

ARE SANCTIONS THE NEW SLAPP? ANALYZING OIL
COMPANIES' WEAPONIZATION OF ETHICS
ACCUSATIONS AGAINST HUMAN RIGHTS
ATTORNEYS

BY
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This Article addresses a troubling trend that has emerged in the human rights and environmental rights litigation space over the last decade: the weaponization of ethics-related allegations against plaintiffs' attorneys as an attempt to suppress litigation. While some states, though certainly not all, have passed legislation to address the harm caused by strategic lawsuits against public participation (SLAPPs), there is not a similar legislative effort to combat newer scrupulous litigation tactics. This Article situates the current weaponization of ethics complaints and sanctions against environmental attorneys within two larger historical phenomena: the longstanding phenomenon of weaponizing ethics and professional responsibility rules as an exclusionary tool within the legal profession and the development of increasingly scrupulous litigation tactics in environmental lawsuits.

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I. INTRODUCTION

“We’re going to fight this until hell freezes over. And then we’ll fight it out on the ice.”

—(Former) Chevron Spokesman Donald Campbell, 2009¹

As the above quotation suggests, Chevron—whom an Ecuadorian court ordered to pay over \$9 billion for dumping oil and sludge in the Ecuadorian Amazon—has adopted aggressive and novel litigation tactics in its quest to evade liability for its actions and its mission to make an example out of the Harvard-educated human rights lawyer that obtained the judgment against the oil company.² Chevron’s attorneys have utilized tools that run the gambit from corporate mainstays to never-before-seen uses of legal tools to achieve these goals. This Article, focusing primarily on the tactics that attorneys for multinational oil companies like Chevron use against human rights lawyers³ and activists, tracks key developments in the ever-evolving corporate playbook. Note that this Article does not seek to take a position on the merits of the cases and disciplinary proceedings discussed; rather, it seeks to highlight the increasingly aggressive and punitive nature of the tactics themselves. Beginning with strategic lawsuits against public participation (SLAPP) suits, moving to racketeer influenced and corrupt organizations (RICO) suits, and then ultimately discussing disciplinary proceedings and other accusations of ethics violations, this Article asks whether disciplinary attacks on attorneys have become the new SLAPP suits (or more accurately, an equally effective tool, as SLAPP suits are still on the rise). This Article then highlights a few of the current challenges that render those working on human rights issues, especially those working on environmental issues, vulnerable to having their ethics and professional conduct attacked. These vulnerabilities are then connected to the longstanding history of the weaponization of bar admission and disciplinary actions against lawyers from marginalized groups and progressive lawyers seen as deviants within the legal profession. Finally, this Article closes with modest suggestions for how to stop, or at least slow, the troublesome trend of corporate attorneys wielding ethics complaints as a weapon against human rights lawyers.

¹ Steve Mufson, *Why Chevron Is Suing One of D.C.’s Most Powerful Lobbying Firms Over . . . The Amazon Jungle?*, WASH. POST (July 2, 2013), <https://perma.cc/Z9PB-5WXU>.

² Sebastien Malo, *Lawyer Who Sued Chevron over Ecuador Pollution Found Guilty of Contempt*, REUTERS (July 26, 2021), <https://perma.cc/TC4C-RSKG>.

³ Note that this Article uses the terms human rights lawyer and environmental lawyer interchangeably throughout, in part because environmental lawyers are human rights lawyers, but also because all the human rights lawyers referenced herein brought suits against oil companies (or other environmental claims). This Article describes the unique challenges that human rights attorneys face when conducting transnational litigation, but this Article also delves into challenges facing human rights attorneys on indigenous lands and elsewhere in the United States because these have implications for transnational litigators as well.

II. SLAPP SUITS AS A TRIED-AND-TRUE CORPORATE TACTIC TO SUPPRESS HUMAN RIGHTS SUITS

SLAPP suits, conceptualized in the 1970s and coined as a term in 1989,⁴ have long proven an effective tool to silence dissent—particularly in the environmental law context.⁵ For example, Robert Murray, head of the United States' largest privately-owned coal company, has been bringing SLAPP suits against activists and journalists for over two decades, including a high-profile defamation suit against comedian John Oliver in 2017.⁶ Though many SLAPP suits are ultimately dismissed, they still achieve their goals of silencing, harassing, and obstructing opponents.⁷ In 2017, a Georgia waste company called Green Group Holdings sued activists for defamation associated with their protest of the company's dumping of hazardous coal ash in a residential landfill.⁸ All of the defendants—whom the company was suing for \$30 million—were residents of Uniontown, Alabama, which the American Civil Liberties Union (ACLU) describes as a poor, predominantly Black town with a median annual income of around \$8,000.⁹ In another instance, a 78-year-old Florida woman named Maggy Hurchalla sent an email to her county commissioners urging them to back out of a water deal with Lake Point Restoration, a company that operates limestone mines in Martin County, Florida.¹⁰ In response, the company sued Hurchalla for interfering with a contract, and Hurchalla is now forced to pay the company \$4.4 million.¹¹

Only twenty-nine states have an anti-SLAPP law on the books, and though the scope of these laws varies greatly, most offer inadequate protection.¹² Important in the transnational litigation context, there is no federal anti-SLAPP statute.¹³ Corporations bringing SLAPP suits in federal court to avoid state anti-SLAPP laws can bring federal causes of action or assert choice of law challenges where the federal court is only sitting in diversity.¹⁴

⁴ George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENV'T L. REV. 3, 4–5 (1989).

⁵ Dwight H. Merriam & Jeffrey A. Benson, *Identifying and Beating a Strategic Lawsuit Against Public Participation*, 3 DUKE ENV'T L. & POL'Y F. 17, 17 (1993).

⁶ *Coal Baron Files SLAPPs Against Those Who Criticize His Labor Practices*, PROTECT THE PROTEST (Aug. 28, 2018), <https://perma.cc/32ZR-PPJ8>; Jonathan Peters, *A Coal Magnate's Latest Lawsuit was Tossed—But Ohio Can Do More to Defend Free Expression*, COLUM. JOURNALISM REV. (May 28, 2014), <https://perma.cc/XVG7-FHC7>.

⁷ Merriam & Benson, *supra* note 5.

⁸ *Green Group Holdings v. Schaeffer: Defense of Environmental Protesters Against Defamation Lawsuit*, AMERICAN CIVIL LIBERTIES UNION, <https://perma.cc/7H5F-P4VW> (last updated Feb. 7, 2017).

⁹ *Id.*

¹⁰ Patricia Mazzei, *The Florida Activist Is 78. The Legal Judgment Against Her Is \$4 Million.*, N.Y. TIMES, <https://perma.cc/3TCP-J9T6> (last updated Sept. 17, 2019).

¹¹ *Id.*

¹² Daniel A. Horwitz, *The Need for a Federal Anti-SLAPP Law*, N.Y.U. J. LEG. & PUB. POL'Y (June 15, 2020), <https://perma.cc/F824-39UY>.

¹³ *Id.*

¹⁴ *Id.*

III. THE DONZIGER CASE AND THE RICO REVOLUTION

Though SLAPP suits remain a corporate bullying mainstay, corporate lawyers have diversified their tactics. The Racketeer Influenced and Corrupt Organizations Act¹⁵ (RICO)—whose civil provisions were largely ignored throughout the 1970s and 1980s—gained immense popularity among corporate litigants in the early 2000s.¹⁶ From 2001 to 2006 alone, plaintiffs filed an average of 759 private civil RICO claims each year.¹⁷ Since its inception, critics of RICO have criticized its vague language as too easily misconstrued.¹⁸ Eventually, certain corporations realized they could weaponize RICO against human rights activists.

Seemingly the first and most widely publicized instance of a RICO suit was the suit Chevron filed against human rights attorney Steven Donziger. The decades-long and still ongoing legal battle began when, from 1972 to 1990, Texaco (which later merged with Chevron) drilled in the Oriente area of the Ecuadorian Amazon and (per its own admission) dumped approximately 15.834 billion gallons of toxic muds and other waste into Amazonian waterways (roughly three million gallons daily).¹⁹ Ecuadorian plaintiffs pursued an Alien Tort Claims Act²⁰ (ATCA) case in the United States in 1994, but the case was dismissed in 2001 on the grounds of international comity and *forum non conveniens* with the condition that Texaco must submit to Ecuadorian jurisdiction.²¹ After eight years of discovery, evidence collection, and litigation, an Ecuadorian judge issued an \$8.646 billion judgment against Chevron (who had merged with Texaco by this point)—awarding an additional \$8.646 billion in punitive damages, which the Ecuadorian National Court of Justice ultimately struck down after finding punitive damages unavailable under Ecuadorian law.²²

Neither the Ecuadorian trial court, the appellate court, nor the National Court of Justice found issues of fraud, bribery, or evidence tampering in the case, yet Chevron—two weeks *before* the National Court of Justice issued its decision—filed a RICO case²³ in federal court in the Southern District of New York, the same district from which the initial

¹⁵ 18 U.S.C. §§ 1961–68 (2018).

¹⁶ Caroline N. Mitchell et al., *Returning RICO to Racketeers: Corporations Cannot Constitute an Associated-in-Fact Enterprise Under 18 U.S.C. § 1961(4)*, 13 FORDHAM J. CORP. & FIN. L. 1, 2–3 (2008).

¹⁷ *Id.* at 3.

¹⁸ Lindsay Ofrias & Gordon Roecker, *Organized Criminals, Human Rights Defenders, and Oil Companies: Weaponization of the RICO Act across Jurisdiction Borders*, 85 J. GLOBAL & HIST. ANTHROPOLOGY 37, 41 (2019).

¹⁹ Corrected Brief for Defendants-Appellants Steven Donziger, The Law Offices of Steven Donziger, and Donziger & Associates PLLC at 18–19, *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2016) (No. 14-826(L)), 2014 WL 3697719.

²⁰ 28 U.S.C § 1350 (2018).

²¹ *Aguinda v. Texaco, Inc.*, 142 F. Supp. 2d 534, 537 (S.D. N.Y. 2001), *aff'd* 303 F.3d 470 (2d Cir. 2002).

²² *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 481–82, 540 (S.D. N.Y. 2014).

²³ *Chevron Corp. v. Donziger*, 768 F. Supp. 2d 581, 637 (S.D. N.Y. 2011).

ATCA claim was dismissed in 2001.²⁴ Chevron alleged that Donziger bribed a judge and ghostwrote the Ecuadorian trial court opinion, among other allegations.²⁵ Chevron dropped its initial claims for damages in order to deprive Donziger of a jury trial and sought only equitable relief under RICO (there is a circuit split on the availability of equitable relief under RICO).²⁶ Judge Kaplan found Donziger to have committed extortion, wire fraud, money laundering, obstruction of justice, and witness tampering under RICO; enjoined the enforcement of the Ecuadorian judgment; and established a constructive trust to divert any attorney's fees or future benefits of the Ecuadorian litigation from Donziger to Chevron.²⁷

As one criminal defense attorney indicated in an interview,

[RICO] was meant to be used against the mob. The danger about a case like this is that it could send a message to a lawyer who wants to take up a cause for an underdog that Big Brother, the big corporate entity, is going to start coming after you for criminal conduct.²⁸

That is precisely what happened. Chevron's successful RICO suit against Donziger, an environmental advocate and human rights lawyer, started a worrisome trend. In 2016, Resolute Forest Products, a Canadian logging company, filed a SLAPP suit, including defamation allegations and RICO charges, against Greenpeace in U.S. federal district court in Georgia.²⁹ The case was then transferred to federal court in northern California³⁰ and largely dismissed with the exception of a single defamation claim allowed to move forward.³¹ Represented by the same law firm that represented Resolute Forest Products, Energy Transfer Partners, L.P. brought a SLAPP suit and RICO charges against lawyers and activists opposing the Dakota Access Pipeline in 2017.³² Professor Michael Gerrard described the lawsuit as "perhaps the most aggressive SLAPP-type suit that [he had] ever seen"—"[t]he paper practically bursts

²⁴ Brief for Defendants-Appellants Hugo Gerado Camacho Naranjo and Javier Piaguaje Payaguaje at 26, 34, *Chevron Corp. v. Donziger*, 833 F.3d 74 (No. 14-0826-cv), 2014 WL 3402507.

²⁵ *Chevron Corp. v. Donziger*, 974 F. Supp. 2d at 460.

²⁶ *Id.* at 546, 568–69.

²⁷ *Id.* at 588, 590, 593–95, 639–42, 644.

²⁸ Victoria Bekiempis, *Was Chevron Scammed for \$19 Billion?*, NEWSWEEK (Oct. 31, 2013), <https://perma.cc/TJK3-65YA>.

²⁹ *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. CV 116-071, 2017 U.S. Dist. LEXIS 74105, at *4–5 (S.D. Ga. May 16, 2017).

³⁰ *Id.* at *2–3.

³¹ *Resolute Forest Prods., Inc. v. Greenpeace Int'l*, No. 17-cv-02824-JST, 2019 U.S. Dist. LEXIS 10263, at *58 (N.D. Cal. Jan. 22, 2019).

³² *Energy Transfer Equity, L.P. v. Greenpeace Int'l*, No. 1:17-Cv-00173-BRW, 2019 U.S. Dist. LEXIS 32264, at *6–7 (D.N.D. Feb. 14, 2019) (*Resolute Forest Products and Energy Transfer Partners, L.P.* were both represented by Kasowitz Benson Torres LLP).

into flames in your hands.”³³ A federal court dismissed these charges in 2019.³⁴

Chevron engaged over 2,000 attorneys from sixty different law firms and spent over \$2 billion in its quest to ensure that the Ecuadorian judgment was not enforced.³⁵ “Chevron has . . . sued or threatened to sue anyone” and everyone who has aided the Ecuadorian plaintiffs, including journalists and a documentary filmmaker.³⁶ By the time it filed its RICO suit in 2011, as part of its scorched earth litigation strategy, Chevron had issued twenty-five requests to obtain discovery from at least thirty different parties in more than a dozen federal courts throughout the United States—a tactic the Third Circuit called “unique in the annals of American judicial history.”³⁷ In the RICO case, Donziger’s small legal team processed an over 2,000-page privilege log and identified 8,652 privileged documents, but because they missed the court’s filing deadline, Donziger forfeited every privilege claim.³⁸ Chevron gained access to Donziger’s tax returns, bank-account information, personal computers and mobile devices, text messages, private phone records, communications with his wife, personal diary, and even the eulogy he gave at his mother’s funeral.³⁹

Chevron, represented by Gibson Dunn, brought a malicious prosecution charge against Cristóbal Bonifaz, the head lawyer on the original *Aguinda* case against Chevron in New York in the 1990s—a tactic the Montana Supreme Court referred to as “legal thuggery” and “truly repugnant” when Gibson Dunn used it in a different case in 2007.⁴⁰ The charges against Bonifaz were dismissed pursuant to California’s anti-SLAPP statute.⁴¹ Bonifaz is a solo practitioner and was forced to expend significant time and expense securing the dismissal of this retaliatory suit—even where an anti-SLAPP law was in place—indicating

³³ Nicholas Kusnetz, *Industry Lawsuits Try to Paint Environmental Activism as Illegal Racket*, INSIDE CLIMATE NEWS (Oct. 5, 2017), <https://perma.cc/FKC9-WMS3>.

³⁴ *Energy Transfer Equity, L.P.*, 2019 U.S. Dist. LEXIS 32264, at *3.

³⁵ *Chevron: Protect the Protest’s Corporate Bully of the Year*, PROTECT THE PROTEST (May 29, 2019), <https://perma.cc/3N7W-H27C>; Lauren Carasik, *Chevron Uses Deep Pockets to Win Ecuador Legal Battle*, AL JAZEERA AMERICA (May 16, 2014), <https://perma.cc/6HLX-GN7D>.

³⁶ Maya Steinitz & Paul Gowder, *Transnational Litigation as a Prisoner’s Dilemma*, 94 N.C. L. REV. 751, 760, 782 (2016).

³⁷ *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir. 2011); Robert V. Percival, *Transnational Litigation: What Can We Learn From Chevron-Ecuador?*, in RESEARCH HANDBOOK ON TRANSNATIONAL ENVIRONMENTAL LAW 318, 318 (Veerle Heyvaert & Leslie-Anne Duvic-Paoli eds., 2020).

³⁸ *In re Application of Chevron Corp.*, No. 1:10-mc-00002-LAK, at 4, 31–32 (S.D. N.Y. Nov. 30, 2010).

³⁹ Corrected Brief for Defendants-Appellants Steven Donziger, The Law Offices of Steven Donziger, and Donziger & Associates PLLC, *Chevron Corp. v. Donziger*, 833 F.3d 74 (2d Cir. 2015) (No. 14-826(L)), 2014 WL 367719, at *28.

⁴⁰ *Seltzer v. Morton*, 154 P.3d 561, 609 (Mont. 2007).

⁴¹ *Chevron Corp. v. Bonifaz*, No. 09-05371 CW, 2010 WL 1948681, at *1 (N.D. Cal. May 12, 2010).

just how burdensome these malicious ethics attacks are on human rights attorneys.⁴²

IV. ATTACKS ON ETHICS: DISCIPLINARY PROCEEDINGS, DISBARMENT, AND SANCTIONS AS NEW TOOLS IN THE CORPORATE TOOLBOX

In addition to many benefits Chevron gleaned from a successful RICO case against Donziger—an injunction against enforcement of the Ecuadorian judgment, millions in attorneys' fees from Donziger, and the guaranteed return of any money Donziger did somehow obtain from the enforcement of judgment—Chevron also eliminated its opponent. Donziger was suspended and subsequently disbarred in New York as a result of Chevron's RICO case.⁴³ Chevron asserted violations of the New York Judiciary Law⁴⁴ governing the conduct of lawyers against Donziger and his team.⁴⁵ Chevron sought to persuade the United States Attorney's Office to criminally prosecute Donziger, and it was after that office declined to prosecute the case that the Attorney Grievance Committee motioned to suspend Donziger's license.⁴⁶ In 2018, under New York's Judiciary Law,⁴⁷ Rules for Attorney Disciplinary Matters,⁴⁸ and doctrine of collateral estoppel, Donziger was suspended from the practice of law.⁴⁹ Because collateral estoppel was invoked, based on Judge Kaplan's judgment alone, Donziger was found guilty of numerous violations of the former Code of Professional Responsibility⁵⁰ and Rules of Professional Conduct.⁵¹

The New York Appellate Division appointed a referee to hold a hearing on the appropriate sanction for Donziger.⁵² The doctrine of collateral estoppel meant that the referee was required to take all underlying facts as Judge Kaplan found them and could not dispute,

⁴² Gwynne L. Skinner, *Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World*, COLUM. HUM. RTS. L. REV., Fall 2014, at 158, 234–35.

⁴³ *United States v. Donziger*, No. 19-CR-561 (LAP), 2021 WL 3141893, at *3 (S.D. N.Y. July 26, 2021).

⁴⁴ N.Y. MISCONDUCT BY ATTORNEYS LAW § 487 (McKinney 2021).

⁴⁵ Emily Seiderman, *The Recognition Act, Anti-Suit Injunctions, the DJA, and Much More Fun: The Story of the Chevron-Ecuador Litigation and the Resulting Problems of Aggressive Multinational Enforcement Proceedings*, 41 FORDHAM URB. L. J. 265, 275 (2013).

⁴⁶ *In re Donziger*, Report and Recommendation, RP No. 2018.7008, at 10 (N.Y. App. Div. 2018).

⁴⁷ N.Y. JUD. ch. 30, art. 4, § 90(2) (2014).

⁴⁸ N.Y. Comp. R. & Regs. tit. 22, § 1240 (2018).

⁴⁹ *In re Donziger*, 80 N.Y.S.3d 269, 271 (N.Y. App. Div. 2018).

⁵⁰ N.Y. CODE OF PRO. RESP. DR 1-102(A)(4), (5), (7); DR 7-102(A)(6); DR 7-105(A); and DR 7-110(A)–(B) (N.Y. Bar Ass'n 2007).

⁵¹ N.Y. RULES OF PRO. CONDUCT r. 3.4(a)(5), r. 3.5(a)(1), and r. 8.4(c)–(d).

⁵² *In re Donziger*, Report and Recommendation, RP No. 2018.7008, at 1 (N.Y. App. Div. 2018).

question, or alter the findings of professional misconduct.⁵³ The referee opened with a reminder

that the point of enforcement is not punishment but rather bringing accountability for unprofessional conduct to the attention of the Court, and the consideration of whether a Respondent, under the circumstances of each case, is in any sense a threat to the public interest, or to actual or potential clients of Respondent.⁵⁴

Although the referee could not deviate from Judge Kaplan's findings, the referee did note that "Judge Kaplan did not hide his regard for Chevron" and included a Judge Kaplan quote from the public record: "We are dealing here with a company of considerable importance to our economy, that employs thousands all over the world, that supplies a group of commodities – gasoline, heating oil, other fuels, and lubricants – on which every one of us depends every single day."⁵⁵

The referee's report included numerous viewpoints on the underlying litigation and on whether Donziger constituted a threat to the public. Deepak Gupta, who represented Donziger in his appeal to the Second Circuit because "[he] felt like a great injustice was being done," told the referee,

I have never seen a judge whose disdain for one side of the case was as palpable on the bench in ways that I think may not have always come through in the paper record. But it was fairly obvious that Judge Kaplan had great personal animosity for Steven Donziger.⁵⁶

With respect to the ongoing threat Donziger poses to the public, Gupta stated, "This is someone who has pursued a single matter for decades. . . . I can't imagine how anyone could say that he poses some kind of ongoing threat to the public interest. It's absurd."⁵⁷ A representative of Amazon Watch, which Chevron has also attacked in the past, testified at length about Chevron's intimidation tactics in environmental matters.⁵⁸ George Roger Waters of Pink Floyd, a major donor to Donziger's litigation effort, testified that "[Donziger] is a huge help to the public interest, and presents something of a threat to corporate America which is why he is being demonized and vilified."⁵⁹ This kind of celebrity involvement occurred at numerous points throughout the decades-long saga, including in 2020 when fifty-five Nobel laureates signed a letter condemning

⁵³ *Id.* at 4.

⁵⁴ *Id.* at 5.

⁵⁵ *Id.* at 9.

⁵⁶ *Id.* at 11.

⁵⁷ *Id.* at 12.

⁵⁸ *Id.* at 14.

⁵⁹ *Id.*

Chevron's "judicial harassment" of Donziger.⁶⁰ John Watkins Kecker, who represented Donziger in some of the proceedings, described Chevron's "scorched earth tactics," noting the tactics made it "simply economically impossible for [them] to keep up" and forced the attorney to ultimately withdraw from the case.⁶¹

The referee ultimately recommended that Donziger's interim suspension end and that he be allowed to resume the practice of law.⁶² The referee indicated that disbarment "[w]as too extreme."⁶³ The referee also indicated that "[t]he extent of his pursuit by Chevron is so extravagant, and at this point so unnecessary and punitive, while not a factor in my recommendation, is nonetheless background to it."⁶⁴ Finally, though the referee was bound by Judge Kaplan's factual findings and the doctrine of collateral estoppel, the referee indicated that Kaplan's decision should not be afforded decisive weight:

Respondent's conduct in this unique matter, all arising from one unusually lengthy and difficult environmental pollution case conducted in Ecuador against the most vigorous and oppressive defense money can buy, leads inexorably to a severe sanction but should be judged in its entire context; the Kaplan decision is entitled to considerable weight but not necessarily, in these unique circumstances, decisive weight.⁶⁵

Crucially, the referee noted the following, which indicates why extreme discipline against human rights attorneys are so troubling: "Lawyers with [Donziger]'s endurance for the difficult case, one which is constantly financially risky and usually opposed by the best paid national firm lawyers available, are not available often."⁶⁶ Human rights lawyers comprise an extremely small proportion of U.S. lawyers, especially as compared to the number of corporate lawyers (Chevron had 2,000 lawyers from sixty different firms working on these Ecuador cases alone),⁶⁷ and the subsection of human rights lawyers who undertake transnational corporate accountability litigation is an even smaller sliver of the legal profession. The New York Appellate Division ultimately ignored the referee's recommendation and disbarred Donziger.⁶⁸ In so doing, the court handed Chevron the ultimate victory—an adversary who was not only

⁶⁰ Jonathan Watts, *Novel Laureates Condemn 'Judicial Harassment' of Environmental Lawyer*, GUARDIAN (Apr. 18, 2020), <https://perma.cc/J9NR-9X68>; *55 Novel Laureates Demand End to Judicial Attacks on U.S. Human Rights Lawyer Steven Donziger*, FRENTE DEFENSA AMAZONÍA (Nov. 4, 2020), <https://perma.cc/BCZ9-97E9>.

⁶¹ *In re Donziger*, Report and Recommendation, RP No. 2018.7008, at 17 (N.Y. App. Div. 2018).

⁶² *Id.* at 33.

⁶³ *Id.* at 34.

⁶⁴ *Id.*

⁶⁵ *Id.* at 34–35.

⁶⁶ *Id.* at 34.

⁶⁷ Carasik, *supra* note 35.

⁶⁸ *United States v. Donziger*, No. 19-CR-561 (LAP), 2021 WL 3141893, at *3 (S.D. N.Y. July 26, 2021).

bankrupted, intimidated, humiliated, and downtrodden but now also unable to fight back or litigate against the company in the future.

Similar to how Chevron's effective use of RICO resulted in other corporate defendants using RICO against environmental defenders, Chevron's disciplinary attack tactics also caught on in similar contexts. Drummond, an Alabama oil company, used similar attacks on human rights lawyer Terry Collingsworth of International Rights Advocates in sanctions proceedings still being litigated.⁶⁹ When Drummond could not secure complete dismissal on jurisdictional grounds of charges that the company paid paramilitaries to murder union leaders in Colombia during the country's civil war,⁷⁰ it shifted its focus to attacks on the Colombian plaintiffs' attorney's ethics.⁷¹ Drummond motioned for sanctions against Collingsworth, asserting that he had improperly paid witnesses for testimony in some of the cases against Drummond.⁷² Collingsworth and his associates helped fund security costs for witnesses.⁷³ The court determined that there was a prima facie showing that Collingsworth and his associates engaged in fraudulent conduct by making such security payments and took further issue with the fact that they did not notify the Court of the payments.⁷⁴ Beyond sanctions, the court then appointed a special master to recommend which of the 18,000 documents Drummond requested would consequently fall within the crime-fraud exception to the attorney-client and work product privileges—thus opening Collingsworth up to the same excessive discovery vulnerability to which Chevron subjected Donziger.⁷⁵ As one reporter described, the litigation tactics Drummond used against human rights lawyer Terry Collingsworth “follow[] the same playbook as the one Chevron used against attorney Steven Donziger.”⁷⁶

It is not uncommon for human rights lawyers to pay for security for witnesses who have received threats or faced violence as a result of their participation in the case,⁷⁷ which unfortunately occurs all too frequently and with impunity.⁷⁸ Many victims who agree to testify face persecution

⁶⁹ Drummond Co. v. Collingsworth, No. 2:11-cv-3695-RDP, 2021 WL 1056610, at *1 (N.D. Ala. Mar. 18, 2021).

⁷⁰ Doe v. Drummond Co., 782 F.3d 576, 613 (11th Cir. 2015).

⁷¹ Drummond v. Collingsworth, No. 2:11-cv-3695-RDP, 2015 WL 522839, at *21 (N.D. Ala. Dec. 7, 2015).

⁷² *Id.* at *1, *23.

⁷³ *Id.* at *1–2, *5.

⁷⁴ *Id.*

⁷⁵ Drummond Co. v. Collingsworth, No. 2:11-cv-3695-RDP, 2021 WL 1056610, at *3 (N.D. Ala. Mar. 18, 2021).

⁷⁶ Daniel Fisher, *Labor-Rights Lawyer Paid Witnesses and Lied About It, Judge Says*, FORBES (Dec. 15, 2015), <https://perma.cc/KD3D-GXWY>.

⁷⁷ Barry Meier, *Companies Turn Tables on Human Rights Lawyers*, N.Y. TIMES (Mar. 5, 2015), <https://perma.cc/RMV3-2QXA>.

⁷⁸ Between 2015 and May 2019, the Business and Human Rights Resource Centre tracked more than 2,000 attacks against individuals advocating on issues related to business. Mary Lawlor (Special Rapporteur on the Situation of Human Rights Defenders), *Final Warning: Death Threats and Killings of Human Rights Defenders*, U.N. Doc. A/HRC/46/35,

from the company or, as was the case in the Shell case discussed below, from the government.⁷⁹ Further, the American Bar Association (ABA) Model Rule 3.4 allows attorneys to pay for a witness' expenses, so long as the attorney is not paying a non-expert witness for testifying.⁸⁰ However, defendant corporations often seek to characterize this as misconduct—as Drummond did with Collingsworth—and motion for Rule 11 sanctions.

In an ATCA case against Shell for human rights abuses and environmental harm committed in Nigeria, plaintiffs' lawyers disclosed that they provided food and lodging for seven witnesses and their families to relocate from Nigeria to Benin to safely testify at trial.⁸¹ Shell tried to assert that this was part of a larger conspiracy of the plaintiffs' lawyers to procure false testimony.⁸² Shell argued that all seven witnesses had made false statements, though only two of the witnesses had been deposed at the time it filed its motion for Rule 11 Sanctions.⁸³ Though the magistrate judge in that case ultimately imposed sanctions on Shell's lawyers for asserting what the judge determined to be completely false accusations against plaintiffs' lawyers and the seven witnesses, and the Southern District of New York affirmed, the Second Circuit ultimately struck down the sanctions against Shell's attorneys.⁸⁴ Interestingly, one of Chevron's witnesses in the RICO case against Donziger admitted that he was only testifying because he would be "rewarded handsomely" for doing so.⁸⁵ Chevron facilitated and funded his family's relocation to the United States and had been providing him with monthly payments and other gifts since he arrived⁸⁶—something Judge Kaplan equated "to a

at 5 n.9 (Dec. 24, 2020); *Silencing the Critics: How Big Polluters Try to Paralyze Environmental and Human Rights Advocacy Through the Courts*, BUS. & HUM. RTS. RESOURCE CTR. (Sept. 30, 2019), <https://perma.cc/VAE9-YQW4>.

⁷⁹ Skinner, *supra* note 42, at 172–73.

⁸⁰ MODEL RULES OF PRO. CONDUCT, r. 3.4 (AM. BAR ASS'N, Comment 3, Aug. 16, 2018), <https://perma.cc/S929-U65C>. One could argue that ABA Model Rule 1.8's prohibition on covering a client's living expenses might be implicated, but 1.8 specifically prohibits *loans* to clients because it gives lawyers too much financial stake in the litigation. That is not the case here.

⁸¹ Plaintiffs' Memorandum of Law in Support of Their Motion for Rule 11 Sanctions at 1, 3, *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-cv-7618 (KMW) (S.D. N.Y. 2004), 2004 WL 6078982.

⁸² Mara González Souto, *Through the ATS Door, Now What?: The Prevalence of MNC Misconduct, Disguise & Manipulation* 26 UCLA J. INT'L L. & FOREIGN AFF. 151, 157 (2022).

⁸³ *Id.* at 157–58.

⁸⁴ *Kiobel v. Royal Dutch Petroleum Co.*, No. 02-CIV-7618-KMWHBP, 2006 WL 2850252, at *10, *11, *13 (S.D. N.Y. Sept. 29, 2006), *rev'd sub nom.* *Kiobel v. Millson*, 592 F.3d 78 (2d Cir. 2010).

⁸⁵ *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 519 (S.D. N.Y. 2014).

⁸⁶ Chevron paid to relocate Guerra, his wife, his son, and his son's family. Chevron paid him \$10,000/month for at least two years (twenty times his monthly income in Ecuador), paid \$2,000/month for his housing, paid for health insurance for his entire family, bought his car, paid for attorneys to represent him in his dealings with federal or state government investigative authorities and civil litigation, and paid for his immigration attorney's fees. Defendants' Motion to Strike the Testimony of Alberto Guerra Bastides at 3–4, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (2014) (No. 11-CV-0691-LAK). Chevron also paid for

private witness protection program.”⁸⁷ Chevron had also paid Guerra approximately \$50,000⁸⁸ in exchange for evidence.⁸⁹ Though this appears to be an emerging trend, especially in the context of transnational litigation, it is difficult to determine how often large companies’ lawyers are instituting/provoking either state disciplinary actions (where some states do not fully investigate all claims and most proceedings involve a significant amount of confidentiality) or Rule 11 sanctions (for which there are no reporting requirements).⁹⁰

Oil companies have not limited their weaponization of ethics claims to attacks on human rights lawyers. Exxon filed a public ethics complaint with the New York State Joint Commission on Public Ethics against former New York Attorney General Barbara Underwood after she sued Exxon over climate change disclosures.⁹¹ The oil company filed suits in California and New York asserting that a Bloomberg Philanthropies-funded program administered through NYU Law whose fellows were involved in the cases against Exxon violated the Executive Law provision.⁹² Exxon also filed suits in Texas and New York asserting that those states’ Attorney Generals violated the company’s constitutional rights by conducting duly-authorized investigations into potential fraud.⁹³ Judge Valerie Caproni, in dismissing the suit, described Exxon as “[r]unning roughshod over the adage that the best defense is a good offense.”⁹⁴ Obviously, these companies’ accusations against government lawyers have not had the same devastating effect as their ethics attacks on human rights attorneys.

Companies have also targeted environmental law clinics. For example, the operator of a landfill threatened to sue members of the Tulane Board of Trustees and the environmental clinic’s legal advisory

an attorney for Guerra’s other son, who had been living in the U.S. undocumented and was facing deportation. *Id.* at 4 n.1.

⁸⁷ *Chevron Corp. v. Donziger*, 974 F. Supp. 2d at 504.

⁸⁸ This includes “\$18,000 for a laptop (which Chevron also replaced), some USB drives, and day planners; \$20,000 for a few discs, a couple of mobile phones, and some paper records; and \$10,000 for . . . stumbling on a single document” Guerra previously indicated he could not find. Defendants’ Motion to Strike the Testimony of Alberto Guerra at 4, 6, *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (No. 11-CV-0691-LAK).

⁸⁹ *Id.* at 4.

⁹⁰ Peter A. Joy, *The Relationship Between Civil Rule 11 and Lawyer Discipline: An Empirical Analysis Suggesting Institutional Choices in the Regulation of Lawyers*, 37 LOY. L.A. L. REV. 765, 785 (2004).

⁹¹ John O’Brien, *Using Bloomberg’s Activists to Sue Exxon is Ethics Violation, Group Complains of N.Y. AG*, LEGAL NEWSLINE (Dec. 10, 2018), <https://perma.cc/8L9Z-HB53>.

⁹² *Id.*

⁹³ *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 686 (S.D. N.Y. 2018).

⁹⁴ *Id.* As part of these lawsuits, Exxon delivered subpoenas to eleven high-profile climate advocates seeking discovery on a broad array of confidential matters related to the New York Attorney General case and then refused to withdraw these subpoenas after Judge Caproni dismissed Exxon’s case. *Oil Giant Uses Court Procedures to Harass Climate Change Advocates and Scientists*, PROTECT THE PROTEST (Aug. 28, 2018), <https://perma.cc/CS8C-RHJG>.

board for inadequate supervision of clinic attorneys.⁹⁵ A clinical professor in Georgetown's environmental law clinic received a letter from a prominent Washington lawyer threatening her with Rule 11 Sanctions if she did not withdraw from a case, while the Dean of Georgetown University Law Center received a letter from the president of a company that the clinic was opposing threatening to withdraw his financial support of the law school if the clinic did not withdraw its opposition in the administrative proceeding.⁹⁶ A major poultry company sued by the University of Maryland environmental clinic lobbied for a Maryland state senator to introduce legislation withholding \$750,000 in university funding until the school's clinics submitted a report listing all cases from the last five years and a complete delineation of their expenditures for each case in an attempt to find misappropriation of government funds.⁹⁷ While government officials and established clinics at well-respected law schools are well-situated to withstand these malicious accusations regarding their ethics and professionalism, human rights attorneys operating as solo practitioners or working for non-governmental organizations are far worse positioned to withstand or successfully refute these attacks.

V. VULNERABILITY TO VIOLATIONS AND ACCUSATIONS: THE UNIQUE POSITION OF HUMAN RIGHTS AND ENVIRONMENTAL LAWYERS

Transnational litigators who advocate for human rights and environmental justice face numerous hurdles in understanding which rules of professional responsibility apply and how to comply with them. Lawyers like Steve Donziger, who litigate in multiple countries, not only face differing laws—both procedural and substantive—but they also must reconcile different conceptions of professional responsibility and ethics in each jurisdiction in which they practice.⁹⁸ As lawyering models centered on social issues and communities emerged, bar associations resisted such actions and insisted on a traditional one lawyer-one client notion of representation.⁹⁹ Nearly all human rights lawyering, especially for environmental harm, involves advocating for an entire affected community. The United States' rules of professional responsibility inadequately address this. ABA Model Rules 4.1-4.4 forbid an attorney from failing to disclose material facts to third parties and forbid attorneys from giving legal advice to community members who are not their

⁹⁵ Hope M. Babcock, *How Judicial Hostility Toward Environmental Claims and Intimidation Tactics by Lawyers Have Formed the Perfect Storm Against Environmental Clinics: What's the Big Deal About Students and Chickens Anyway?*, 25 J. ENV'T L. & LITIG. 249, 260–61 n.40 (2010).

⁹⁶ *Id.* at 261 n.41.

⁹⁷ *Id.* at 261.

⁹⁸ Morial Shah, *Ethical Standards for International Human Rights Lawyers*, 32 GEO. J. LEGAL ETHICS 213, 218–20 (2019).

⁹⁹ James E. Moliterno, *Politically Motivated Bar Discipline*, 83 WASH. U. L. Q. 725, 747 (2005).

clients—restrictions that certainly seem untenable in a human rights practice.¹⁰⁰ This is just one example of the incompatibility of ABA rules and international human rights practice. The lack of adequate guidance for attorneys operating in international arenas, or even in transnational litigation in U.S. courts, has led to a problematic accountability vacuum for human rights advocates¹⁰¹ but also likely leaves human rights attorneys vulnerable to ethics attacks such as those described in this Article.

U.S. courts are increasingly systematically closing themselves off to transnational human rights cases.¹⁰² Though courts are willing to send cases off to foreign courts that they deem adequate alternative forums,¹⁰³ they are often *unwilling* to recognize the foreign judgment as valid¹⁰⁴—as the *forum non conveniens* dismissal of the *Aguinda* case and corresponding Donziger RICO case so clearly exemplify. Not only does this make transnational human rights litigation an increasingly difficult practice area, but it also opens up human rights lawyers to potential claims of fraud or malpractice. Perceptions of foreign courts as corrupt make allegations of bribery, ghostwriting, and undue influence believable in the eyes of U.S. judges, regardless of the merits of such accusations. As one article on the “prisoner’s dilemma” of transnational litigation explains, “a review of the doctrine reveals that U.S.-based multinational corporations and much of the American judiciary perceive the judicial systems of much of the world as corrupt to such a degree that it is unnecessary to examine whether any form of corruption actually occurred in any given case.”¹⁰⁵ As another author describes, these colonial attitudes played out in Judge Kaplan’s decision in the Donziger RICO case: “Kaplan’s decision made a commentary on Global South legal systems more broadly by playing off racist clichés of corrupt Latin American judges, rogue kangaroo courts, banana republics, and greedy or

¹⁰⁰ Shah, *supra* note 98, at 218–19.

¹⁰¹ See, e.g., *id.* at 215–16 (describing numerous sex for aid scandals involving Oxfam, the International Committee of the Red Cross, Save the Children, and Plan International).

¹⁰² Caroline Bettinger-López et al., *Redefining Human Rights Lawyering Through the Lens of Critical Theory: Lessons for Pedagogy and Practice*, 18 GEO. J. ON POVERTY L. & POL’Y 337, 345–46 (2011).

¹⁰³ The adequate alternative forum analysis is required as one factor in a *forum non conveniens* analysis. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981).

¹⁰⁴ See, e.g., *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 141–42 (2d Cir. 2000) (refusing to enforce a judgment rendered by the Supreme Court of Liberia based on a determination that Liberian courts do not provide impartial tribunals or procedures compatible with due process); *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (holding that Ms. Pahlavi could not have possibly had due process in Iran); *Osorio v. Dow Chemical Co.*, 635 F.3d 1277, 1279 (11th Cir. 2011) (holding a judgment in favor of Nicaraguan farmworkers unenforceable due to incompatibility of Nicaraguan and American due process requirements and the fact that the judgment “was rendered under a system which does not provide impartial tribunals”); *Franco v. Dow Chemical Co.*, 611 F.3d 1027, 1039–40 (9th Cir. 2010) (issuing sanctions against the lawyers representing Nicaraguan plaintiffs bringing a tort claim against Dow Chemical).

¹⁰⁵ Steinitz & Gowder, *supra* note 36, at 767.

misguided activist lawyers.”¹⁰⁶ This anthropological analysis goes on to explain how Judge Kaplan sought to make a decolonial argument that a U.S. lawyer exploited his Ecuadorian clients, but the effects, regardless of the truth of the accusations, were colonial—Kaplan, a single district court judge in the United States, overruled the highest court in Ecuador and prohibited enforcement of the Ecuadorian judgment *anywhere in the world*.¹⁰⁷

In addition to the persistent colonial attitudes that render ethics accusations against human rights lawyers de facto credible in the eyes of U.S. judges based on the countries where the alleged conduct took place, environmental rights advocates, in particular, are increasingly viewed as dangerous and exploitative.¹⁰⁸ Indigenous protestors at Standing Rock were labeled “ecoterrorists,”¹⁰⁹ blasted with water cannons in freezing temperatures, and tear gassed—all for peaceful protests.¹¹⁰ Leaked documents obtained by the ACLU indicated that law enforcement agencies collaborated with private security contractors to employ counterterrorism tactics against what they referred to as “pipeline insurgencies” and that law enforcement collaborated in manufacturing the RICO allegations (described above) that Energy Transfer Partners brought against environmental advocates.¹¹¹ Twenty states in the United States have enacted laws or have laws pending that impose stricter penalties and more severe criminal punishments for activists attempting to disrupt pipeline operations.¹¹² Some of these laws include provisions allowing prosecutors to seek fines ten times the original amount where groups are found to be “conspirators,” which is likely to implicate environmental rights lawyers who work for organizations like Greenpeace and the Sierra Club.¹¹³ Not only might this lead to criminal charges against environmental lawyers, and corresponding disciplinary proceedings in some states, but the larger attack on environmental activism as subversive could make environmental lawyers, especially those operating in the transnational context, the next in a long line of groups of attorneys who have had attorney discipline and other bar-imposed rules unduly weaponized against them.

¹⁰⁶ Lindsay Ofrias & Gordon Roecker, *Organized Criminals, Human Rights Defenders, and Oil Companies: Weaponization of the RICO Act Across Jurisdictional Borders*, 85 J. GLOB. & HIST. ANTHROPOLOGY 37, 43 (2019).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 41–42.

¹⁰⁹ *Id.* at 46. This term was commonly used against environmental activists in the 1990s to justify increased state surveillance of environmental activists. Justine Calma & Paola Rosa-Aquino, *The Term ‘Eco-Terrorist’ is Back and it’s Killing Climate Activists*, GRIST (Jan. 2, 2019), <https://perma.cc/C7NX-6WUG>.

¹¹⁰ Calma & Rosa-Aquino, *supra* note 109.

¹¹¹ Jacob J. Hutt, *Is the Government Planning to Surveil Keystone XL Protestors?*, ACLU (Sept. 4, 2018), <https://perma.cc/E2TK-8XXC>.

¹¹² Nicholas Kusnetz, *Driven by Industry, More States Are Passing Tough Laws Aimed at Pipeline Protesters*, INSIDE CLIMATE NEWS (Apr. 12, 2021), <https://perma.cc/3N6V-RQEB>.

¹¹³ *Id.*

VI. SITUATING ETHICAL ATTACKS ON ENVIRONMENTAL LAWYERS IN THE LARGER HISTORY OF WEAPONIZING BAR PROCEDURES

Use of attorney discipline and bar admission and expulsion mechanisms has long been used for purposes other than ensuring ethical attorney conduct. One of the earliest actions of the bar was to institute a stricter ban on advertising and solicitation of clients—a direct attack on plaintiffs’ lawyers.¹¹⁴ Late nineteenth-century weaponization of bar mechanisms included a prohibition on women joining the bar, a restriction of bar admission to citizens in the face of increasing eastern and southern European immigration, and law school accreditation procedures attacking the urban, part-time law schools that educated working people, women, and immigrants.¹¹⁵ As James Moliterno explains, “one of the surest ways to become a target of bar discipline charges was to be a successful personal injury or injured worker plaintiffs’ lawyer.”¹¹⁶

In the twentieth century, disciplinary actions were levied against lawyers who were anti-war activists, leftists, or members of the National Lawyers Guild (which Attorney General Herbert Brownell called the “legal mouthpiece’ of the Communist Party”).¹¹⁷ Representing a communist so frequently led to disciplinary action that those accused of being communists were incapable of finding representation: “A lawyer willing to represent the government’s mortal enemy risked near certain professional annihilation.”¹¹⁸ “Ronald Reagan was openly hostile to legal services lawyers,” and Warren Burger encouraged the legal profession to weaponize discipline—both judicial and bar-enforced—against lawyers in political trials whom he blamed for the decline of “civility” in the profession.¹¹⁹ A North Carolina lawyer who publicly stated his opinion that North Carolina should follow the desegregation order laid down in *Brown v. Board of Education*¹²⁰ had disbarment proceedings swiftly instituted against him alleging domestic misconduct.¹²¹ Lawyers at the National Association for the Advancement of Colored People faced a constant threat of disciplinary sanctions for their work, as did lawyers in the South who defended civil rights activists.¹²² The ABA advocated against the United States’ ratification of the Genocide Convention out of fear that it would give civil rights activists a more powerful tool to fight Jim Crow discrimination in the 1950s.¹²³ The ABA also lobbied against

¹¹⁴ Moliterno, *supra* note 99, at 733.

¹¹⁵ *Id.* at 732.

¹¹⁶ *Id.* at 733.

¹¹⁷ *Id.* at 735–38.

¹¹⁸ *Id.* at 738.

¹¹⁹ *Id.* at 739–40.

¹²⁰ 349 U.S. 294, 301 (1955) (ordering the lower courts to take all necessary steps to admit students “to public schools on a racially nondiscriminatory basis with all deliberate speed”).

¹²¹ Moliterno, *supra* note 99, at 741–42.

¹²² *Id.* at 742–43.

¹²³ Martha F. Davis, *Human Rights and the Model Rules of Professional Conduct: Intersection and Integration*, 42 COLUM. HUM. RTS. L. REV. 157, 172–73 (2010).

the United States signing the Universal Declaration of Human Rights and the Convention on the Elimination of Discrimination Against Women.¹²⁴

In the context of the war on terror in post-9/11 America, a former Department of Justice (DOJ) attorney told a reporter that the government failed to follow her advice against interrogating a detainee prior to informing the detainee that his family had hired a lawyer to represent him (after the U.S. government publicly lied about its knowledge of the detainee's represented status in response to a suppression motion).¹²⁵ The Office of the Inspector General launched an investigation, and within weeks of clearing the former DOJ attorney of wrongdoing, DOJ filed disciplinary complaints against her with the D.C. and Maryland bars.¹²⁶

In this way, two trends appear to be converging on environmental rights activists. First, corporations' increasingly aggressive and punitive litigation tactics led oil companies, in particular, to bring SLAPP suits and employ scorched earth litigation tactics, such as excessive discovery, RICO charges, and ethics accusations against the lawyers that dare to sue them for misconduct committed at home or abroad. Second, the longstanding weaponization of disciplinary proceedings and bar exclusion against racial minorities, women, immigrants, the working class, lawyers with leftist views, or lawyers who speak out against war efforts begs the question: which group of lawyers will be targeted next? It seems environmental lawyers who take on large corporations might be one of the groups (of many) currently subject to this weaponization. As discussed, transnational litigation itself poses immense difficulties that render human rights advocates vulnerable to accusations of professional misconduct and thus easy targets for corporations.

VII. IS THERE A MORE ETHICAL AND RIGHTS-RESPECTING PATH FORWARD?

In light of these troubling trends, what solutions are available to ensure that sanctions and disciplinary mechanisms do not become a widely used weapon for Goliath to crush David? There are two potential approaches. One approach is to ensure greater protections for lawyers who are the subject of these claims. Bar associations and federal courts could deal with retaliatory ethics accusations in the way that some states have addressed SLAPP suits. Strong anti-SLAPP legislation includes provisions that allow legitimate claims to be differentiated from baseless claims early and with minimal cost to the defendant. It also includes shifting of attorneys' fees from the defendant to the party that brought that SLAPP suit and sometimes providing sanctions or disciplinary action for the lawyers that filed the suit. Limiting the invocation of collateral

¹²⁴ *Id.*

¹²⁵ Moliterno, *supra* note 99, at 727.

¹²⁶ *Id.* at 728.

estoppel in disciplinary proceedings could also provide human rights lawyers—who face numerous hurdles and misconceptions in their work—with a crucial opportunity to present a case against disbarment.

Another approach focuses on better regulating the conduct of corporate attorneys. Corporate lawyers who engage in the litigation tactics described in this Article often rely on the duty of zealous advocacy as the ethical obligation guiding their actions.¹²⁷ Model Rule 1.3 calls for diligent representation as opposed to zealous advocacy.¹²⁸ Zealous advocacy does not need to equate to bullying, and an understanding of a lawyer's duty as one of diligent advocacy, as opposed to zealous advocacy, may begin to move the profession toward a more professional and civil mode of engagement among parties.

Interestingly, international human rights law provides some guidance on how corporate lawyers should regulate their conduct. The ABA adopted a resolution in 2012 endorsing the United Nations' Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises and urging the legal community to integrate them into their operations and practices.¹²⁹ These international instruments impose the duty to respect, protect, and remedy human rights, as defined by international law, on private companies—regardless of the extent to which certain rights are ratified in domestic law. The Guiding Principles apply to *all* businesses, including law firms, which means that law firms are obligated to respect human rights in their operations and through their business relationships—their corporate clients.¹³⁰ The ABA's Human Rights Committee explained that this impacts the content of the independent and candid advice attorneys must provide to corporate clients under Model Rule 2.1.¹³¹ In essence, law firms should advise clients on how to achieve the client's goals in a way that respects human rights, which include the rights to freedom of speech and expression, freedom of assembly, and access to a judicial remedy.¹³² Further, applying respect for human rights to the conduct of law firms would, at least in theory, prevent abusive discovery practices that deplete the limited financial resources of impoverished plaintiffs, SLAPP suits that attack

¹²⁷ Babcock, *supra* note 95, at 298.

¹²⁸ *Id.*; MODEL RULES OF PRO. CONDUCT r. 1.3 (AM. BAR ASS'N 2020). Zealous advocacy of course still appears in the preamble of the ABA Model Rules.

¹²⁹ Debra Cassens Weiss, *ABA House Considers Human Rights Responsibilities of Corporations*, ABA J. (Feb. 6, 2012), <https://perma.cc/LY3U-7XS7>; A.B.A. Ctr. Hum. Rts., Resolution 109 (2011).

¹³⁰ John F. Sherman III, *Professional Responsibility of Lawyers under the Guiding Principles*, SHIFT (Apr. 2012), <https://perma.cc/K92W-K7DQ>.

¹³¹ *Id.*

¹³² *Id.*; *Basic Principles on the Role of Lawyers*, U.N. HUM. RTS. OFF. HIGH COMM'R (Sept. 7, 1990), <https://perma.cc/N7XC-UK93>.

freedom of expression, and slanderous accusations against attorneys seeking to represent underserved populations.¹³³

VIII. CONCLUSION

As oil companies' use of SLAPP suits and civil RICO suits continues to increase in frequency, it can hardly be said that attorney sanctions and ethics complaints have replaced these popular corporate litigation tactics. Instead, these newly popular tactics are just the most recent addition to an ever-growing toolbelt of increasingly aggressive litigation tactics that oil companies' attorneys weaponize against environmental justice advocates and attorneys. While these attacks on attorneys' character, reputation, and law licenses may be a relatively new play in the corporate playbook, they fit into a broader pattern of increasingly punitive—and increasingly personal—litigation tactics that oil companies' lawyers have devised or adopted to quash opposition to their projects.

Oil companies have used SLAPP suits against activists and lawyers for decades, which has a chilling effect on free speech, protests, and other public advocacy. In addition to the silencing of speech, SLAPP suits also attack advocates' pockets, as well as their reputability. The shift from SLAPP suits to RICO suits—intended to be used against the mob and other organized crime syndicates—was in some ways a fairly natural progression, in that it allowed oil companies' attorneys to come after activists' money and reputation. However, RICO suits proved to be more effective for oil companies as a litigation tool, because as the Donziger case showed, RICO could allow Chevron's lawyers to obtain discovery of a level "unique in the annals of American judicial history."¹³⁴

Oil companies' abuse of court sanctions for widely accepted practices, such as providing security for victims of human rights abuses who are serving as witnesses in a civil trial, marked a shift toward more direct attacks on the human rights lawyers in their role as attorneys. As the Collingsworth case shows, these sanctions serve to provide the companies' lawyers the level of discovery access that RICO provided in the Donziger case, and they also discredit the attorney in the eyes of the judge, as well as force the attorney to divert scarce resources from the primary litigation efforts to defending their conduct against sanctions. And from these sanctions, oil companies' lawyers have taken a leap from courtroom sanctions to seeking disciplinary action—including disbarment proceedings—against human rights attorneys. This is a troubling development, as these attacks are not only once-off sanctions that affect a single case, but instead, these disciplinary attacks seek to deprive attorneys of their law licenses—allowing oil companies to eliminate their

¹³³ Corinne Lewis, *The ABA's Commitment to Develop and Promote Business and Human Rights Within the Legal Profession: What This Means for Lawyers*, 38 HOUS. J. INT'L L. 1, 47–50 (2016).

¹³⁴ *In re Chevron Corp.*, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

opponents in what is already an incredibly small and poorly resourced subsection of the legal field.

While this burgeoning practice of weaponizing attorney discipline procedures against opponents is a relatively new tactic for oil companies and their lawyers, it is hardly a new phenomenon in the legal industry. Attorney licensing and disciplinary procedures have been used in racist, sexist, xenophobic, and classist ways for more than a century. In the twentieth century, the targeting shifted from attacks and exclusion based solely on identity to include attacks based on the clients and causes that the attorneys represented. For example, lawyers for individuals accused of being communists, for anti-war protesters, and for civil rights activists all found themselves the victims of nefarious disciplinary proceedings, sanctions, and reputational attacks. Human rights lawyers taking on oil companies are just the latest group within the legal profession to be subjected to such treatment. The fact that attorney licensing and discipline have been so consistently weaponized in this way for so long indicates that the legal profession, including the ABA, state bar associations, and private law firms, have learned very little from these historic and ongoing abuses. Bar associations could learn a great deal from the anti-SLAPP movement and the legal protections resulting from it in determining how to ensure effective protection against malicious disciplinary complaints. Further, better regulation of private law firms in line with international laws and norms—whether through legislation or by the ABA and state bar associations—could deter law firms from carrying out nefarious and rights-violating attacks on activists and attorneys alike.

These solutions will not address the colonial attitudes and inconsistent respect for comity in United States courts, society's perceptions of environmental lawyers as ecoterrorists, or the complexities of transnational litigation that lead to legitimate ethical dilemmas. However, these solutions could begin to slow the tide of increasingly abusive litigation tactics that corporate lawyers, especially those who represent multinational oil companies, employ in the context of transnational human rights litigation.