Rule of Professional Conduct 1.1 and Climate Change

By David G. Mandelbaum | May 13, 2024 | The Legal Intelligencer

Last month at the Pennsylvania Bar Institute's Environmental Law Forum, over 100 environmental lawyers discussed the implications of the duty of competence imposed by Rule of Professional Conduct 1.1 on their practices in light of climate change. John Dernbach first posed the issue to the forum in a keynote address a year earlier. Dernbach later published those thoughts. See Irma Russell, John C. Dernbach, and Matt Bogoshian, "The Lawyer's Duty of Competence in a Climate-Imperiled World," 92 U. Mo. Kansas City L. Rev. 1 (2023), available at https://ssrn.com/abstract=4742669. Oddly, applying those thoughts to environmental practice is not obvious; this article tries to memorialize some of the group's conversation about doing so.

Rule 1.1 provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." See 204 Pa. Code Section 81.4, R. 1.1. Russell, Dernbach and Bogoshian observe that just as a lawyer must have a basic understanding of many things that may affect a client's business or activities, the lawyer also has to have a basic understanding of how a changing climate will have changing effects on clients. Not only does the lawyer have to understand that there is a risk of storm damage, but the lawyer also has to understand that the risk of storm damage may change. In order for legal advice to be competent, it must at least in some contexts incorporate an understanding of climate change. Next year will not be like last year.

Climate change causes other things to change as well, and they may be more within a lawyer's usual competence:

- Because climate change poses a risk (and sometimes an opportunity), one can expect governments to change statutes, regulations and policies.
- Because conditions change, one can expect government agencies and courts to change the way they apply existing legal rules.
- Because all of these things are changing, one can expect other actors (adverse parties in litigation, counter-parties in transactions, customers, investors, neighbors, and so forth) to change the way they behave and advocate.

Russell, Dernbach, and Bogoshian cite to John Kerry's famous remarks to the American Bar Association in 2021, where he said: "You are all climate lawyers now, whether you want to be or not." See 92 U. Mo. Kansas City L. Rev. at 11. And, indeed, the examples commentators typically provide come from nonenvironmental areas of practice. Real estate lawyers must advise clients in transactions about the risk of flooding or storms, corporate lawyers must advise clients about risks to supply chains, and so forth.

Examples of instances where climate change directly affects advice or advocacy by environmental lawyers require some thought.

Changing Physical Environment

Climate change affects the physical conditions under which clients conduct their activities. A lawyer may have to understand that the climate is changing and to endeavor to spot issues for his or her client.

Environmental lawyers face a risk in this regard. In our interaction with colleagues and clients, often the environmental lawyer serves double-duty in their minds as the environmental technical expert. So, along with the duty to be competent goes the duty to know when you are not competent and to seek technical assistance.

Understanding of physical change most obviously affects assignments where an environmental lawyer is called upon to advise a client on long-term strategies, for example when the lawyer is asked to help establish an environmental management system or, on behalf of a governmental, NGO, or injured party client, to question the adequacy of an enterprise's systems.

But many do not believe similar considerations apply in permitting or cleanup matters. Permit conditions and cleanup standards are established and applied through a process that either does or does not take into account climate change, and most lawyers do not think that they have a duty to inquire into the adequacy of those standards, even when they advise a permitting agency. That is simply not part of the legal assignment, in their view. But, of course, if one were asked to advise development of the standards, that might be a different story.

Many hold a conceptual model of permitting under which a permit applicant has an entitlement to a permit if the applicant demonstrates that it will satisfy all the regulatory conditions for issuing a permit. Similarly, selection of a remedy for a contamination problem by considering factors not set forth in the statute or regulations can be criticized. Under the federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), a remedy selected using any criteria other than the nine set out in 40 C.F.R. 300.430(e)(9)(iii) is not consistent with the National Contingency Plan, with all that follows from that inconsistency. And under the Pennsylvania Land Recycling and Environmental Standards Act (Act 2), the whole point of the program is to allow remediators to look up environmental remediation standards and to meet them with the assurance that achievement of those standards will lead to cleanup liability protection. See 35 Pa. Stat. Ann. Section 6026.501. So many feel that a lawyer does not have an ethical duty under Rule 1.1 to address the possible insufficiency of a permit condition or a remedy to remain adequate even though it meets regulatory standards.

On the other hand, others view the lawyer as having a duty to push their clients "forward" toward climate change mitigation or adaptation. That duty, if it exists, may not arise under Rule 1.1, but something else.

Changing Legal Requirements

Federal, state and local governments have taken a variety of actions to mitigate and to adapt to climate change. Competent environmental lawyers might have to be aware of recent activity that directly affects environmental regulatory programs.

Most are comfortable with that obligation as it affects advice or advocacy under the environmental programs. For example, if one represents, regulates, or advocates against regulated entities under the Clean Air Act, one has to be aware of recent rulemaking. But one can get far afield when actions under

other programs have environmental or climate change implications; the "energy community" investment or production tax credit bonuses discussed in the February column in this series provide an example.

The Securities and Exchange Commission regulation on The Enhancement and Standardization of Climate-Related Disclosures for Investors, 89 Fed. Reg. 21,668 (Mar. 28, 2024), presents an interesting case. Environmental lawyers are not competent securities lawyers. Many environmental lawyers do not practice in a firm or office with securities lawyers. On the other hand, as was usefully observed during this conversation, many environmental lawyers learned the rules governing accounting and disclosure for environmental liabilities decades ago when the Financial Accounting Standards Board and the SEC began to treat environmental liabilities as often material. The climate disclosure rules should be no different.

Changing Application of Existing Legal Authority

Law can change without a change in statutes or regulations. For example, the care necessary to avoid liability for negligence can change as conditions change. The duty of competence may require a lawyer to advise a client of its evolving duties of care. It may also require an attorney zealously to advocate for that evolution when representing a person arguably injured by a lapse in that duty. Notice that permits and environmental remediation selections do not necessarily protect permittees and remediators for liability under the common law. Environmental lawyers, therefore, may have to take these evolving duties into account when advising or advocating about regulatory decisions.

Even some statutory requirements may change as the climate changes. To take one example, the "reasonable steps" that amount to "appropriate care with respect to hazardous substances" necessary to establishing the "bona fide prospective purchaser defense" under CERCLA may become dynamic. See 42 U.S.C. Section 9601(40)(B)(iv).

Changing Behavior by Others

Competent lawyers always help their clients anticipate what other people will do. For example, an environmental lawyer advising the sale of a business will anticipate the diligence demands of potential buyers and the economic and other terms they will demand in light of environmental conditions. An environmental lawyer advising on the establishment of corporate environmental policies or disclosures will anticipate how regulators or plaintiffs will view those policies or disclosures, and how they will help or hurt in negotiation or litigation. It is a game of chess on a board that we now understand to be moving.

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