Research Council (NRC), as well as approximately eleven thousand public comments not associated with mass-mailing campaigns.[93] And after reviewing all this information, EPA found *sea level rise* to be the most significant concern: "The evidence concerning adverse impacts in the areas of water resources and sea level rise and coastal areas

89. JOHN ENGLANDER, HIGH TIDE ON MAIN STREET (Rev. 2.1, 2014).

90. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,499 (Dec. 15, 2009).

91. *Id.* at 66,496.

92. *See, e.g.*, JILL S. BARON ET AL., PRELIMINARY REVIEW OF ADAPTATION OPTIONS FOR CLIMATE-SENSITIVE ECOSYSTEMS AND RESOURCES (Feb. 28, 2008) (third review draft), *available at* http://www.globalchange.gov/sites/globalchange/files/sap4-4-draft3.pdf; JANET L. GAMBLE ET AL., ANALYSES OF THE EFFECTS OF GLOBAL CHANGE ON HUMAN HEALTH AND WELFARE AND HUMAN SYSTEMS (2008), *available at* http://globalchange.gov/browse/reports/sap-46-analyses-effects-global-change-human-health-and-welfare-and-human-systems; JAMES G. TITUS ET AL., COASTAL SENSITIVITY TO SEA-LEVEL RISE: A FOCUS ON THE MID-ATLANTIC REGION (2009), *available at* http://downloads.globalchange.gov/sap/sap4-1/sap4-1-final-report-all.pdf.

93. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. at 66,497 (discussing sources), 66,500 (discussing public comments).

provides the clearest and strongest support for an endangerment finding, both for current and future generations."[94]

To help understand the scientific disagreement, the United States Army Corps of Engineers (Army Corps or USACE) prepared a 2011 guidance document, using the historic trends as an assumed baseline condition.[95] The Army Corps looked carefully at many of the different scientific documents, and in particular, the documents' calculations of minimum and maximum sea level rise trends and acceleration by 2100. The projections included significant variation. Three scientific documents, as discussed by the Corps, projected minimum sea level rise ranging from 0.6 to 0.8 meters, and maximum sea level rise of 1.8 to 2.0 meters.[96] In contrast, the 2007 IPCC report seems conservative, forecasting a minimum sea level rise of 0.2 meters and a maximum of 0.6 meters.[97] Despite the scientific uncertainty about the rate of sea level rise, the Army Corps guidance reached a clear conclusion, adopting the following premise:

> Global mean sea level (GMSL) has risen over the past century, and the rate of rise will continue and may accelerate in the future. USACE projects need to be planned, designed, constructed, and operated with the understanding that the rate of

94. *Id.* at 66,498 col. 1; *see also id.* at col. 2 ("The most serious potential adverse effects are the increased risk of storm surge and flooding in coastal areas from sea level rise and more intense storms. Observed sea level rise is already increasing the risk of storm surge and flooding in some coastal areas. . . . In addition, coastal areas face other adverse impacts from sea level rise such as land loss due to inundation, erosion, wetland submergence, and habitat loss.").

95. U.S. Army Corp of Eng'rs, *Sea-Level Change Considerations for Civil Works Programs*, DEP'T OF THE ARMY B-2 (Sept. 30, 2011), http://planning.usace.army.mil/toolbox/library/ECs/ EC11652212Nov2011.pdf [hereinafter *DOA Sea-Level Change Consideration*].

96. *Id.* at B-11; *see also* Asbury H. Sallenger, Jr. et al., *Hotspot of Accelerated Sea-Level Rise on the Atlantic Coast of North America*, 2 NATURE CLIMATE CHANGE 884 (2012); Miguel Llanos, *Sea Level Rose 60 Percent Faster Than UN Projections, Study Finds*, NBC NEWS (Nov. 28, 2012, 11:05 AM), http://worldnews.nbcnews.com/_news/2012/11/28/15512957-sea-level-rose-60-percent-faster-than-un-projections-study-finds?lite. "In a peer-reviewed study, the experts said satellite data show sea levels rose by 3.2 millimeters (0.1 inch) a year from 1993 to 2011—[sixty] percent faster than the [two millimeter] annual rise projected by the U.N.'s Intergovernmental Panel on Climate Change for that period." *Id.*

97. *DOA, Sea-Level Change Consideration*, *supra* note 95, at B-11. Indeed, the IPCC Report *is* extremely conservative, and one portion of the document explicitly notes that it does *not* account for changes in melting rates for Antarctic or Greenland ice shelves. Gabriele C. Hegel et al., *Understanding and Attributing Climate Change*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 75, at 663, 707 tbl.9.2.

> rise of GMSL may increase and affect USACE water resource projects in and adjacent to the nation's coastal zone.[98]

A 2010 report by the Navy reached a similar matter-of-fact conclusion, stating that "sea level is rising," and "acknowledg[ing] that climate change is a national security challenge with strategic implications."[99] With that recognition, the Navy recommended an action item of "increasing requirements for earthmoving projects due to sea level rise and erosion."[100] The U.S. Geological Survey also forecasted the future inundation of Pacific Ocean atolls,[101] while concluding that the U.S. Atlantic Coast will be a sea level rise hot spot.[102]

Estimating the precise amount of expected sea level rise over the coming century involves a substantial amount of both judgment and expert opinion. Yet there are still facts. Actual data shows that sea levels are rising. The National Ocean Service simply states, in its Ocean Facts webpages, that "global sea level is now rising at an increased rate," and that it is doing so at "a significantly larger rate than the sea-level rise averaged over the last several thousand years."[103] The National Academy of Science, after declaring global warming to be a "settled fact,"[104] further

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98. *DOA, Sea-Level Change Consideration*, *supra* note 95, at App. C-1.

99. *U.S. Navy Climate Change Roadmap*, TASK FORCE CLIMATE CHANGE/ OCEANOGRAPHER OF THE NAVY 5 (Apr. 2010), http://www.navy.mil/navydata/documents/CCR.pdf (noting that "[s]ea level rise and storm surge will lead to an increased likelihood of inundation of coastal infrastructure").

100. *Id.* at 12.

101. *USGS Sounds Sea-Level Alarm for Pacific*, UNITED PRESS INT'L (Apr. 15, 2013, 9:19 AM), http://www.upi.com/Business_News/Energy-Resources/2013/04/15/USGS-sounds-sea-level-alarm-for-Pacific/UPI-56151366031962/.

102. David Zucchino, *USGS: Sea Level in Atlantic 'Hot Spot' Rising Faster Than World's*, L.A. TIMES (June 25, 2012), http://articles.latimes.com/2012/jun/25/nation/la-na-nn-sea-level-atlantic-20120625.

103. Nat'l Oceanic & Atmospheric Admin., *Is Sea Level Rising?* OCEANSERVICE.NOAA.GOV, http://oceanservice.noaa.gov/facts/sealevel.html (last revised Apr. 10, 2014).

104. PAMELA A. MATSON ET AL., AMERICA'S CLIMATE CHOICES: PANEL ON ADVANCING THE SCIENCE OF CLIMATE CHANGE (2011), *available at* http://www.nap.edu/openbook.php?record_id=12782&page=22 ("Any scientific theory is thus, in principle, subject to being refined or overturned by new observations. In practical terms, however, scientific uncertainties are not all the same. Some scientific conclusions or theories have been so thoroughly examined and tested, and supported by so many independent observations and results, that their likelihood of subsequently being found to be wrong is vanishingly small. Such conclusions and theories are then regarded as settled facts. This is the case for the conclusions that the Earth system is warming and that much of this warming is very likely due to human activities.").

explained that sea level rise, triggered by thermal expansion and melting ice masses, represents an extraordinary planetary risk.[105]

Recognizing the challenges of uncertainty, the U.S. Army Corps of Engineers created procedures to evaluate and adapt to sea level change. Significantly, in a draft 2014 Technical Letter, the nation's water management experts absolutely refused to ignore sea level rise: "The conundrum of the planning process, and any decision support process, is in doing sufficient work to support a decision while avoiding decision paralysis, or, worse, making decisions that ignore important uncertainties."[106] Instead, the Corps emphasized the need for adaptation to sea level rise through projects focused on navigation, coastal storm damage reduction, flood risk reduction, and ecosystems.[107] The Corps noted that the issue demanded an understanding of risks and uncertainties, and necessitated either a precautionary approach, such as picking a risk reducing approach from the outset, or a managed adaptive approach, allowing for repeated interventions over time.[108] Moreover, the Corps emphasized the importance of tipping points and the need for decisions to allow lead time for planning and construction before those critical thresholds were passed.[109]

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105. *Id.* at 44–45. ("Even if GHG concentrations are stabilized, ocean warming and the accompanying sea level rise will continue until the oceans reach a new thermal equilibrium with the atmosphere . . . . For example, if the Greenland ice sheet were to shrink substantially over several decades, a large amount of freshwater would be delivered to key regions of the North Atlantic. This influx of freshwater could alter the ocean structure and influence ocean circulation, with implications for regional and global weather patterns. Compelling evidence has been assembled indicating that rapid freshwater discharges at the end of the last ice age caused abrupt ocean circulation changes, which in turn led to significant impacts on regional climate. The recent ice melting on Greenland and other areas in the Arctic, combined with increased river discharges in the Arctic region (see discussion of precipitation and runoff changes below), may have already led to changes in ocean circulation patterns. However, much work remains to develop confident projections of future ocean circulation changes—and the influence of these changes on regional climate patterns—resulting from ongoing freshwater discharges in the North Atlantic.").

106. Technical Letter No. 1100-2-1 from James C. Dalton, Chief, Eng'g & Constr. Div., Dep't of the Army U.S. Army Corp of Eng'rs, to the Commander, *Procedures to Evaluate Sea Level Change: Impacts, Responses, and Adaptations* at 3-1 (June 30, 2014), *available at* http://www.publications.usace.army.mil/Portals/76/Publications/EngineerTechnicalLetters/ETL_1100-2-1.pdf.

107. *Id.* at 3-3 to 3-8 (summarizing adaptation approaches).

108. *Id.* at 3-9 to 3-13.

109. *Id.* at 3-25.

3. Rijkswaterstaat

The discussion of sea level rise, as a truly global matter, deserves an international perspective, too. The Netherlands offers unquestionable experience and expertise with managing water.[110] In a nation just twice the size of New Jersey, nine million out of seventeen million people live in areas below current sea level, yet the population is protected by dikes and extraordinary water management structures like the man-made coastal dunes, the Oosterscheldekering and Maeslantkering storm surge barriers, and dozens of other historic and important structures and canals.[111]

Like the U.S. Army Corps of Engineers and other American counterparts, Rijkswaterstaat, the governmental entity within the Netherlands Ministry of Infrastructure and Environment, carefully considered the data on climate change and sea level rise.[112] But unlike their United States counterparts, the Dutch are taking much less risk. Choosing a precautionary approach, they are planning for much more sea level rise than either the United States or the IPCC. Accustomed by centuries of living below sea level, the Dutch simply accept the inevitability of glacial melting and thermal expansion of the ocean.[113] According to calculations by researchers, the high-end projections for global sea level are estimated to be up to 1.10 meters (four feet) in 2100 and 3.5 meters (10 feet) in 2200, and those figures continue to be

110. As a result of dramatic flooding of 1953, the Dutch plan for flood events with a probability of one in ten thousand per year. Pier Vellinga, *Exploring High-End Climate Change Scenarios for Flood Protection of the Netherlands*, KNMI9 (2009), http://edepot.wur.nl/191831.

111. *Id.*; *The Keringhuis*, KEREINGHUIS.NL, http://www.keringhuis.nl/index.php?id=37 (last visited Feb. 20, 2015).

112. *See generally* Luitzen Bijlsma, *Water Management in the Netherlands*, RIJKSWATWERSTAAT MINISTRY OF INFRASTRUCTURE & ENV'T (Feb. 2011), http://www.rijkswaterstaat.nl/en/images/Water%20Management%20in%20the%20Netherlands_tcm224-303503.pdf.

113. *Id.* at 65 ("Since the early [twentieth] century, average temperature has risen by approximately 0.74°C. It is highly probable that we also contribute to this rise: burning of fossil fuels, deforestation and certain industrial and agricultural activities lead to an increase in the concentration of greenhouse gases in the atmosphere. Model calculations indicate that the temperature could rise from between 1.1°C to 6.4°C between 1990 and 2100. Increases of more than 2°C will probably be accompanied by substantial changes, because the sea level will also rise significantly, there will be more periods of drought and heat and occasionally extreme precipitation will occur.")

revised upwards.[114] The Dutch, therefore, plan to spend billions of euros to implement additional measures to optimize their flood control systems and to protect themselves from rising seas—on top of the $3 billion *per year* they already spend for water management.[115] The national commitment of the Netherlands to tackle the difficult challenges presented by sea level rise stands in stark contrast to the positions of many United States based leaders who deny or discount its relevance.

B. Morality

Ethically astute lawyers will readily understand and address the essential facts and risk management assessments associated with sea level rise. Yet, some clients will continue to entirely deny sea level rise or insist that inaction is an appropriate response. Even prominent institutional and political leaders may continue to adopt the views they find preferable, rather than accepting the facts they find uncomfortable.[116]

While sea level rise often proves to be too abstract or difficult a concept for social conversation, the consequences of the facts above are real. The change in ocean level will transform our coastal communities. Our shorelines will move inland. Within the lifetime of today's generations, coastal roads and icons will be altered or submerged. This is not just a scientific or factual debate: it is a moral one as well.

The Catholic Church has unequivocally recognized the *moral* dilemma at stake. In 2011, a working group of scientists and lawyers, organized by the Pontifical Academy of Sciences at the Vatican, issued a report concluding that due to human actions, glaciers are melting, seas are rising, and people are at risk. The Church stated:

> Humanity has created the *Anthropocene* era and must live with it. This requires a new awareness of the risks human

114. Vellinga, *supra* note 110, at 13.

115. Michael Kimmelman, *Going with the Flow*, N.Y. TIMES (Feb. 13, 2013), http://www.nytimes.com/2013/02/17/arts/design/flood-control-in-the-netherlands-now-allows-sea-water-in.html.

116. *See, e.g.*, Chris Mooney, *The Science of Why We Don't Believe Science: How Our Brains Fool Us on Climate, Creationism, and the End of the World*, MOTHER JONES (Apr. 18, 2011, 6:00 AM), http://www.motherjones.com/politics/2011/03/denial-science-chris-mooney.

> actions are having on the Earth and its systems, including the mountain glaciers discussed here. It imposes a new duty to reduce these risks. Failure to mitigate climate change will violate our duty to the vulnerable of the Earth, including those dependent on the water supply of mountain glaciers, and those facing rising sea level and stronger storm surges. Our duty includes the duty to help vulnerable communities adapt to changes that cannot be mitigated. All nations must ensure that their actions are strong enough and prompt enough to address the increasing impacts and growing risk of climate change and to avoid catastrophic irreversible consequences.[117]

Similar calls to action have been offered by the representative bodies of the Jewish, Muslim, and Buddhist faiths, too,[118] and by interfaith communities as well.[119] Even from a purely secular perspective, sea level rise raises moral issues of life or death by presenting a substantial threat to public health stemming from the availability of drinking water, the spread of disease by mosquitos or sea dwelling bacteria, and the toxification of coastal environments—all risks likely to be magnified in the poorest coastal environments.[120]

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117. Working Grp. Commissioned by the Pontifical Acad. of Sci., *Fate of Mountain Glaciers in the Anthropocene: A Report by the Working Group Commissioned by the Pontifical Academy of Sciences*, CATHOLICCLIMATECOVENANT.ORG 15 (May 11, 2011), http://catholicclimatecovenant.org/wp-content/uploads/2011/05/Pontifical-Academy-of-Sciences_Glacier_Report_050511_final.pdf.

118. ARAB ENVIRONMENT CLIMATE CHANGE: IMPACT OF CLIMATE CHANGE ON ARAB COUNTRIES, 2009 REPORT OF THE ARAB FORUM FOR ENVIRONMENT & DEVELOPMENT (Mostafa K. Tolba & Najib W. Saab eds., 2009), *available at* http://www.afedonline.org/afedreport09/main.asp.; David Tetsuun Loy, Bhikkhu Bodhi & John Stanley, *The Time to Act is Now: A Buddhist Declaration on Climate Change*, ECOBUDDHISM.ORG (2008), http://www.ecobuddhism.org/bcp/all_content/buddhist_declaration; Joshua Ratner, *Rabbinical Assembly Statement on Energy Security*, COAL. ON THE ENV'T & JEWISH LIFE (2012), http://www.coejl.org/resources/ra-statement-on-energy-security.

119. Interfaith Ctr. for Sustainable Dev., *Report on the Interfaith Climate and Energy Conference*, INTERFAITHSUSTAIN.COM (Mar. 19, 2012), http://www.interfaithsustain.com/interfaith-climate-and-energy-conferences.

120. Robin Kundis Craig, *A Public Health Perspective on Sea Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 531 (2010) (discussing the effects of salt water intrusion on coastal fresh water supplies, the risks of increases in malaria and dengue fever, the contamination of fish and shellfish, the risks of algae blooms affecting influenza-carrying migratory birds, and the contamination of coastlines due to storm damage and destruction, and citing evidence from the World Health Organization as well as federal and state governmental entities in the United States).

C. Economics

In economic terms, the potential consequences of sea level rise are stunning. If sea level rises between three and five feet over one hundred years, the major ports and coastal cities of the United States—Boston, Charleston, Miami, New Orleans, New York, Norfolk, Seattle, and Tampa—could face serious threats of coastal flooding.[121] Estimates of potentially affected property exceed $31 billion for South Florida alone.[122] A 2008 bipartisan Florida report noted that the state's "barrier islands are only minimally above sea level" and that these areas, already costing Florida more than $600 million for beach erosion, are at significant risk from sea level rise and increased hurricane intensity.[123] Various studies have projected costs from coastal flooding to reach $52 billion by 2050 in United State coastal cities,[124] and $3 trillion in assets.[125]

If our nation is willing to learn from the global experience—the Delta Project protecting the Netherlands, the Thames Barrier protecting London, the Mose Project protecting Venice—then massive and costly flood control surge barriers may be needed to protect the great cities of the United States from the adjacent ocean.[126] These projects will be possible only with extraordinary

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121. Baden Copeland, Josh Keller & Bill Marsh, *What Could Disappear*, N.Y. TIMES, http://www.nytimes.com/interactive/2012/11/24/opinion/sunday/what-could-disappear.html?_r=0 (last updated Nov. 24, 2012).

122. John Kennedy, *Rising Sea Levels More than Just South Florida's Costly Problem, Officials Say*, THE PALM BEACH POST (Feb. 13, 2013), http://www.postonpolitics.com/2013/02/13/rising-sea-levels-more-than-just-south-floridas-costly-problem-officials-say/ ("The upper estimate of current taxable property values in Monroe, Broward, and Palm Beach Counties vulnerable in the one-foot scenario is $4 billion with values rising to more than $31 billion at the three-foot scenario. The greater values reflected in the financial impacts are coastal residential properties with ocean access and high taxable value.").

123. Governor's Action Team on Energy and Climate Change, *Florida's Energy and Climate Change Action Plan*, CTR. FOR CLIMATE STRATEGIES 8-2 (Oct. 15, 2008), https://www.broward.org/NaturalResources/ClimateChange/Documents/phase2report08.pdf [hereinafter Governor's Action Team].

124. Stephane Hallegatte et al., *Future Flood Losses in Major Coastal Cities*, 3 NATURE CLIMATE CHANGE 802–06 (2013), *available at* http://www.nature.com/nclimate/journal/v3/n9/full/nclimate1979.html.

125. R.J. Nicholls et al., *Ranking of the World's Cities Most Exposed to Coastal Flooding Today and in the Future*, ORG. FOR ECON. COOPERATION & DEV. (2007), http://www.oecd.org/env/cc/39721444.pdf.

126. The I-STORM network, for example, "unites public administrations of countries that build, manage, operate and maintain moveable storm surge barriers . . . to accomplish the highest levels of operational safety and reliability to protect people and property against severe floods." *I-Storm Network*, http://www.i-storm.org/en

coordinated effort, requiring creative engineering and financing for public works projects at an unprecedented scale. Early adaptation could save trillions of dollars.[127]

In some communities, the coastal adaptation and armoring process has begun. New York City, for example, as a result of Superstorm Sandy, announced a comprehensive plan for rebuilding the impacted communities and increasing the resilience of infrastructure and buildings citywide.[128] New Jersey amended its Flood Hazard Area Control Act rule to "establish new elevation standards for new and reconstructed buildings."[129] Miami and other cities may soon follow.[130] Indeed, if moderate or worst case projections prove correct, the level of infrastructure investment necessitated by sea level rise will trigger worldwide innovations and expenditures worthy of a world war. Sea level rise presents an epic struggle between humans and the oceans.

D. Society and Politics

Lastly, lawyers cannot ignore the social and political realities. Climate change can be an intensely partisan political and social issue. Although Democrats and Republicans sometimes agree,[131] the Republican party is deeply divided internally.[132]

(last visited Feb. 20, 2015); *see also* John McQuaid, *A Dutch Solution for New York's Storm Surge Woes?*, FORBES (Oct. 30, 2012, 5:30 PM), http://www.forbes.com/sites/johnmcquaid/2012/10/30/a-dutch-solution-for-new-yorks-storm-surge-woes/.

127. Brian Kahn, *Adapting to Sea Level Rise Could Save Trillions by 2100*, CLIMATE CENTRAL (Feb. 3, 2014), http://www.climatecentral.org/news/adapting-to-sea-level-rise-could-save-trillions-by-2100-17034. Florida estimated that the implementation of its 2008 climate change recommendations would result in a net savings for the state of $28 billion during the period from 2009 to 2025. Governor's Action Team, *supra* note 123, at 2.

128. Special Initiative for Rebuilding & Resiliency, *A Stronger, More Resilient New York*, THE CITY OF NEW YORK 5–6 (June 11, 2013), http://www.nyc.gov/html/sirr/html/report/report.shtml.

129. N.J. Dep't of Envtl. Prot., N.J. Dep't of Cmty. Affairs & Fed. Emergency Mgmt. Agency, *Fact Sheet: Rebuilding After Sandy*, STATE.NJ.DS (June 2013), http://www.state.nj.us/dep/special/hurricane-sandy/docs/rebuilding-after-sandy-factsheet.pdf.

130. Tim Folger, *New York's Sea-Level Plan: Will It Play in Miami? Rising Seas Threaten Other Cities More Than New York*, NAT'L GEOGRAPHIC NEWS (June 12, 2013), http://news.nationalgeographic.com/news/2013/06/130612-sea-level-rise-new-york-bloomberg-sandy-climate-change-science/.

131. Mark Fischetti, *Democrats and Republicans Agree on Climate Change, U.S. Public Opinion Varies over a Surprisingly Narrow Range*, SCI. AM. (Mar. 18, 2014), http://www.scientificamerican.com/article/democrats-and-republicans-agree-on-climate-change/. *But see Partisan Views of Climate Change*, YALE SCH. OF FORESTRY & ENVTL. STUDIES, http://environment.yale.edu/climate-communication/article/the-climate-note-climate-change-by-political-party (last visited Feb. 20, 2015).

Scientists argue with evangelicals.[133] Individual willingness to accept climate change as a fact often depends on a person's personal experience.[134] Demographics matter, too. Recent polling suggests that Millennials are less concerned about environmental issues than Generation X members,[135] and among coastal residents in rural Florida, the number of people not concerned about sea level rise outnumbered the people who were concerned.[136] Given these and many other nuances of social and political realities, communicating about sea level rise necessitates political awareness and diplomatic skill.[137]

IV. THE DUTIES OF FAIRNESS TO OTHERS

Even after being advised of the law, facts, raw economics, and moral ideals discussed above, deniers and skeptics will still note that the rate of sea level rise could take decades to have any effect. To justify present day inaction, they will point to the uncertainties of science.[138] Others will claim that the problem can

132. Pew Research Ctr. for the People & the Press, *GOP Deeply Divided over Climate Change*, PEW RES. (Nov. 1, 2013), http://www.people-press.org/2013/11/01/gop-deeply-divided-over-climate-change/.

133. Matthew C. Nisbet, *Communicating Climate Change: Why Frames Matter for Public Engagement*, ENVIRONMENTMAGAZINE.ORG 21 (2009), http://blog.lib.umn.edu/burn0277/pa5012/readings/Nisbet%202000%20-%20Communicating%20Climate%20Change.pdf.

134. Teresa A. Myers et al., *The Relationship Between Personal Experience and Belief in the Reality of Global Warming*, 3 NATURE CLIMATE CHANGE 343 (2012), *available at* http://environment.yale.edu/climate-communication/article/the-relationship-between-personal-experience-and-belief-in-global-warming#sthash.mqbgYqxM.dpuf.

135. Pew Research Soc. & Demographic Trends, *Millennials in Adulthood: Detached from Institutions, Networked with Friends*, PEW RES. (Mar. 7, 2014), http://www.pewsocialtrends.org/2014/03/07/millennials-in-adulthood/.

136. In a November 2011 University of Florida research survey, mailed to one thousand households in Franklin, Gulf, and Bay Counties, Florida, respondents were asked whether they were concerned about sea level rise: 37.07% said yes, 47.41% said no, and 15.52% were not sure. LAILA RACEVSKIS, COASTAL ECOSYSTEM SERVICES AND SEA LEVEL RISE IN FLORIDA: UNDERSTANDING PUBLIC PERCEPTIONS, VALUES, AND POLICY (2012), *available at* http://www.conference.ifas.ufl.edu/intecol/presentations/147/1100%20L.Racevskis.pdf.

137. *See, e.g.*, Matthew C. Nisbet, Ezra M. Markowitz & John E. Kotcher, *Winning the Conversation: Framing and Moral Messaging in Environmental Campaigns*, *in* TALKING GREEN: EXPLORING CURRENT ISSUES IN ENVIRONMENTAL COMMUNICATION (Lee Ahern & Denise Servick Bortree eds., 2012), *available at* http://climateshiftproject.org/wp-content/uploads/2013/02/talking-green-chapter-2.pdf (noting that politically attentive individuals are easier to communicate with and that individual perception regarding climate science is dependent on policy).

138. John M. Broder, *Both Romney and Obama Avoid Talk of Climate Change*, N.Y. TIMES (Oct. 25, 2012), http://www.nytimes.com/2012/10/26/us/politics/climate-change-nearly-absent-in-the-campaign.html (noting that neither the Obama nor Romney cam-

be left to the political players to find a cure in the future.[139] But regardless of whether a national or state policy emerges in the future, decisions being made *today*—especially in Florida—have lasting repercussions on the citizens they serve. For the lawyer in particular, inaction and silence on matters of sea level rise constitute material omissions, and maybe even negligent misrepresentation, that violate the legal standards of our profession.

The ABA Model Rules, and most state rules,[140] establish expectations of fairness towards others from lawyers. For example, pursuant to Model Rule 3.2, lawyers have a duty to make reasonable efforts to expedite litigation consistent with the interests of the client. Importantly, the comments establish that the pursuit of a course of action must have some substantial purpose other than delay, and "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."[141] But the duty of fairness to others extends far beyond the narrow context of litigation. Lawyers and litigators must ensure that they comply with ABA Model Rule 4.1 demanding "Truthfulness in Statements to Others," which specifically states that

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (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

paigns offered a legislative, regulatory, or economic plan to face one of the most vexing issues to face the planet, and rhetorically asking: "Is the climate system so fraught with uncertainty that the rational response is to do nothing?").

139. Coral Davenport, *The Coming GOP Civil War over Climate Change: Science, Storms, and Demographics are Starting to Change Minds Among the Rank and File*, NAT'L J. (May 9, 2013), http://www.nationaljournal.com/magazine/the-coming-gop-civil-war-over-climate-change-20130509.

140. Florida adopted the ABA Model Rules on July 17, 1986. Am. Bar Ass'n, *State Adoption of the ABA Model Rules of Professional Conduct*, AMERICANBAR.ORG, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 20, 2015). Rule 4-4.1 of the Rules Regulating the Florida Bar includes the entire text of ABA Rule 4.1 and its comments. RULES REGULATING THE FLORIDA BAR 4-4.1 (2014); MODEL RULES OF PROF'L CONDUCT R. 4.1 cmts. 1–3 (2013).

141. MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt. 1.

> disclosure is prohibited by Rule 1.6 [governing confidentiality].[142]

The commentary[143] associated with the rules notes that a lawyer "generally has no affirmative duty to inform an opposing party of relevant facts." However, lawyers cannot obscure the truth, nor engage in fraud or misrepresentation. Comment 1 states that

> [a] misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.[144]

Adding confusion to the subject of misrepresentation, Comment 2 notes that "[w]hether a particular statement should be regarded as one of fact can depend on the circumstances."[145] By way of example, Comment 2 highlights statements of price or value in negotiations as circumstances *not* ordinarily viewed as statements of fact.[146] On the other hand, Comment 2 to Rule 4.1 also requires lawyers to be mindful of their obligation to avoid criminal and tortious misrepresentation,[147] a notion echoed in Comment 3 to Rule 4.1,[148] which also cites to Rule 1.2 addressing the "Scope of Representation and Allocation of Authority Between Client and Lawyer."[149] Collectively, these comments make it clear

142. *Id.* R. 4.1.

143. Although the text of Model Rule 4.1 is authoritative in most states, the comments are also generally accepted by the states as a guide to interpretation. Am. Bar Ass'n CPR Policy Implementation Comm., *State Adoption of the ABA Model Rules of Professional Conduct and Comments*, AMERICANBAR.ORG (May 23, 2011), http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf. In Florida:

> The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

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144. MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. 1.

145. *Id.* cmt. 2.

146. *Id.*

147. *Id.*

148. *Id.* cmt. 3.

149. Model Rule of Professional Conduct Rule 1.2(d) states that

that a lawyer cannot engage in a fraud, and where a lie or misrepresentation creates a fraud, the lawyer must either withdraw from the representation or disclose the information.[150]

In general, fraud requires a knowing and intentional misrepresentation of a material fact that causes detrimental reliance.[151] Knowledge may still exist where ignorance is contrived, and a person can also be negligent in failing to obtain knowledge.[152] Moreover, lawyers have special duties to protect nonclients from fraud. Where client fraud exists, the American Law Institute's Restatement (Third) of Law Governing Lawyers, codifying black letter law on the matter, notes that the attorney–client[153] and work product[154] privileges do *not* apply. Based on the lawyer's independent duties of competence and diligence,[155] the lawyer must exercise an independent duty of care to nonclients,

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[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

150. Rule 4.1, Comment 3 states:

> Under Rule 1.2(d) [related to the scope of the lawyer-client relationship], a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. 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.

Id. r. 4.1 cmt. 3.

151. The requirements for fraud are as follows:

> Fraud must be proved by showing that the defendant's actions involved five separate elements: (1) a false statement of a material fact, (2) knowledge on the part of the defendant that the statement is untrue, (3) intent on the part of the defendant to deceive the alleged victim, (4) justifiable reliance by the alleged victim on the statement, and (5) injury to the alleged victim as a result.

WEST'S ENCYCLOPEDIA OF AMERICAN LAW 487 (The Gale Group, 2d ed. 2008).

152. KEVIN F. O'MALLEY ET AL., FEDERAL JURY PRACTICE & INSTRUCTIONS § 17:09 (6th ed. 2014).

153. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82 (2000).

154. *Id.* § 92.

155. *See id.* § 52 (stating that a lawyer owing a duty of care is required to use the competence and diligence of a lawyer in a similar situation); MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 (2013) (stating that a lawyer must provide a client with competent representation and that a lawyer must be diligent and prompt when representing a client, respectively).

particularly in circumstances where the nonclient relies on the lawyer's client:

> For purposes of liability under § 48 [related to professional negligence], a lawyer owes a duty to use care within the meaning of § 52 [related to the duty of care] in each of the following circumstances: . . . (2) to a nonclient when and to the extent that:
>
> (a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and
>
> (b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection.[156]

The Restatement (Third) Section 98 extends the lawyer's ethical duties to misrepresentation of *facts* as well, stating that lawyers "communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact or law to the nonclient."[157] Lawyers must be truthful with facts.[158] Accordingly, even honest errors in judgment, calculation, or

156. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51.

157. *Id.* § 98. ABA Model Rule 8.4(c) requires lawyers not to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." MODEL RULES OF PROF'L CONDUCT R. 8.4(c). In fact, according to the Restatement (Second) of Torts, Section 550, lawyers giving opinions may become "vulnerable to liability to an unforeseen third party lacking privity." E. Cliff Martin & T. Karena Dees, *The Truth About Truthfulness: The Proposed Commentary to Rule 4.1 of the* Model Rules of Professional Conduct, 15 GEO. J. LEGAL ETHICS 777, 792 (2002). However, in some jurisdictions, negligent misrepresentation against lawyers by nonclients requires privity to establish a claim. *See* Mehaffy, Rider, Windholz & Wilson v. Cent. Bank Denver, N.A., 892 P.2d 230, 236 (Colo. 1995) (stating that "[o]ther jurisdictions have held attorneys liable for negligent misrepresentation to nonclients"); McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 792 (Tex. 1999) (stating that a number of jurisdictions have concluded that Restatement (Second) of Torts, Section 552, does not require privity in instances of negligent misrepresentation, even for attorneys).

158. *See generally* Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 214–15 (2006) (noting that honesty is not the same as truth, because truth contains an objective and often historical character, referring to a specific past or present state of affairs or course of conduct, whereas honesty is more a personal characteristic, referring to the nature of the person's expressions and actions that reflect integrity and trustworthiness).

reasoning can expose a lawyer to liability to clients and non-clients alike and even expose the lawyer to state bar sanctions.[159]

Collectively, all of these principles lead to an important conclusion: lawyers cannot ignore sea level rise when it is a material fact of relevance to third parties. Some facts, as discussed above, have been established: sea level rise is real. And when the consequences of sea level rise denial are applied to the actions by governmental entities and their lawyers, the risk of substantial ethical breaches becomes evident. Across the nation, people reasonably rely upon the actions of the government, and acceptance of sea level rise denial is equivalent to a massive public deception. The failure to disclose could lead to claims of negligent misrepresentation, if not malpractice.[160] A lawyer's false statements or material omissions might also jeopardize the enforceability of the legal document or settlement agreement when the other side discovers that the facts were not as represented.[161]

Examples involving coastal property readily demonstrate the importance of full disclosure and open discussion of sea level rise,[162] and coastal land-use zoning and planning decisions direct real estate investment strategies. Investors in coastal areas, after obtaining needed government approvals, expect not to endure a forced retreat from their property before the investment has paid off. In these circumstances, the importance of disclosure seems self-evident. The Florida Statutes already require some degree of

159. Martin & Dees, *supra* note 157, at 792.

160. *See Mehaffy*, 892 P.2d at 239–40 (finding that lawyers for a town who induced a bank to purchase development bonds issued opinion letters to the bank stating that the town and the authority complied with appropriate procedures before issuing the bonds and could be liable to bank for negligent misrepresentation, but not malpractice).

161. Carrie Menkel-Meadow, *Ethics, Morality, and Professional Responsibility in Negotiation*, *in* DISPUTE RESOLUTION ETHICS: A COMPREHENSIVE GUIDE 139 (Phyllis Bernard & Bryant Garth eds., 2002); *see also* Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 KY. L.J. 1055, 1056–58 (1999) (providing examples of omissions resulting in jeopardizing enforceability); Barry R. Temkin, *Misrepresentation by Omission in Settlement Negotiations: Should There Be a Silent Safe Harbor?*, 18 GEO. J. LEGAL ETHICS 179 (2004) (providing examples of misrepresentations and omissions).

162. The SEC's regulations permit a lawyer to disclose confidential information to the SEC without client consent to, inter alia, "rectify the consequences of a material violation [of federal securities law] . . . in the furtherance of which the attorney's services were used." 17 C.F.R. § 205.3(d)(2)(iii) (2010).

mandatory disclosures associated with sales of coastal property.[163] The duty of truthfulness applies too, and lawyers owe a duty of care to the clients and nonclients alike who reasonably rely on the lawyers' efforts.

Hurricane and flood insurance, and its regulation, presents another circumstance where the actions of the decision makers and the lawyers are absolutely and immediately relied upon by the public. Indeed, in Florida, the government itself, through Citizens Insurance, is often the only available insurer for many coastal communities.[164] Unfortunately, despite the EPA's explicit warnings about the likelihood of hurricanes impacting coastal communities,[165] maps created by the Federal Emergency Management Agency (FEMA) and state authorities may not fully consider the effects of future sea level rise.[166] In the past, FEMA officials accounted for the omission by stating that the agency tradi-

163. Section 161.57, Florida Statutes, requires sellers of certain coastal property that is totally or partially seaward of the Coastal Construction Control Line (CCCL) governing coastal development and construction to advise purchasers that the "property being purchased may be subject to coastal erosion and to federal, state, or local regulations that govern coastal property, including the delineation of the coastal construction control line, rigid coastal protection structures, beach nourishment, and the protection of marine turtles." FLA. STAT. § 161.57 (2013).

164. In Section 627.351(6), Florida Statutes, the legislature explicitly found that

> private insurers are unwilling or unable to provide affordable property insurance coverage in this state to the extent sought and needed. . . . The Legislature intends, therefore, that affordable property insurance be provided and that it continue to be provided, as long as necessary, through Citizens Property Insurance Corporation, a government entity that is an integral part of the state, and that is not a private insurance company.

FLA. STAT. § 627.351(6).

165. Observed sea level rise is already increasing the risk of storm surge and flooding in some coastal areas. The conclusion in the assessment literature that there is the potential for hurricanes to become more intense (and even some evidence that Atlantic hurricanes have already become more intense) reinforces the judgment that coastal communities are now endangered by human-induced climate change, and may face substantially greater risk in the future. Even if there is a low probability of increasing the destructive power of hurricanes, this threat is enough to support a finding that coastal communities are endangered by greenhouse gas air pollution. In addition, coastal areas face other adverse impacts from sea level rise such as land loss due to inundation, erosion, wetland submergence, and habitat loss.

166. Anne Siders, *New FEMA Flood Maps for New York Do Not Consider Sea Level Rise*, CLIMATE LAW BLOG (Feb. 14, 2013), http://blogs.law.columbia.edu/climatechange/2013/02/14/new-fema-flood-maps-for-new-york-do-not-consider-sea-level-rise. In 2013, the Columbia Law School Center for Climate Change Law profiled the release of the updated Federal Emergency Management Agency (FEMA) flood maps following Hurricane Sandy, which devastated many coastal areas in the northeast in October 2012. *Id.*

tionally used historical storm information to set the flood zones.[167] But in the future, property owners may lose their investments to floods that occur in places where parties failed to properly account for sea level rise.

Litigation over the failure to disclose material facts seems inevitable, especially in the context of public infrastructure. The EPA has cautioned that water- supply infrastructure systems may be at risk,[168] yet water- supply permits continue to be issued and water systems continue to be built. In fact, despite public recognition that climate change will radically change salt-water intrusion, storm patterns, and water supply in highly unpredictable ways, Florida's water management districts have been issuing water supply permits to the utilities for longer periods of time.[169] Coastal roads also continue to be built, and homes relying upon those roads continue to be bought and sold.[170] These decisions seem numb to the future risks of sea level rise. A Florida court even told St. Johns County that it had an affirmative duty to "reasonably maintain" and repair the road along the ocean known as Old A1A in a way that preserved

167. *Id.* This seems to contravene the requirements of the Biggers-Waters Flood Insurance Reform Act (Reform Act), which was signed into law by President Obama in July 2012 and requires FEMA to consider the "best available science regarding future changes in sea levels" in its flood zone maps. Moving Ahead for Progress in the 21st Century Act, 42 U.S.C. § 4101(b)(3)(D) (2012).

168. Water infrastructure, including drinking water and wastewater treatment plants, and sewer and storm water management systems, may be at greater risk of flooding, sea level rise and storm surge, low flows, saltwater intrusion, and other factors that could impair performance and damage costly investments. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,534 col. 1 (Dec. 15, 2009).

169. *See* Thomas F. Mullin, *Basics of Florida Water Law and Water Use Permitting for Utilities*, JDSUPRA BUSINESS ADVISOR (Nov. 19, 2012), http://www.jdsupra.com/legalnews/basics-of-florida-water-law-and-water-us-08711 (stating that water consumptive permits, which used to be issued for twenty years, are now being issued for at least thirty to thirty-seven years).

170. In testimony to Congress, Dr. Leonard Berry, the Director of the Florida Center for Environmental Studies, the Distinguished Professor of Geosciences at Florida Atlantic University (FAU), and the Co-Director of the Climate Change Initiative at FAU, explained that "Florida is a special case for sea level rise. . . . Sea level rise is already creating multiple complications in Florida" causing decreased coastal flood protection for infrastructure, making real estate vulnerable (including Everglades National Park and hazardous material sites), necessitating transportation readjustment, and contaminating coastal wells. *Impacts of Sea Level Rise on Florida's Domestic Energy and Water Infrastructure: Dr. Leonard Berry's Testimony to the United States Senate Committee on Energy and Natural Resources: Hearing Before the Comm. on Energy and Natural Resources*, 112th Cong. (2012), *available at* http://www.hq.nasa.gov/legislative/hearings/2012%20hearings/4-19-2012%20BERRY.pdf.

"meaningful access" for landowners.[171] The county argued that action was financially impossible because protecting the road from the "ravages of the ocean" would cost millions of dollars, exceeding the entire county budget for road repair and maintenance.[172] The case was remanded for a determination of whether the county had met its duty, but settled without further judicial review. Eventually, our society will need to address the degree to which sea level rise is disclosed and discussed in our decisions, and the extent to which adaptation to sea level rise is required or prohibited. Over time, legal doctrines such as the public trust doctrine,[173] takings law,[174] and property rights[175] may all be substantially reformed. In some cases, inadequate consideration and disclosure of sea level concerns could rise to the level of negligence, fraud, and a breach of the duty of truthfulness to others.[176]

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171. Jordan v. St. Johns Cnty., 63 So. 3d 835, 838–39 (Fla. 5th Dist. Ct. App. 2011).

172. *See* Thomas Ruppert & Carly Grimm, *Drowning in Place: Local Government Costs and Liabilities for Flooding Due to Sea-Level Rise*, 87 FLA. B.J., Nov. 2013, at 29, 31 (noting initial expenses of $13 million for elevating the road and an additional $5 to $8 million every three to five years to maintain that protection).

173. Chloe Angelis, *The Public Trust Doctrine and Sea Level Rise in California: Using the Public Trust to Restrict Coastal Armoring*, 19 HASTINGS W. NW. J. ENVTL. L. & POL'Y 249, 251, 269 (2013).

174. *Id.* at 269. In some past cases, flooding has been held to constitute a taking by the government. *See, e.g.*, S. Fla. Water Mgmt. Dist. v. Basore of Fla., Inc., 723 So. 2d 287, 288 (Fla. 4th Dist. Ct. App. 1998) (stating that to support a claim for inverse condemnation, flooding must be caused by government action that results in "an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury, to the property"); Elliott v. Hernando Cnty., 281 So. 2d 395, 396 (Fla. 2d Dist. Ct. App. 1973) (changing drainage systems in a way that caused frequent rain based flooding has been considered "permanent" where flooding is expected to reoccur and denies all reasonable use of the land).

175. *See generally* Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26 SOC. POL'Y & PHIL. 296 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1174467 (noting that climate change could lead to winners and losers, with some properties, such as low-lying nations, suffering disproportionately, while other elevated or colder properties, and nations, benefit); *see also* Bert J. Harris Jr. Private Property Rights Protection Act, FLA. STAT. § 70.001 (limiting the deprivation of investment backed expectations).

176. Bd. of License Comm'rs. of the Town of Tiverton v. Pastore, 469 U.S. 238, 240 (1985). The duty of candor includes a "continuing duty to inform the Court of any development which may *conceivably* affect the outcome of the litigation." *Id.* (quoting Fusari v. Steinberg, 419 U.S. 379, 391 (1975)) (emphasis added) (internal quotation removed).

V. THE DUTY OF CANDOR TO THE TRIBUNAL

Scholars anticipate a future of tort-based[177] or takings-based[178] litigation, and the litigation over sea level rise is already underway.[179] In some cases, the government directly addressed matters related to sea level rise; in other cases, nongovernmental organizations and environmental advocates raised the issues that the government did not.[180] In all of these cases, lawyers will have duties to the courts.

Specifically, lawyers must adhere to their duty of candor to the tribunal. No matter what their clients might believe, ethical lawyers cannot deny the existence of sea level rise. Specifically, Rule 3.3(a) of the Model Rules of Professional Conduct states that "a lawyer shall not knowingly: make a false statement of fact or law to a tribunal, or fail to correct a false statement of material fact or law made to the tribunal by the lawyer," nor "offer evidence that the lawyer knows to be false."[181]

In fact, lawyers can and should refuse to put forward evidence wholly denying sea level rise. Model Rule 3.3(a)(3)

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177. David A. Grossman, *Warming up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1 (2003); David Hunter & James Salzman, *Negligence in the Air: The Duty of Care in Climate Change Litigation*, 155 U. PA. L. REV. 1741, 1744 (2007).

178. James Wilkins, *Is Sea Level Rise "Foreseeable"? Does It Matter?*, 26 J. LAND USE & ENVTL. L. 437, 439 (2011) (noting that exacerbated flooding sometimes serves as a basis for government takings liability and noting that foreseeability of sea level rise may undermine government defensive claims where the government failed to protect public safety and allowed development to proceed).

179. See Part II(A), above, especially footnotes 27 through 30 (discussing as suggested by Biscayne Bay Waterkeepers and *Massachusetts v. EPA*).

180. *See supra* Part II(A).

181. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2013). Rule 3.3(a) states as follows:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

explicitly provides that "[a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."[182] As often happens in the context of criminal proceedings where a party may lie, this rule can put lawyers in precarious positions. The potential certainly exists for difficult conversations between a client who denies sea level rise and the lawyer who wants to comply with professional duties. Ideally, many of these types of tensions will be resolved when the lawyer elevates the issue within the chain of organizational command, as discussed in Part V.

Nevertheless, some lawyers will have clients who insist on attempting to argue that sea level rise is not a *fact*, and, driven by a desire to preserve the status quo, will characterize it as mere conjecture or even unimportant.[183] Thus, while there is room for argumentation over the degree of risk, the topic of sea level rise simply cannot be wholly rejected or ignored by counsel, and outright scientific distortion can be cause for sanctioning a lawyer.

The boundaries between legal advocacy and scientific argument were discussed in *Otsuka Pharmaceutical Co.* v. *Sandoz, Inc.*[184] Otsuka brought a number of consolidated actions against generic drug manufacturers, including Sandoz, alleging that the defendants abbreviated a United States Food and Drug Administration application for approval of commercial manufacture, use, or sale in the United States of generic Aripiprazole products.[185] In response, the defendants asserted that Otsuka's patent was invalid and unenforceable, in part due to inequitable conduct.[186] Explaining that a duty of candor is owed to the United States Patent and Trademark Office by all inventors, application preparers, and attorneys who prepare and represent the patent, and further noting that "[a] breach of the duty of candor constitutes inequitable conduct and renders the patent unenforce-

182. *Id.*

183. Many North American officials push climate change aside to focus on hot political topics, demonstrating a willful ignorance to a now-global issue while the coal and oil industries remain comfortably protected by the apathy represented. K. M. Norgaard, *Climate Denial and the Construction of Innocence: Reproducing Transnational Environmental Privilege in the Face of Climate Change*, 19 RACE, GENDER & CLASS 80 (2012).

184. No. 3:07-cv-01000(MLC), 2010 WL 4596324 (D.N.J. 2010).

185. *Id.* at *1.

186. *Id.*

able,"[187] the court considered whether the duty of candor had been breached where the parties withheld information and allegedly falsely characterized the scientific methodology used in the declarations.[188]

The *Otsuka* court's analysis was robust, but in the end, the court lacked "clear and convincing evidence" that the failure to disclose "was either material or made with intent to deceive,"[189] and that the patent holder's testimony reflecting uncertain memory did not establish awareness of contradictory data.[190] Otsuka's patent was, therefore, upheld—but perhaps just barely.

In future disputes, lawyers seeking to assert the existence of sea level rise over voices of opposition should learn lessons from *Otsuka* and be sure to methodically present the evidence of sea level rise—forcing the other side to accept or reject the data and to assert its alternatives—and never allowing a record of uncertainty to remain unrebutted. Timidity in response to silence or uncertainty might enable deceptive practices to escape judicial scrutiny when the courts apply the "clear and convincing evidence" standard of review.

Lawyers who rely on silence or uncertainty in the context of sea level rise must also beware of the angry court. Many courts, in fact, have held that an attorney's silence that misleads a judge constitutes an overt false statement.[191] Lawyers have been disciplined for remaining silent when a client testifies in a manner plainly contrary to credible evidence.[192] And cases have demonstrated that knowingly offering false evidence—such as

187. *Id.* at *7.

188. *Id.*

189. *Id.* at *31.

190. *Id.* at *33.

191. *See* Douglas R. Richmond, *Appellate Ethics: Truth, Criticism & Consequences*, 23 REV. LITIG. 301, 311 (2004) (explaining that failure to make a disclosure is the equivalent of an affirmative misrepresentation); *see also* United States v. Shaffer Equip. Co., 11 F.3d 450, 457–58 (4th Cir. 1993) ("Even the slightest accommodation of deceit or a lack of candor in any material respect quickly erodes the validity of the process. . . . The system can provide no harbor for clever devices to divert the search, mislead opposing counsel or the court, or cover up that which is necessary for justice in the end."); Gum v. Dudley, 505 S.E.2d 391, 400 (W. Va. 1997) ("A review of the cases throughout the country clearly illustrate[s] that the general duty of candor may be thwarted through an attorney's silence."); Griffis v. S.S. Kresge Co., 197 Cal. Rptr. 771, 777 (1984) ("The concealment of material information within the attorney's knowledge as effectively misleads a judge as does an overt false statement.").

192. *See In re* Page, 774 N.E. 2d 49, 50 (Ind. 2002) (finding a lawyer's silence inappropriate in the face of contrary, credible evidence).

omissions of key data,[193] use of manipulated reports,[194] introducing a client's false affidavit,[195] or inclusion of false data[196]—can lead to attorney sanctions in civil matters.[197] The demands of the duty of candor, and the lawyer's authority to confront and reject the factual omissions and misrepresentations associated with sea level rise denial, become especially rigorous in the context of ex parte proceedings, as Model Rule 3.3(d) makes quite clear that "[i]n an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the

193. For example, in *United States v. City of Jackson*, 359 F.3d 727, 732 (5th Cir. 2004), the court rebuked counsel based on the duty of candor without the need for reminders from opposing counsel. In 1996, the United States government sued the city of Jackson, Mississippi, "charging it with violating provisions of the Fair Housing Amendments Act (FHAA)" based on the failure of zoning ordinances and policies to make the reasonable accommodations necessary for disabled persons. *Id.* at 728–29. The language in a subsequent 1997 consent decree, tracking the terms of the FHAA, prohibited the City from engaging in specified discriminatory housing practices, and compelled the City to amend its zoning ordinance to permit group homes for disabled persons in certain residential districts. *Id.* at 729. In a contempt hearing, the City never mentioned the express language of the consent decree allowing attorneys' fees. *Id.* at 732. The court originally responded to this omission (but later amended its opinion to omit the sentence) by stating, "We are not pleased by the fact that the City's appellate brief makes *no* mention of this critical aspect of the case and remind counsel of their ongoing duty of candor to the court." *Id.*

194. *In re* Bailey, 848 So. 2d 530, 530–31 (La. 2003) (finding that suspension was warranted for a lawyer that attempted to introduce an altered medical report into evidence).

195. Patsy's Brand, Inc. v. I.O.B. Realty, Inc., No. 98 CIV 10175(JSM), 2002 WL 59434, at *1, *10 (S.D.N.Y. Jan. 16, 2002) (noting that the court sua sponte sanctioned a law firm for permitting its client to submit a false affidavit because "no reasonable lawyer could accept [it]" in light of other known evidence).

196. *In re* Scahill, 767 N.E.2d 976, 981 (Ind. 2002) (finding misconduct in marital dissolution action, when husband's lawyer continued to include couple's IRA on schedule of marital assets to be divided by court even though the lawyer knew his client dissipated it).

197. Criminal cases involving client perjury are treated differently under Rule 3.3 because of the defendant's rights under the Sixth Amendment of the United States Constitution; in those matters, for example, defense lawyers and public defenders can allow the client to testify falsely, but must remedy the perjury thereafter. *See, e.g.*, U.S. v. Casas, 425 F.3d 23, 40 (C.A.1 Puerto Rico 2005) (explaining that prosecutors do owe duty of candor to the court); United States v. Sattar, No. 02 CR 395(JGK), 2003 WL 22510398, at *3–4 (S.D.N.Y. Nov. 5, 2003) (discussing circumstances where government attorney does not have to disclose under the duty of candor); *see generally* Nathan M. Crystal, *False Testimony by Criminal Defendants: Still Unanswered Ethical and Constitutional Questions*, 2003 U. ILL. L. REV. 1529, 1531 (2003); Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 HOFSTRA L. REV. 821, 824 (2006) (requiring criminal defense counsel to remedy completed client perjury does not implicate defendant's constitutional rights).

tribunal to make an informed decision, whether or not the facts are adverse."[198]

The commentary supporting this concept further explains that a lawyer serving a client engaged in sea level rise denial may have no choice; the lawyer *must* inform the court of the potential consequences of sea level rise. While most cases require the advocates for the opposing parties to be responsible for their own side of the matter, ex parte proceedings are different, as Comment 14 makes clear when it states:

> However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.[199]

On the subject of candor and advocacy in ex parte proceedings, the Restatement (Third) largely echoes the ABA Model Rules.[200] Based on these principles, lawyers need to be especially cautious when appearing in ex parte proceedings, where the duty of candor to the tribunal applies. In other words, outright denial of sea level rise, or even the failure to mention the science on sea level rise, could have serious consequences for the lawyers because omissions of material facts during ex parte proceedings violate Model Rule 3.3.

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198. MODEL RULES OF PROF'L CONDUCT R. 3.3(d) (2013).

199. *Id.* r. 3.3(a) cmt. 14.

200. The Restatement states that

> [i]n representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must comply with the requirements of § 110 and §§ 118-120 and further:
>
> (1) must not present evidence the lawyer reasonably believes is false;
>
> (2) must disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision; and
>
> (3) must comply with any other applicable special requirements of candor imposed by law.

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 112 (1998).

Judicial approval of large-scale coastal public works construction projects will present circumstances where sea level rise will become an important consideration. For example, sea level rise has been raised as a significant concern in matters including the Port of Seattle expansion,[201] San Diego's port and convention center,[202] the Gulf Coast estuaries and watersheds and associated fisheries and forests,[203] and South Florida's ports[204] and water treatment infrastructure.[205] A 2012 report by the National Research Council predicts that sewer systems and coastal roads throughout California and the Pacific Northwest

201. This is no surprise to the National Oceanic and Atmospheric Administration or the governmental institutions of Washington, who have been intelligently planning for the impacts of sea level rise since 1993. CITY OF OLYMPIA, PRELIMINARY ASSESSMENT OF SEA LEVEL RISE IN OLYMPIA WASHINGTON: TECHNICAL AND POLICY IMPLICATIONS (June 1993), *available at* http://olympiawa.gov/~/media/Files/PublicWorks/Water-Resources/Assessment%20of%20Sea%20Level%20Rise%20in%20Olympia.ashx.

202. Amita Sharma, *Coastal Commission Concerned About Sea Level Rise and Convention Center Expansion*, KPBS (Jan. 28, 2013), http://www.kpbs.org/news/2013/jan/28/coastal-commission-concerned-about-sea-level-rise-/.

203. ROBERT R. TWILLEY ET AL., CONFRONTING CLIMATE CHANGE IN THE GULF COAST REGION: PROSPECTS FOR SUSTAINING OUR ECOLOGICAL HERITAGE (Oct. 2001), *available at* http://www.ucsusa.org/sites/default/files/legacy/assets/documents/global_warming/gulfcoast.pdf.

204. S.E. FLA. REG'L CLIMATE CHANGE COMPACT WORK GRP., ANALYSIS OF THE VULNERABILITY OF SOUTHEAST FLORIDA TO SEA LEVEL RISE (2012), *available at* http://southeastfloridaclimatecompact.files.wordpress.com/2014/05/vulnerability-assessment.pdf.

205. A Miami sewage treatment plant on the low-lying barrier island of Virginia Key was recently the subject of a lawsuit by Biscayne Bay Waterkeeper, alleging that "forty-seven million gallons of untreated human sewage has been illegally discharged into Miami-Dade County waterways and streets between 2009 and 2011" and that the proposed Consent Decree "fails to address the sea level rise and climate impacts (expected by the scientific community) that will, if not appropriately accounted for, cause major failures in the sewage collection and treatment system during its useful life." Citizen's Suit Complaint, *Biscayne Bay Waterkeeper, Inc. v. United States*, http://www.cnsenvironmentallaw.com/2013/03/06/Miamisewageinbrief.pdf (S.D. Fla. Mar. 1, 2013) (No. 1:13-cv-20748-CMA). Related testimony before the county commissioners clearly put the region on notice of the looming potential for a sea level rise disaster. *Biscayne Bay Waterkeeper Testimony on Waste Water Issue Before the County Commission Yesterday*, EYE ON MIAMI (May 18, 2013), http://eyeonmiami.blogspot.com/2013/05/biscayne-bay-waterkeeper-testimony-on.html (emphasizing the need to remedy "massive violations" of the federal CWA by fixing three wastewater treatment plants, but noting the "serious risk of damage and losing operational reliability (violating the [CWA]) due to the failure of the [sewer Capital Improvement Plan] to protect the plants from rising sea levels and storm surge expected[—]and acknowledged[—]in the [four]-county compact that [has been approved]"). Although the case ultimately settled—because the environmental advocates agreed to a bifurcated approach that allowed the sewer repairs to be undertaken and separate planning procedures to address sea level rise—disputes such as these may become the norm.

will need to be relocated.[206] The economic consequences, as noted earlier, are extraordinary.

In some instances, investments of this scale will necessitate the issuance of revenue bonds, which must be approved by a judicial or adjudicative mechanism. Model Rule 1.0(m) defines "tribunal" as "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity."[207] Bond proceedings, therefore, can raise the need to address the lawyer's duty of candor to the tribunal and the duty to avoid misrepresentations.[208] Often, bond validations are nominally contested proceedings, with the governmental entity seeking the revenue bond serving as a plaintiff, and the people of the affected jurisdiction, perhaps represented by the state attorney, serving as defendants.[209] In other states, bond validation proceedings involve ex parte components.[210]

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206. ROBERT A. DALRYMPLE ET AL., SEA-LEVEL RISE FOR THE COASTS OF CALIFORNIA, OREGON, AND WASHINGTON: PAST, PRESENT, AND FUTURE (2012), *available at* http://ssi.ucsd.edu/scc/images/NRC%20SL%20rise%20W%20coast%20USA%2012.pdf.

207. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2013).

208. *See generally* NAT'L ASS'N OF BOND LAWYERS, THE FUNCTION AND PROFESSIONAL RESPONSIBILITIES OF BOND COUNSEL (3d ed. 2011), *available at* http://www.nabl.org/uploads/cms/documents/nabl_function_and_professional_responsibilities_of_bond_counsel.pdf (noting duties of candor and to avoid misrepresentations); *see also In re* Ukwu, 926 A.2d 1106, 1109 (D.C. 2007) (identifying candor to the tribunal violations in federal administrative proceeding); *In re* Bihlmeyer, 515 N.W.2d 236, 238 (S.D. 1994) (describing candor to the tribunal applied to state industrial commission). *But see* State *ex rel.* Okla. Bar Ass'n v. Dobbs, 94 P.3d 31, 67 (Okla. 2004) (finding that a state commission supervising public service corporations did not exercise adjudicative powers by requiring change-of-ownership notification letter, so candor to the tribunal did not apply). Conflict of interest considerations may also arise. John R. Axe, *Conflicts of Interest Involving Bond Counsel*, 27 URB. LAW. 991 (Fall 1995).

209. In Florida, for example, Section 75.02 of the 2013 Florida Statutes provides that the governmental entity serves as a plaintiff; Section 75.01 of the Florida Statutes provides that circuit courts (meaning one of the twenty courts of general jurisdiction in Florida) have jurisdiction to determine the validation of bonds and certificates of indebtedness and all matters connected therewith; and Section 75.05 of the Florida Statutes provides that the court order shall be "directed against the state and the several property owners, taxpayers, citizens and others . . . in general terms and without naming them and the state through its state attorney or attorneys of the circuits . . . ." Section 139.29 of the Florida Statutes also requires these same judicial validation procedures for refunded (refinanced) bonds. Notably, the public has rights to intervene pursuant to Section 75.07 of the Florida Statutes, which states that "[a]ny property owner, taxpayer, citizen or person interested may become a party to the action."

210. California Government Code Section 53511(a) provides that a "local agency may bring an action to determine the validity of its bonds, warrants, contracts, obligations or evidences of indebtedness" and that process also requires an ex parte application for order for publication of summons. CAL. GOV'T CODE § 53511(a) (West 2013). Texas Government

Municipal securities, however, "cannot be sold without an approving opinion of 'bond counsel,' which is frequently printed directly on the bond[ ]" documents.[211] "Bond counsel generally view themselves not as counsel to the issuer but as counsel to the *holders* of the bonds."[212] Furthermore, "the opinion printed on the bonds is intended to be relied upon by all persons who may invest in the bonds."[213] In other words, bond cases are likely to raise substantial concerns with both the duty of candor to the tribunal and the duty of truthfulness to others.[214] In these matters, lawyers will need to act with great caution to ensure that their clients' desires to deny sea level rise do not cross the ethical and legal lines.

A particularly relevant example of the tension between infrastructure decisions and sea level rise emerged in 2013, when the Miami-Dade Board of County Commissioners approved a consent decree with the federal and state governments to settle alleged failures to operate and maintain a sewage collection, transmission, and treatment system. For years, the system had allowed unpermitted discharges of pollutants in violation of the federal Clean Water Act, 33 U.S.C. Sections 1311 through 1330 (the "Clean Water Act").[215] In the settlement, the county committed $1.6 billion over the next fifteen years to repair and replace the county's antiquated water and sewer pipes.[216] But Biscayne Bay Waterkeeper, an environmental advocacy group,

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Code Section 1205.021 allows state governmental entities, as issuers of public securities, to obtain a declaratory judgment styled as an ex parte proceeding, but pursuant to Texas Government Code Section 1205.042, the Texas Attorney General is a necessary party to the declaratory judgment action. TEX. LOC. GOV'T CODE ANN. §§ 1205.021, 1205.042 (2013); *see, e.g.*, *Ex parte* City of Irving, 343 S.W.3d 850, 852 (Tex. App. Dallas 2011).

211. John P. Freeman, *Current Trends in Legal Opinion Liability*, 1989 COLUM. BUS. L. REV. 235, 267 (1989).

212. *Id.* (emphasis added).

213. Richard R. Howe, *The Duties and Liabilities of Attorneys in Rendering Legal Opinions*, 1989 COLUM. BUS. L. REV. 283, 289 (1990).

214. *See, e.g.*, Mehaffy v. Cent. Bank Denver, 892 P.2d 230, 233 (Colo. 1995) (describing negligent misrepresentation in opinion letter provided to bond purchaser); Haberman v. Wash. Pub. Power Supply Sys., 744 P.2d 1032 (Wash. 1987), *amended by* 750 P.2d 254 (finding bond counsel liable for negligently furnished misinformation).

215. *See* Proposed Pls./Intervenors' Mot. & Mem. for Leave to Intervene as Pls., *United States v. Miami-Dade Cnty.*, http://www.scribd.com/fullscreen/121872961?access_key=key-z2gceuugsxmzkzu916s (S.D. Fla. Jan. 23, 2013) (No. 12-24400-FAM).

216. Patricia Mazzei, *Miami-Dade Commissioners Approve Spending $1.6 Billion to Fix Water, Sewer Pipes*, MIAMI HERALD (May 21, 2013), http://www.miamiherald.com/2013/05/21/3407080/miami-dade-commissioners-to-take.html.

objected to the proposal for not addressing sea level rise and storm surge during major storm events,[217] and moved to intervene in the case. Waterkeeper eventually agreed to allow the sewer systems to proceed, with a separate process for sea level rise planning. Only a few weeks after the case settled, Rolling Stone magazine ran its *Goodbye Miami* cover story referring to the imminent risks of sea level rise. Yet Miami, Florida, and the United States of America have all agreed to a court-ordered, bond-funded $1.6 billion water and sewer infrastructure rehabilitation proposal. The Miami case proves the point: the issuance of long-term bonds to fund water-quality-oriented sewer system projects in places facing such uncertainty raises huge concerns for counsel. Eventually, public infrastructure investments that fail to consider the potential consequences of sea level rise will trigger new layers of contentious litigation, and for the lawyer who absolutely denies sea level rise, could lead to professional sanctions as well.

VI. THE DUTIES TO ELEVATE WITHIN ORGANIZATIONS

Despite the lawyers' duties of truthfulness to others and candor to the tribunal, and even after being advised of the relevant laws and facts, some clients will ask their lawyers to bend the rules. Rather than lie in those cases, the lawyers may need to withdraw from representation. Furthermore, individual constituents are not the clients of lawyers who represent organizations. No matter how strong the opinion of the town councilmember, corporate president, or state governor may be, these individuals are not the lawyer's clients, and again, the lawyer may have a duty to elevate issues—or in the worst cases, to whistle blow or withdraw.

Although individual communications within the scope of the organizational representation will remain confidential,[218] individuals within an organization are not considered the lawyer's

217. Francisco Alvarado, *Judge Allows Environmental Group to Join Miami-Dade Water and Sewer Lawsuit*, MIAMI NEW TIMES (May 15, 2013), http://blogs.miaminewtimes.com/riptide/2013/05/judge_ allows_environmental_gro.php.

218. Comment 2 states that "[w]hen one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6." MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 2 (2013).

clients,[219] and the lawyer does not represent both the individual and the organization unless conflicts of interest considerations are addressed.[220] Instead, pursuant to Model Rule 1.13, and the parallel rules adopted in many states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[221] In some circumstances, the lines between the lawyer and the client become blurred, especially in the context of government lawyers and private lawyers who represent governmental entities,[222] because these lawyers may report to a mayor, council chairman, or department head, but may consider the client to be a collegial body, an agency, the executive branch, or even the government as a whole.[223] The absence of clarity in that lawyer-client relationship can create difficult tensions between the government

219. Rule 1.13, Comment 1, states that "[o]fficers, directors, employees and shareholders are the constituents of the corporate organizational client," but Comment 2 notes that even though some communications may be confidential, "[t]his does not mean, however, that constituents of an organizational client are the clients of the lawyer." *Id.* r. 1.13 cmt. 1.

220. Rule 1.13(g) states that "[a] lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." *Id.* r. 1.13(g); *see also id.* r. 1.13 cmt. 12 (explaining that "[p]aragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder").

221. *Id.* r. 1.13.

222. John M. Burman, *Ethics for Lawyers Who Represent Governmental Entities as Part of Their Private Practices*, 10 WYO. L. REV. 357, 360 (2010) (noting that the duties of a government lawyer transcend that of private firm attorneys and increase the authority of the government attorney to act in the best interest of the governmental entity).

223. See Model Rule 1.13, Comment 9, which states:

> The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.

But see D.C. R. PROF'L CONDUCT R. 1.6(k) (stating that "[t]he client of the government lawyer is the agency that employs the lawyer unless expressly provided to the contrary by appropriate law, regulation, or order").

counsel and the other elected and appointed officials responsible for the decisions of the government.[224] But in all these cases, if constituent members of the organization are pressing a lawyer to misrepresent or ignore fundamental facts or legal issues related to sea level rise, the lawyer's ethical duties dictate action.

Applying these ethical principles to the controversies associated with sea level rise raises special complications. Comment 3 to Model Rule 1.13 notes that lawyers generally do not make decisions on policy or risk, but may be forced to act if the organization is likely to be "substantially injured."[225] So if an organizational constituent becomes an outspoken sea level rise denier, and if the lawyer becomes aware that material omissions of information are involved, then the lawyer's duty to the organization may compel the lawyer to take measures to protect the client. Those measures begin with a duty to elevate the matter within the organizational hierarchy, as Rule 1.13(b) explains:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so,

224. Elisa E. Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 272 (1999) (explaining that "[i]f a lawyer is to function effectively as counselor and adviser to elected and appointed officials, those officials must not view the lawyer as some independent actor, liable at any time to arrive at some individualistic perception of the public interest and act accordingly. The governmental client . . . must believe that the lawyer will represent the legitimate interests the governmental client seeks to advance, and not be influenced by some unique and personal vision of the public interest" (internal quotations omitted)).

225. Model Rule 1.13, Comment 3 states, in part:

> Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization.

> the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.[226]

The powerful command of this ethical rule even allows attorneys to reveal otherwise confidential information when criminal activity may be involved,[227] a concept that reflects the legal profession's response to the historic collapse of Enron Corporation. When corporate lawyers knowingly failed to disclose widespread fraud and misconduct, part of the response was the passage of the Sarbanes-Oxley Act governing corporate ethics.[228] Model Rule 1.13, echoing the need for disclosure of organizational fraud, compels the lawyer to make some difficult judgments as to whether and when to second-guess the behavior of his or her peers and organizational constituents.[229] Sometimes, merely asking the constituent to reconsider his or her actions may be enough.[230] In other instances, the lawyer must "climb the organi-

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226. MODEL RULES OF PROF'L CONDUCT R. 1.13(b).

227. *See id.* r. 1.13(c) (describing certain circumstances where "the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization"); *id.* r. 1.13 cmt. 6 (stating that "[i]f the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.").

228. *See In re* Enron Corp. Sec., Derivative & ERISA Litig., 258 F. Supp. 2d 576 (S.D. Tex. 2003) (stating that once attorneys have knowledge of counsel's fraud, they must report the knowledge to their superior, going to the highest authority if necessary to remedy the fraud); Jenny E. Cieplak & Michael K. Hibey, *The Sarbanes-Oxley Regulations and Model Rule 1.13: Redundant or Complementary?*, 17 GEO. J. LEGAL ETHICS 715, 715 (2004); Christina R. Salem, *The New Mandate of the Corporate Lawyer After the Fall of Enron and the Enactment of the Sarbanes-Oxley Act*, 8 FORDHAM J. CORP. & FIN. LAW 765, 777–78 (2003); William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947, 949 (2005), *available at* http://ir.lawnet.fordham.edu/flr/vol74/iss3/1. For a dissenting view, see Lawrence J. Fox, *The Fallout from Enron: Media Frenzy and Misguided Notions of Public Relations Are No Reason to Abandon Our Commitment to Our Clients*, 2003 U. ILL. L. REV. 1243, 1245 (2000).

229. Model Rule 1.13, Comment 4, states:

> In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary.

230. Model Rule 1.13, Comment 4, states:

zational ladder" to elevate awareness of the problem to senior officials, and even the board or ultimate decision-maker, a response that could easily be perceived as a breach of loyalty by the lawyer resulting in termination.[231]

At a minimum, sea level rise is a risk management issue, as the National Academy of Sciences emphasizes.[232] North Carolina, defined by the National Oceanic and Atmospheric Administration (NOAA) as "one of three states with significant vulnerability to sea level rise," is currently undertaking a Sea Level Rise Risk Management Study funded by a $5 million grant from the Federal Emergency Management Agency.[233] Some institutions have already adopted a "no regrets" approach to the issue, embracing mitigation and adaptation strategies, and planning for intelligent retreat in the worst cases. Lawyers representing New York,[234] engineering companies like KPMG,[235] and the reinsur-

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> In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.

231. Model Rule 1.13, Comment 4, states:

> If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization.

See also Lawrence A. Hamermesh, *Up the Ladder and out the Door? Illegal Activities, New Model Rules and Reporting Obligations*, ABA BUS. L. SEC. (2004), http://apps.americanbar.org/buslaw/blt/2004-05-06/hamermesh.shtml (explaining that the new Model Rule 1.13 requires corporate attorney's to report up where a constituent "refuses to take corrective action").

232. COMM. ON AMERICA'S CLIMATE CHOICES ET AL., AMERICA'S CLIMATE CHOICES 1–2 (2011), *available at* http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12781 (explaining that "a valuable framework for making decisions about America's Climate Choices is iterative risk management. This refers to a process of [systematically] identifying risks and [possible] response options, advancing a portfolio of actions that emphasize risk reduction and are robust across a range of possible futures, and revising responses over time to take advantage of new knowledge," information, and technological capabilities.).

233. JOHN DORMAN ET AL., EVALUATING FUTURE CLIMATE CHANGE DRIVEN RISKS TO COASTAL SYSTEMS: THE NORTH CAROLINA SEA LEVEL RISE RISK MANAGEMENT STUDY (2010), *available at* http://www.asbpa.org/conferences/10abstracts/Hosking.doc.

234. *See* N.Y. STATE SEA LEVEL RISE TASK FORCE, NEW YORK STATE SEA LEVEL RISE TASK FORCE: REPORT TO THE LEGISLATURE (2010), *available at* http://www.dec.ny.gov/docs/

ance industry,[236] for example, have nothing to worry about because their clients are seriously and substantially considering sea level rise before making their decisions. On the other hand, the desire to deny is powerful in Texas[237] and North Carolina,[238] where some

administration_pdf/slrtffinalrep.pdf (recognizing "[t]he responses needed to protect communities from the threat posed by sea level rise will take time," but emphasizing that government has an obligation "to protect its citizens while there is time to do so effectively"); THE CITY OF N.Y., PLANYC: A STRONGER, MORE RESILIENT NEW YORK (2013), *available at* http://www.nyc.gov/html/sirr/html/report/report.shtml (proposing a nearly $20 billion plan, with more than 250 initiatives to defend against storms and rising sea level); NYC.gov, *Mayor Bloomberg Outlines How to Protect NYC Against Climate Change*, MIKEBLOOMBERG.COM (Jun. 11, 2013), http://www.mikebloomberg.com/index.cfm?objectid=34ADFF08-C29C-7CA2-F244BC8B5CA207D7 (discussing New York City's September 2012 passage of Local Law 42, establishing the Panel on Climate Change as an ongoing body to advise the City on the latest climate science; a panel that predicts that sea levels could rise at a faster rate than forecasted just four years ago—potentially by more than 2.5 feet by the 2050s). *See also* N.Y. City Special Initiative for Rebuilding and Resiliency, *Federal Emergency Management Agency Flood Map Update*, NYC.GOV, http://www.nyc.gov/html/sirr/html/map/flood_map_update.shtml (last visited Feb. 20, 2015) (The Federal Emergency Management Agency (FEMA) is currently updating the Flood Insurance Rate Maps (FIRMs) for New York City).

235. KPMG, a professional advisory services organization, posits "taking the right action [on climate change] can help businesses improve . . . performance . . . in a sustainable way." *See, e.g.*, KPMG LLP UK, *Climate Change: A Clearer View*, KPMG.COM, http://www.kpmginstitutes.com/global-energy-institute/insights/2008/pdf/climate-change-clearer-view.pdf?utm_source=page&utm_medium=/global-energy-institute/insights/2008/climate-change-clearer-view.aspx&utm_campaign=download (last visited Nov. 12, 2014) (providing centralized information on the debate of climate change and what strategies are being implemented by policy makers to address global warming through legislation and regulation); KPMG INT'L, CARE IN A CHANGING WORLD: CHALLENGES AND OPPORTUNITIES FOR SUSTAINABLE HEALTHCARE (2012), *available at* http://www.kpmg.com/global/en/issuesandinsights/articlespublications/care-in-a-changingworld/pages/default.aspx (reporting that the growing recognition of the effects of climate change, including rising sea levels, "will continue to drive up the cost[s]" of healthcare. "[T]he health[care] sector is facing . . . [a] change that will require . . . innovative solutions . . . [that] make available resources work harder towards creating a . . . model of health[care]" that will sustain climate change).

236. Fla. Trend, *Special Report: Sea Level Rise and Florida, Impact: Insurance*, FLORIDATREND.COM (July 8, 2013), http://www.floridatrend.com/article/15823/impact-insurance (explaining that "European-based reinsurance companies such as Munich Re and Swiss Re" acknowledge the dangers posed by climate change "[a]nd sponsor research that studies the impact of climate change and the cost of adapting to it").

237. Texas formally challenged "the Environmental Protection Agency's finding that gases blamed for global warming threaten public health," and Texas Attorney General Greg Abbot, Governor Rick Perry, and United States Senator Kay Bailey Hutchison all question the EPA's finding. The state's petition dismisses threats like sea level rise, droughts, and floods that global warming poses to Texas. *See* Matthew Tresaugue, *Texas Challenges EPA's Global Warming Findings*, CHRON (Feb. 16, 2010), http://www.chron.com/news/houston-texas/article/Texas-challenges-EPA-s-global-warming-findings-1585469.php; *see generally* Bill Dawson, *Texans Play Lead Roles in GOP Attack on Climate Regulations in Congress*, TEXAS CLIMATE NEWS (Feb. 22, 2011), http://texasclimatenews.org/wp/?p=1279. The briefs, however, properly noted the binding effect of *Massachusetts v. EPA*. *See supra* note 32. Notably, the Texas state climatologist finds "no scientific basis in

elected leaders will reject climate change or sea level rise. Some business institutions continue to resist the concepts too, advocating slow or modest increases in sea level, at best.[239]

In the future, society may draw parallels between these ongoing twenty-first century disputes over sea level rise and the tobacco disputes of the twentieth century. When scientists linked lung cancer to cigarette smoke inhalation, tobacco company litigation ensued.[240] In defense, the tobacco industries' corporate counsel cited a lack of scientific research definitively linking cigarettes to cancer, denied any duty to warn consumers of potential hazards,[241] asserted an "assumption of the risk" defense to tort claims,[242] and blamed other possible causes.[243] But in 1992, in the matter of *Cipollone v. Liggett Group, Inc.*,[244] allegations emerged that the tobacco companies knew cigarettes were

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his [own] state's effort to [repeal the] Environmental Protection Agency's finding that greenhouse gases endanger the public." Brad Johnson, *Texas State Climatologist Disputes State's Denier Petition: Greenhouse Gases 'Clearly Present a Danger to the Public Welfare'*, CLIMATE PROGRESS (Feb. 17, 2010), http://thinkprogress.org/climate/2010/02/17/174566/texas-climatologist-v-denier-petition/.

238. Alexander Glass & Orrin Pike, American Geosciences Institute, *Denying Sea-level Rise: How 100 Centimeters Divided the State of North Carolina*, EARTH MAGAZINE (Apr. 21, 2013), http://www.earthmagazine.org/article/denying-sea-level-rise-how-100-centimeters-divided-state-north-carolina. In 2012, the North Carolina "legislature introduced a bill that would have required state agencies to estimate future sea[ ]level rise based only on linear projections of historic sea[ ]level rise, rather than on models and [current] field observations that show the rate can change over time. . . . Subsequent events led to the complete dismissal of scientific input by the state government and the passage of non-science-based sea[ ]level rise legislation, delaying any consideration of sea[ ]level rise for planning purposes in the foreseeable future." The basic motivation of the NC-20, "a private group of business and local government individuals from each of the [twenty] coastal counties in the state," is financial, as evidenced by the group withholding information about coastal hazards from the public in order to keep area real estate and tourist markets up and running. NC-20 employs media and public relations strategies in an effort to halt or delay any coastal management response to sea level rise. The authors finally noted that "[i]f current and past decisions by the North Carolina legislature are indicative of what future sea-level rise policy will look like, North Carolina will drown in the murky and ever-rising waters of pseudoscience."

239. Suzanne Goldenberg, *Conservative Groups Spend up to $1bn a Year to Fight Action on Climate Change*, THE GUARDIAN (Dec. 20, 2013), http://www.theguardian.com/environment/2013/dec/20/conservative-groups-1bn-against-climate-change.

240. Richard Doll & A. Bradford Hill, *Smoking and Carcinoma of the Lung: Preliminary Report*, 1950 BRIT. MED. J. 739, 739.

241. Stephen E. Smith, *"Counterblastes" to Tobacco: Five Decades of North American Tobacco Litigation*, 14 WINDSOR REV. LEGAL & SOC. ISSUES 1, 16 (2002).

242. 11 Catherine Palo, CAUSES OF ACTION 2d § 555, 1, 29 (1998).

243. 61 DANA G. DEATON, AM. JUR. TRIALS § 95, 1, 37–38 (1996).

244. 505 U.S. 504 (1992).

harmful and addictive, and hid these facts from the public.[245] That revelation empowered the attorneys general of forty-six states and the four largest tobacco corporations to enter into the 1998 Tobacco Master Settlement Agreement, seeking to offset the additional healthcare costs the states endured due to cigarettes and secondhand tobacco smoke.[246] Florida helped lead the tobacco litigation, independently settling its dispute while the Tobacco Master Settlement Agreement remained pending before Congress.[247] Later, a Florida case in 2006 granted the class action plaintiffs a multi-million dollar award of punitive damages.[248] Years from now, as society experiences the consequences of sea level rise, the climate change deniers may find themselves defendants in controversial lawsuits alleging tortious and ethical misconduct. As society asks itself why various people failed to act, or acted wrongfully, the historic echoes of the tobacco litigation may be heard in Florida courtrooms again and again. Lawyers joining their clients in the outright denial of sea level rise may even suffer lawsuits and consequences.[249]

To protect themselves from this foreseeable future, lawyers can and should ensure, at a minimum, that their constituents give sea level rise thoughtful and meaningful consideration. For example, as the federal caselaw involving the National Environmental Policy Act has made clear, lawyers must ensure that government agency decision-making is fully informed and well considered, even if it does not necessarily produce the best

245. *Id.* at 505–06.

246. C. STEPHEN REDHEAD, TOBACCO MASTER SETTLEMENT AGREEMENT (1998): OVERVIEW, IMPLEMENTATION BY STATES, AND CONGRESSIONAL ISSUES, CRS-3 (1999).

247. *Id.*

248. J.B. Harris, Engle v. Liggett: *Has Big Tobacco Finally Met Its Match?*, 86 FLA. B. J., Nov. 2012, at 16, 20, (Nov. 2012) (discussing Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1276–77 (Fla. 2006)). The Florida Supreme Court decertified the class in *Engle* and the verdict did not stand. *Id.* Similar disputes are ongoing as to whether tobacco companies knew "light" cigarettes were no different from regular ones or that it is unfairly deceptive to consumers what "light" means. Thomson Reuters, *Judge Snuffs out Bid for Class Certification in Light-Cigarette Case* Wyatt v. Philip Morris, WESTLAW J. TOBACCO INDUS. Sept. 6, 2013, at *1, 2013 WL 4528557.

249. Sadly, by the time the true repercussions of sea level rise manifest, the statute of limitations on potential actions for malpractice or misconduct may have passed, long ago, enabling the responsible parties to escape the consequences of their actions (and inactions). The question, however, will be when the harm manifests, and whether the statutes of limitation are tolled—all potentially the subject of a future article.

decision.[250] In a 2007 federal district court case over the operation of regional water projects and their effects on the Delta Smelt, in which this Author was counsel for the federal government, the federal government had originally argued that the effects of climate change on rainfall and snowpack in the Sierra Mountains were simply too speculative.[251] The court rejected the speculation argument, finding that the "absence of *any* discussion . . . of how to deal with any climate change is a failure to analyze a potentially 'important aspect of the problem.'"[252]

In future litigation disputes, courts "will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor."[253] But it is the duty of the courts to ensure that the government adequately considers and discloses the environmental impact of its actions and to take a hard look at the government's decision to ensure that it is not arbitrary or capricious.[254] For the government action to survive judicial scrutiny, sea level rise *must* be considered when it is relevant.

Once the issue of sea level rise has been acknowledged, and framed as one involving a degree of risk management, lawyers can reasonably rely on Model Rule 1.13, Comment 3, which states, in part, that "[d]ecisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[255] For example, when Florida Power & Light Company (FPL) faced intense criticism of its Turkey Point Nuclear Power Plant expansion proposal near Miami, hearing significant public concerns about how sea level rise could affect the facility, FPL agreed to "consider" the issue "for planning purposes."[256] Similarly, lawyers can accept an institutional risk

250. Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978); New York v. NRC, 681 F.3d 471, 476 (D.C. Cir. 2012).

251. Natural Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 369 (E.D. Cal. 2007).

252. *Id.* at 370 (emphasis in original).

253. Nevada v. Dep't of Energy, 457 F.3d 78, 93 (D.C. Cir. 2006) (citing Fuel Safe Wash. v. FERC, 389 F.3d 1313, 1323 (10th Cir. 2004)).

254. Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 72 (D.C. Cir. 2011).

255. MODEL RULES OF PROF'L CONDUCT R. 1.13, cmt. 3 (2013).

256. *In Re* Fla. Power & Light Co. Turkey Point Units 6&7, DOAH Case No. 09-3575EPP, OGC Case No. 09-3107, Stipulation Between South Florida Regional Planning Council and Florida Power & Light Company (stating, "FPL agrees to consider [South Florida Climate Change Compact] data and reports for its planning purposes as the Project progresses towards final approval, construction and operations").

management approach that assumes only modest sea level rise or best-case scenarios. But for lawyers whose organizational constituents insist that sea level rise is just a farce, careful scrutiny of the organization's conduct will be necessary. If the organization is engaged in material omissions or misrepresentations, or otherwise has exposed itself to substantial civil liability or even criminal consequences, the lawyer will need to elevate the issues.

A. The Risks of Whistleblowing

In the worst cases, even after providing necessary advice, and even after elevating the issues, some lawyers will have clients who still refuse to accept the facts or abide by the law. The clients might even continue to advocate absolute and irresponsible denial of sea level rise. Their lawyers, however, cannot engage in the deception.

In some cases, a lawyer may fall within the scope of whistleblower protection and become empowered to disclose information while retaining some protections for continued employment.[257] In fact, in the particular context of sea level rise, where coastal communities face special risks, whistleblower protection could prove itself a necessary option for lawyers seeking to protect public health, safety, or welfare.

The effectiveness of whistleblower laws may vary from state to state. In Florida, for example, an organization's mere failure to consider sea level rise, or even outright denial, will *not* be sufficient, by itself, to protect a lawyer's disclosure. Instead, whistleblowers must also be able to identify a violation of law. The state's public sector whistleblower law is intended "to prevent agencies or independent contractors from taking retaliatory action" where an employee reports "violations of law on the part of a public employer or independent contractor that create a substantial and specific danger to the public's health, safety, or welfare."[258] For the private sector, Florida's whistleblower law

257. Florida law also intends to prevent financial misconduct by the government. FLA. STAT. § 112.3187 (2013) (explaining that "[i]t is further the intent of the Legislature to prevent agencies or independent contractors from taking retaliatory action against any person who discloses information to an appropriate agency alleging improper use of governmental office, gross waste of funds, or any other abuse or gross neglect of duty on the part of an agency, public officer, or employee").

258. *Id.*

provides that "[a]n employer may not take any retaliatory personnel action against an employee" who "[d]isclosed, or threatened to disclose, to any appropriate governmental agency, under oath, in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation."[259]

But where statutes require consideration and protection of public safety, and where those statutes are violated, denial of sea level rise may be a basis for invoking whistleblower protections.[260] The Federal Whistleblowing Protection Act, for example, prohibits an adverse action against a federal employee who discloses, among other concerns, any violation of any law, an abuse of authority, or a substantial and specific danger to public health or safety.[261] In some cases, the facts associated with sea level rise could rise to that level.

Lawyers, however, face unusual complications in whistleblower matters due to the classic ethical tensions between a client's desire to deceive, the lawyer's duty to protect confidentiality, and the lawyer's obligation of truthfulness.[262] Although an ABA ethics opinion suggests that lawyers can pursue whistleblower claims,[263] courts have been divided on the degree to which competing responsibilities to the client can be protected. Some courts have even disallowed whistleblower claims.[264]

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259. FLA. STAT. § 448.102. In addition, the general whistleblower law applicable to the private sector requires the employee, in writing, to elevate the issues to a supervisor and afford the employer a reasonable opportunity to correct the problem. *Id.*

260. See, for example, the List of Sample Provisions in Florida Statutes Chapters 298, 373, 380, and 403 (referencing public safety).

261. Federal Whistleblower Act, 5 U.S.C. § 2302(b)(8) (2012).

262. *See, e.g.*, Rachel S. Arnow Richman, *A Cause Worth Quitting for? The Conflict Between Professional Ethics and Individual Rights in Discriminatory Treatment of Corporate Counsel*, 75 IND. L.J. 963, 964 (2000).

263. *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-424 (2001) (explaining that "[t]he Model Rules do not prevent an in-house lawyer from pursuing a suit for retaliatory discharge when a lawyer was discharged for complying with her ethical obligations. . . . The lawyer must take reasonable affirmative steps, however, to avoid unnecessary disclosure and limit the information revealed.").

264. *See* Van Asdale v. Int'l Game Tech., 577 F.3d 989, 995 (9th Cir. 2009) (finding that in-house counsel could pursue whistleblower action under Sarbanes-Oxley Act, and confidentiality or privileges could be adequately addressed by court's equitable powers); Gen. Dynamics Corp. v. Super. Court, 876 P.2d 487, 490 (Cal. 1994) (holding that in-house counsel could pursue retaliatory discharge claim, but only if possible to do so without breaching attorney-client privilege); Balla v. Gambro, Inc., 584 N.E.2d 104, 110 (Ill. 1991) (stating that in-house lawyer could not pursue whistleblower claim because of the chilling effect on confidential communications).

Given their duties to the public at large, government lawyers might also raise First Amendment based arguments to justify breaches of client confidentiality because of their unique role, their access to information, and the importance of leaks in democratic governance.[265] For example, in *Pickering v. Board of Education*,[266] the Supreme Court balanced a public employee's First Amendment speech rights with the government's interest in managing its employees by considering, first, whether the employee was acting as a citizen speaking out on a matter of public concern, and second, whether the government had an adequate justification to treat the employee differently from other members of the general public.[267] But that test, when applied to lawyers, has provided less protection. In *Garcetti v. Ceballos*, the First Amendment failed to protect a supervising deputy district attorney, who was asked to review a case and the police affidavit used to obtain a search warrant.[268] Concluding that the affidavit made serious misrepresentations, the attorney wrote a memorandum advising his supervisor to dismiss the case, and later testified about his memorandum on behalf of the defendant.[269] After the trial, the County District Attorney office disciplined Ceballos, and in response he pursued a civil rights claim against his employer for unconstitutional retaliatory conduct in violation of 42 U.S.C. Section 1983.[270] The Supreme Court, applying *Pickering*, held that the First Amendment provided no protection "when public employees make statements pursuant to their official duties," and that such communications were not insulated from employer discipline.[271]

Legal ethics certainly make life challenging for the lawyer dealing with a client that denies sea level rise. And even if the whistleblower statutes, or the First Amendment, provide some degree of protection, the reality of whistleblowing is that it is a

265. Mika Morse, Note, *Honor or Betrayal? The Ethics of Government Lawyer-Whistleblowers*, 23 GEO. J. LEGAL ETHICS 421, 452 (2010) (encouraging a more lenient view of government lawyer whistleblowing).
266. 391 U.S. 563 (1968).
267. *Id.* at 568.
268. 547 U.S. 410, 420–21 (2006).
269. *Id.* at 414.
270. *Id.* at 415.
271. *Id.* at 421.

path fraught with risk. Whistleblowing, even if protected by law, can still result in a dead-end career.[272]

B. The Last Resort of Withdrawal

Where whistleblowing is not a viable option, and in the absence of changed client behavior, some lawyers may finally have reached a worst-case scenario: the duty to withdraw. In pertinent part, ABA Model Rule 1.16, governing termination of representation, notes that a lawyer has discretion to withdraw from representing a client if "the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent" or if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement."[273] In addition, the lawyer has a mandatory duty to withdraw if the lawyer's continued representation of the client "will result in violation of the rules of professional conduct or other law."[274] Withdrawal also may be appropriate where "other good cause for withdrawal exists."[275]

Frequently in the caselaw, ethical quandaries over lies and withdrawals have arisen in the context of criminal testimony or disclosures associated with financial instruments and securities.[276] However, as Comment 9 to ABA Model Rule 1.13 notes, the lawyer's duties to an organization, including a duty to elevate issues and perhaps even a duty to withdraw, apply to governmental organizations, too.[277] In fact, in a matter involving the

272. Jesselyn Radack, *The Government Attorney-Whistleblower and the Rule of Confidentiality: Compatible at Last*, 17 GEO. J. LEGAL ETHICS, 125, 143 (2003) (explaining that even where an attorney may be insulated from malpractice suits, he or she may face ostracization and hostility from his or her peers).

273. MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(2),(4) (2013).

274. *Id.* r. 1.16(a)(1).

275. *Id.* r. 1.16(b)(7).

276. *See, e.g.*, SEC v. Fehn, 97 F.3d 1276 (9th Cir. 1996) (discussing a lawyer who helped prepare deficient form 10-Qs and filed them with Securities and Exchange Commission, aiding violations of securities laws).

277. ABA Model Rule 1.13(e) states:

> [a] lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

conduct of government officials, the lawyer "may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances."[278]

Indeed, lawyers can even be found to have breached their ethical duties when they fail to withdraw. Rule 11 of the Federal Rules of Civil Procedure allows courts to impose sanctions against clients or their lawyers after considering "whether a party's claims are objectively frivolous and whether the person who signed the pleadings should have been aware that they were frivolous."[279] By signing a pleading in federal court, an attorney certifies that he or she has conducted a reasonable inquiry and that the pleading is well-grounded.[280] But an attorney cannot silently acquiesce to a client's unethical pursuit of litigation,[281] nor function as the client's mouthpiece.[282] For example, in a civil dispute involving misuse of trade secrets, even where a lawyer has advised his client to dismiss his claims, the lawyer's subsequent filing of a tepid response and request for a jury trial, his "deliberate indifference to obvious facts," and his failure to withdraw from a case that was "factually and legally without merit" earned the lawyer Rule 11 sanctions from a federal judge.[283] Similarly, lawyers cannot pursue baseless employment claims[284] or make arguments in bankruptcy proceedings[285] based

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Id. r. 1.13(e).

278. *Id.* r. 1.13 cmt. 9.

279. Baker v. Alderman, 158 F.3d 516, 524 (11th Cir. 1998); Souran v. Travelers Ins. Co., 982 F.2d 1497, 1508 n.14 (11th Cir. 1993) (finding that "[e]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction on the client").

280. FED. R. CIV. P. 11.

281. Thomas v. Tenneco Packaging Co., 293 F.3d 1306, 1327 n.31 (11th Cir. 2002).

282. Morrison v. State, 373 S.E.2d 506, 509 (Ga. 1988).

283. Cargile v. Viacom Int'l., Inc., 282 F. Supp. 2d 1316, 1320–21 (N.D. Fla. 2003).

284. Baker v. Am. Juice, Inc., No. 2:93cv262, 1994 WL 750614, at *1–2 (N.D. Ind. Aug. 9, 1994) (discussing a motion for summary judgment and attorneys' fees that was granted when the plaintiff's counsel knew or should have known that plaintiff as an "at will" employee lacked entitlement to relief based on a claim of retaliatory discharge when the EEOC claim was brought after the employee-plaintiff was terminated); Sherman v. Optical Imaging Sys., Inc., 843 F. Supp. 1168, 1183 (E.D. Mich. 1994) (finding that an attorney's failure to withdraw suit for employment discrimination, or alternatively withdraw as counsel after it became clear that plaintiff's claims were without merit or legal application, was a cause for attorney sanctions under Federal Rule Of Civil Procedure 11).

285. *In re* Robinson, 373 B.R. 612, 629 (Bankr. E.D. Ark. 2007) (discussing the imposition of Bankruptcy Rule 9011 sanctions for bad faith litigation that were ordered when an attorney filed petitions that were not "well-grounded in fact" and that demonstrated both

on merely the desires of a misguided client. As another federal judge explained:

> An attorney has a duty to exercise independent professional judgment, and should not be an unreflecting conduit through which the opinions or desires of a client are permitted to flow unchecked. Rather, the attorney must stand his or her ground and refuse to act in a manner that flies in the face of the relevant ethics rules. When lawyers yield to the temptation to file baseless pleadings to appease clients, they must understand that their adversary's fees become a cost of *their* business. Litigation must be grounded in an objectively reasonable view of the facts and the law, and if it is not, the lawyer who proceeds recklessly—not his innocent adversaries—must foot the bill.
>
> The Court recognizes the concern that a lawyer's withdrawal from representing an unreasonable client may do more harm than good. The appropriate course of conduct for a lawyer, however, is to move for withdrawal.[286]

Where the attorney offers, as the basis for withdrawal, his or her own belief that the claim lacks merit—even over the client's objections—courts have allowed attorneys to withdraw.[287] In cases

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a deliberate indifference to well-grounded facts and bad faith in pursuing a claim with the knowledge that it was unfounded).

286. Wood v. Khan Hotels LLC, 2013 WL 2147969 (D. Neb. May 16, 2013) (internal citations omitted) (sanctioning attorney for pursuit of client's claims knowing that they were "grounded in at best, speculation" amounting to a reckless disregard of the attorney's duties to the court) (citing *Thomas*, 293 F.3d at 1327 n.31, which upheld sanctions against a plaintiff's attorney for personal attacks on and accusations of racism against defendant and defense counsel, emphasizing lawyers' duties to the court and justice system as a whole, which necessitate professionalism and independent judgment). For additional cases discussing attorney sanctions, see *Cargile*, 282 F. Supp. 2d at 1320–21 (upholding finding of Federal Rule of Civil Procedure 11 violations when counsel failed to withdraw from the case despite realization that claims lacked merit, citing need for claims to be grounded in fact, legally tenable, and not submitted in bad faith for an improper purpose); *see also In re* TCI Ltd., 769 F.2d 441, 446–50 (7th Cir. 1985) (The court held that a plaintiff's attorney's motion to withdraw as counsel should be granted, where a "client insists upon taking action which the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;" this decision was also supported by Rule 1.16(b)(6), which permits withdrawal when the representation has "been rendered unreasonably difficult by the client," and Rule 1.16(b)(7), which permits withdrawal when good cause exits when the corporate entity plaintiffs refuse to cooperate with the discovery process and continue to stall litigation unreasonably); Parfi Holding AB v. Mirror Image Internet, Inc., No. Civ.A. 18507, 2006 WL 903578, at *1 (Del. Ch. Apr. 3, 2006).

287. Lumsden v. Sec'y of the Dep't of Health and Human Servs., No. 97-0588V, 2012 WL 1357504, at *2–3 (Fed. Cl. Mar. 29, 2012) (upholding a petitioner's attorney's request to withdraw as counsel because, although respondent alleged that counsel must show

where the attorney knows that the client's position is baseless, the lawyer's failure to withdraw can lead to sanctions or even disbarment.[288] Accordingly, when it comes to denial of sea level rise, lawyers should be similarly cautious. Not every argument desired by a client deserves its day in court.

VII. CONSEQUENCES OF BREACHING THE LEGAL DUTIES

Based on the rules of the legal profession discussed above, lawyers owe duties to confront the denial of sea level rise. But significant questions remain as to the consequences of breaching those duties.

In theory, ethical breaches can be disciplined by the bar. A lawyer who stays silent about or openly misrepresents important risks associated with sea level rise could be found to violate many of the rules discussed above. History, however, suggests that attorney discipline is unlikely. After all, one of the dark revelations of the tobacco litigation was the discovery that lawyers were knowingly misusing the attorney–client privilege, "consulting" with clients on "scientific" research, and then suppressing findings adverse to the client under the shield of lawyer–client confidences while publishing preferred findings.[289] Professor Geoffrey Hazard, a distinguished ethics scholar, decried the conduct in the pages of the National Law Journal under the

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cause to withdraw, the counsel's irreconcilable differences with the petitioner and the counsel's belief that the claim lacked merit were sufficient reasons for the withdrawal); Brunswick v. Statewide Grievance Comm., No. HHDCV054010799, 2006 WL 895007, at *6 (Conn. Super. Mar. 22, 2006) (imposing sanctions on a lawyer for bringing a frivolous claim, in violation of Rule 3.1, with no basis in fact or law and for not withdrawing as counsel in a timely manner upon realization that the claim lacked merit even though the client refused to authorize the withdrawal of the attorney).

288. *In re* Dennis, 188 P.3d 1, 18 (Kan. 2008). The Supreme Court of Kansas upheld the disbarment of an attorney where clear and convincing evidence proved the attorney made false statements of fact or law to a tribunal or failed to correct a previous false statement of material fact or law, and that such deception to the court was contrary to the administration of justice. *Id.*; *In re* Nalls, 926 So. 2d 491, 492 (La. 2006) (explaining that an attorney was suspended from the practice of law for one year and one day for filing a frivolous suit on behalf of a client in violation of the following Model Rules of Professional Conduct: "Rule 1.16(a)(1) (failure to decline or terminate a representation when the representation will result in a violation of the Rules . . . or other law) [Rule] 3.2 (meritorious claims and contentions) and [Rule] 8.4(d) (engaging in conduct prejudicial to the administration of justice)").

289. Edward J. Cleary, *The Use and Abuse of the Attorney Client Privilege*, BENCH & B. MINN., Sept. 1998, *available at* http://lprb.mncourts.gov/articles/Articles/The%20Use%20and%20Abuse%20of%20the%20Attorney%20Client%20Privilege.pdf.

headline *Tobacco Lawyers Shame the Entire Profession*, but recognized that the legal duties of confidentiality arguably allowed for secrecy.[290]

Then again, the tobacco cases predated the historic Enron collapse, and the reforms that followed.[291] Protecting client confidentiality is no longer as sacrosanct as it once was, particularly when huge risks to the public are involved.[292] Indeed, ABA Model Rule 1.6 has clear exceptions to the duty of confidentiality. If sea level rise presents a physical threat to safety of people on the coastlines, then Rule 1.6 (b)(1) would allow the lawyer to reveal information "to prevent reasonably certain death or substantial bodily harm."[293] Similarly, if sea level rise presents a threat to the local economy, or financial investors, then Rule 1.6(b)(2) would allow the disclosure of otherwise confidential information "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."[294] In other words, while the tobacco and Enron lawyers may have escaped discipline based on older versions of the ethical rules,[295] society is increasingly poised to hold lawyers accountable for failing to disclose their clients' lies and wrongdoings.

Although the ethical duties might suggest the need for action with a client determined to deny the rising seas, it is another matter altogether to suggest that a state bar would pursue

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290. Geoffrey C. Hazard, *Tobacco Lawyers Shame the Entire Profession*, NAT'L. L.J., May 18, 1998, at A22, *available at* http://legacy.library.ucsf.edu/documentStore/a/g/lagl49b00/Sagl49b00.pdf.

291. Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, *in* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS 625 (Nancy B. Rappaport & Bala G. Dharan eds., 2002), *available at* http://www.thecorporatescandalreader.com/forms/04c%20rhode.pdf.

292. *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101-1107, 116 Stat. 745 (2002) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.) (requiring attorneys to report evidence of a material violation of securities law, breach of fiduciary duty, or similar violation by the company or any agent thereof, to the chief legal counsel, the chief executive officer, or the audit committee of the board of directors).

293. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2013).

294. *Id.* r. 1.6(b)(2).

295. *See generally* William H. Simon, *Introduction: The Post-Enron Identity Crisis of the Business Lawyer*, 74 FORDHAM L. REV. 947 (2005); *see also* Julie Hilden, *Scummery Judgment: Why Enron's Sleazy Lawyers Walked While Their Accountants Fried*, SLATE (June 21, 2002), http://www.slate.com/articles/news_and_politics/jurisprudence/2002/06/scummery_judgment.html.

discipline in that case. As noted earlier, sea level rise is a matter involving partisan perceptions, and a bar discipline case, even if abundantly meritorious, easily could be criticized as politically motivated.[296] Moreover, as the plain text of Rule 1.6 states, a debate over the boundaries of fraud lies at the heart of the lawyer's duties. Thus, while discipline may be a possibility, and one worthy of greater consideration in another article, tort law also may prove to be an effective mechanism to ensure that lawyers confront the sea level rise deniers.[297]

The various examples discussed above show how lawyers, in representing their clients, can misrepresent important factual issues. In instances where the lawyers are representing clients who want them to deny sea level rise, it is third parties who are harmed by the lawyers' actions. In fact, the lawyers' actions and omissions raise the potential for a tort-based action for negligent misrepresentation. Section 552 of the Restatement (Second) of Torts codifies the lawyer's duty of care, and liability for negligent misrepresentation, and has been widely adopted:

> One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.[298]

Although the precise circumstances creating the risk of negligent misrepresentation, and the degree of risk, are also topics both left to a future article,[299] for purposes of this initial ethics-based analysis it is important to note that government lawyers are not wholly immune from this risk. In many instances, government lawyers rely upon special protections and immunities from

296. *See generally* James Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L. Q. 725 (2005), *available at* http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1962&context=facpubs.

297. Grossman, *supra* note 177; Kysar, *supra* note 14.

298. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

299. By way of example, negligent misrepresentation has been applied to deed warranties, *Menuskin v. Williams*, 145 F.3d 755 (6th Cir. 1998); opinion letters, *Greycas Inc. v. Proud*, 826 F.2d 1560 (7th Cir. 1987); and inaccurate financial projections, *Eisenberg v. Gagnon*, 766 F.2d 770 (3d Cir. 1985).

liability for their actions and their mistakes, because the limited jurisdiction of the courts provided by Article III of the United States Constitution, coupled with Supreme Court precedent, often immunizes federal officials from lawsuits.[300] But that immunity can be waived. At the federal level, individual claimants may have jurisdiction in the Court of Claims upon the Tucker Act, 28 U.S.C. Section 1491, for "any claim against the United States founded either upon the Constitution, or any Act of Congress."[301] Similarly, through the Federal Tort Claims Act,[302] the United States authorizes tort suits to be brought against itself, making the United States liable for the tortious actions of its employees to the extent that private employers are liable under state law for the torts of their employees. Based on common law and interpretations of the Eleventh Amendment, states have also had degrees of sovereign immunity.[303] Like the federal government,

300. Article III, Section 2, of the Constitution delineates the scope of the judicial power over nine types of cases and controversies, stating that

> [t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Generally, the "federal party clause," which constitutionally allows the federal government to be a defendant, has been narrowly interpreted to require consent to be sued. *See, e.g.*, United States v. Sherwood, 312 U.S. 584, 586 (1941) (stating, "The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit") (citations omitted); *cf.* Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 528 n.29 (2003).

301. 28 U.S.C. § 1491 (2012).

302. *Id.* § 1346(b) (providing judicial review "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred").

303. The Eleventh Amendment states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. As for suits by citizens of a state against their own state, the United States Supreme Court explained, in *Alden v. Maine*, 527 U.S. 706, 728, 732 (1999), that "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself. . . . Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States

states have also waived sovereign immunity in many ways, sometimes through statutes, and sometimes even in their state constitutions.[304]

Thus, the extent to which sovereign immunity protects some government lawyers varies from state to state and agency to agency. For example, Florida water management district attorneys benefit from a strong statutory assertion of sovereign immunity.[305] Other lawyers, especially county and special district counsel who issue permits or who render advice to third parties, and even private lawyers engaged in contracts or leases, receive less protection.[306]

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to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers." *Cf.* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1201–24 (2001) (critiquing the entire doctrine of state sovereign immunity as inconsistent with federal supremacy).

304. *See generally* Nat'l Conference of State Legislatures, *State Sovereign Immunity and Tort Liability*, NCLS.ORG, http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx (last updated Sept. 8, 2010) (containing a table listing statutes and constitutional provisions for all 50 states and the District of Columbia relating to immunity and tort claims against the state).

305. Florida employees working for water management districts have a large degree of sovereign immunity based on Section 373.443 of the Florida Statutes, which states that

> [n]o action shall be brought against the state or district, or any agents or employees of the state or district, for the recovery of damages caused by the partial or total failure of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works upon the ground that the state or district is liable by virtue of any of the following: (1) Approval of the permit for construction or alteration. (2) The issuance or enforcement of any order relative to maintenance or operation. (3) Control or regulation of stormwater management systems, dams, impoundments, reservoirs, appurtenant work, or works regulated under this chapter.

Relatedly, federal flood control workers for the United States Army Corps of Engineers might be able to rely upon the Flood Control Act of 1928 (FCA), 33 U.S.C. Section 702, and the discretionary-function exception (DFE) which bars suits on any claim that is "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). *See also* Robinson v. United States, 696 F.3d 436, 448–49 (5th Cir. 2012) (discussing flood control immunities of federal workers).

306. In contrast with Florida water management district personnel, employees for Florida's "Chapter 298" flood control districts have immunity from suit only for construction and maintenance activities, pursuant to Section 298.24 of the Florida Statutes, which states that "[e]ach district shall have full authority to construct and maintain any ditch or lateral provided in its water control plan, across any of the public highways of this state, without proceedings for the condemnation of the same, or being liable for damages therefor." FLA. STAT. § 298.24 (2013).

And local government officials engaged in stormwater management have even less protection, simply being held to a duty of care. *See* Slemp v. City of North Miami, 545 So. 2d 256, 258 (Fla. 1989) (holding that a city can be held liable for flooding damages that

Further complicating matters, caselaw and statutes have also drawn important distinctions between immunity and liability based on the substantive nature of the governmental action at issue. For example, sovereign immunity may not extend to constitutional violations.[307] And in cases involving local governments, the proprietary functions of government may not be protected from tort suits by sovereign immunity, whereas caselaw may immunize other governmental functions carried out for the public good that advance or protect public health, safety, or welfare.[308] Given the complexity of the subject, litigators may spend decades debating the nuances of sovereign immunity and its applicability to sea level rise litigation. But for the lawyers working on these issues today—and especially for private lawyers who lack the special protections and immunities of the government lawyers—the point is simpler. Negligent misrepresentations create the potential for tort exposure, but that risk can be reduced or eliminated by meaningfully addressing the consequences of sea level rise upon third parties who might rely upon the lawyer's actions.

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result from the allegedly negligent maintenance of a storm sewer pump system it constructed); *see also* FLA. STAT. § 170.01(1)(a), (b) (stating that "[a]ny municipality of this state may . . . [o]rder the construction, reconstruction, repair, renovation, excavation, grading, stabilization, and upgrading of greenbelts, swales, culverts, sanitary sewers, storm sewers, outfalls, canals, primary, secondary, and tertiary drains, water bodies, marshlands, and natural areas, all or part of a comprehensive stormwater management system, including the necessary appurtenances and structures thereto and including, but not limited to, dams, weirs, and pumps").

307. *See, e.g.*, 42. U.S.C. § 1983; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1426–27, 1466–92 (1987) (arguing that neither federal nor state governments "can enjoy plenary 'sovereign' immunity from a suit alleging a violation of constitutional right" and that the Constitution embodies a "remedial imperative").

308. *See, e.g.*, David N. Anthony & Beth V. McMahon, *Sovereign Immunity: Can the King Still Do No Wrong?* 48 VA. LAW. 10 (2000) (citing relevant case law and distinguishing sovereign immunity for proprietary functions from sovereign immunity for governmental functions, which include municipal designing, planning, and construction, such as public street and sidewalk construction; designing dams and seawalls; responding to public emergencies; maintaining traffic signals and railroad crossings; operating hospitals and health departments; capturing and impounding stray animals; operating police and firefighting forces; operating ambulance services; maintaining governmental buildings, such as courts and jails; operating schools; removing trash and operating landfills; and inspecting buildings; whereas proprietary and ministerial functions, carried out primarily for the benefit of the municipality rather than the public, include operating tollgates; operating a water department; operating a market; operating utilities; operating an airport; renting property as a landlord; and operating a public housing authority).

VIII. CONCLUSIONS: THE DUTY TO THE NEXT GENERATION

No matter what the lawyer says or does, some clients will search for their own version of the facts to support their cause. But the absolute denial of sea level rise requires a client to wholly reject the global consensus of science, the evaluations of United States government agencies, the globally respected expertise of the Dutch, and the international community. Inevitably, determined to vindicate their own particular biases, these clients will uncover many individual opinions suggesting that "Sea Level Is Not Rising."[309] Diligent scrutiny by the lawyers can quickly uncover the critiques of those and other outlier individual opinions. The law governing lawyers mandates competence, not ignorance. For the lawyers serving as the voices of their clients and the officers of the court, knowledge is power. And in the context of sea level rise, the legal profession—a profession of leaders—should not allow misinformation or willful blindness to shape our social conduct in response to the challenging times ahead.[310]

This Article does not intend to suppress well-reasoned and principled disagreements on specific points such as the magnitude and timing of sea level rise, or the degree of risk presented in a particular circumstance. The policy merits and economic consequences of action or inaction, armoring, adaptation, or retreat are worthy of debate. The lawyer's fundamental duty is to ensure that the debate occurs by insisting that clients carefully *consider* the facts related to sea level rise. Caselaw, statutes, and credible science all stand for the proposition that the oceans are rising at an accelerating rate. A client's irresponsible denial of the facts cannot be tolerated, either by counsel or the courts.

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309. Nils-Axel Mörner, *Sea Level Is Not Rising*, SCI. & PUB. POL'Y (Dec. 6, 2011), http://scienceandpublicpolicy.org/images/stories/papers/reprint/sea_level_not_rising.pdf; *discredited by others*, *see* Mark Lynas, *The Spectator Runs False Sea-level Claims on Its Cover*, THE GUARDIAN (Dec. 2, 2011), http://www.theguardian.com/environment/georgemonbiot/2011/dec/02/spectator-sea-level-claims.

310. *See, e.g.*, United States v. Benjamin, 328 F.2d 854, 863 (2d Cir. 1964) (stating that "Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess," and holding that a defendant's lawyer had a duty recognize violations of the Securities Act of 1933).

Yet the lawyer's duty to confront the sea level liars feels like a mission impossible. Abstract principles and ethical duties are easily lost amidst raging debates over political party loyalties or the raw economics of keeping a job.[311] Staying silent or circumspect seems far easier, but the lawyer's silence may create new risks of discipline or negligent misrepresentation consequences in the future.

Sea level rise presents an unprecedented intergenerational controversy. In South Florida, the potential for even a modest twenty-one inches of sea level rise could have catastrophic effects on coastal communities, freshwater supplies, and the operation of the local flood control system.[312] The risks are just too high, and lawyers who participate in denial and inaction on sea level rise are complicit in a dangerous deception. Wearing a belt of truth, lawyers must confront the schemers and deniers. Clients may choose the do-nothing option in response to the risks of sea level rise, but lawyers have ethical and moral duties to nonclients, third parties, the courts, and the next generation. The legal profession must ensure that clients meaningfully consider and address the realities of sea level rise, no matter how unpleasant, unwelcome, or unpalatable the lawyer's advice might be.

311. For example, in Florida, government lawyers have struggled with multiple career challenges. Pension contracts were rewritten by the legislatures, reducing the lawyers' total income, an action upheld by the state's supreme court. *See* 2011-68 Fla. Laws 40, 44, *upheld in* Scott v. Williams, 107 So. 3d 379 (Fla. 2013). In addition, agency litigators who brought controversial environmental enforcement cases faced intervention by senior political appointees and termination. Craig Pittman, *DEP Lawyer Says Clashes over Enforcement Led to His Firing*, TAMPA BAY TIMES (June 14, 2013, 5:17 PM), http://www.tampabay.com/news/environment/dep-attorneys-say-they-were-fired-for-clashing-with-anti-regulation/2126767.

312. Tim Folger, *Rising Seas*, NAT'L GEOGRAPHIC (Sept. 2013), http://press.nationalgeographic.com/2013/08/15/national-geographic-magazine-september-2013/ (containing statements from multiple South Florida experts warning about impairment of flood control canal discharges, accelerated saltwater intrusion, poisoning of freshwater aquifers by saltwater, and uninsurable homes).