Sidebar

ABA Rules Could be a Climate Activist's Sword

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

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

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

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

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

This past semester, I invited him to Charlottesville to lead a classroom discussion on the matter. We enjoyed a lively debate on whether an attorney's failure to disclose her industrial client's greenhouse gas pollution would violate legal ethics rules designed to prevent clients from exploiting legal services to perpetuate an ongoing crime or fraud.

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

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

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

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

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

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

The author teaches a course on "Professional Responsibility in Public Interest Law Practice."