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Handling the Land Use Case: A User's Manual for the Public Interest Attorney

I went back to Ohio, but my pretty countryside had been paved down the middle by a government that had no pride. The farms of Ohio had been replaced by shopping malls, and muzak filled the air from Seneca to Cuyahoga Falls. Said eh oh, way to go Ohio

The Pretenders. 1983

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I**“MY PRETTY COUNTRYSIDE WAS GONE”*****A. Land Use Law, the “New” Environmentalism***

When I first began my career as a public interest land use lawyer representing grassroots clients, I often felt that the land use battles my clients and I were waging were overshadowed by the seemingly larger battles being fought by our colleagues in the more typical environmental fields. Such battles include challenging timber sales under the National Environmental Policy Act (NEPA), battling hazardous waste dumps under the Resource Conservation Recovery Act (RCRA), and protecting endangered species under the Endangered Species Act (ESA). At that time, I also suspected, with considerable dread, that the exploding urbanization in this country would bring land use battles to the scale of the battles being waged under environmental laws such as NEPA, RCRA and the ESA. In addition, the accelerated rate of urban sprawl made it more likely that the sprawl would spill over into pristine natural areas. Unfortunately, this has come to pass. Land use cases today are more likely to resemble traditional environmental cases in terms of the natural values at stake and the sheer area of land affected. Moreover, modern land use battles are more likely than ever to implicate not only local land use laws, but the whole panoply of state and federal environmental laws as well.¹ As a result of these trends, the work of the public interest land use lawyer is not only more important than ever before, but also more complex.

¹ See generally, Mary C. Wood, *Protecting the Wildlife Trust: A Reinterpretation of Section 7 of the Endangered Species Act*, 34 ENVTL. L. 605 (2004). Between 1970 and 1990, land development occurred at a rate four times that of population growth in urban areas. U.S. Department of Housing and Urban Development, *Part One: The State of America's Cities*, (Jul. 11, 2002), available at <http://www.huduser.org/publications/polleg/tsoc99/part1-2.html> (last visited Sept. 29, 2004). See also DAVID RUSK, *INSIDE GAME, OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA* 344-46 (Brookings Institution Press 1999). This has led to a degradation of air quality (from increased auto emissions), and water quality (from increased paved surface area causing runoff pollution, producing one-third more water pollution than nonsprawl development). It also has resulted in a loss of open space and environmentally sensitive land (forests, coastal areas, and fragile natural habitats) by consuming 25 to 67 percent more open land than nonsprawl development. U.S. Department of Housing and Urban Development, *supra* note 1.

This Article presents a collection of tactics, tips, and shortcuts for the solo public interest practitioner to offset the resource advantages typically enjoyed by government and large firm attorneys. This information covers the gamut of the public interest practice, from how to get clients to tips on developing the record in a land use proceeding. Beyond that, this Article attempts a “big-picture” look at the processes and players the public interest attorney is likely to encounter in land use and environmental litigation.

Most land use cases begin in an administrative proceeding of some sort; the basic litigation model employed in this Article is of litigation originating in an administrative land use proceeding rather than in a civil lawsuit filed in court.² While many of the recommendations in this Article are drawn from local and state land use proceedings, such as hearings before planning commissions, town councils, or boards of supervisors, they should be applicable in a variety of administrative proceedings encountered in land use practice. Except for describing tips for creating the administrative record, this Article does not address handling a land use case on judicial appeal.³

This Article is directed at solo practitioners representing grassroots clients.⁴ It assumes that these readers frequently lack both the financial resources and the personnel to provide paralegal and administrative support for their litigation. Accordingly, many of the discussions contained here may be of less value to large firm attorneys or in-house counsel for whom issues such as litigation support and finding and working with clients are normally not pressing concerns. These readers may wish to skip the initial sections on finding and working with grassroots clients and move directly to the later discussions of litigation strategy beginning with section IV.

² The term “administrative proceeding” is used broadly in this Article, referring to administrative proceedings under the Administrative Procedures Act and “quasi-administrative proceedings.” The APA governs administrative agency proceedings consisting of rule making, adjudications, or licensing. Administrative Procedure Act 5 U.S.C. § 551(12) (2004). “Quasi-administrative proceedings” would include informal adjudications such as land use hearings, which are outside the APA, and usually governed by enabling statutes or agency regulations.

³ The term “agency” is used in this Article to describe the governmental body responsible for control and supervision of the relevant area of public interest, which in most land use cases will be a planning or public works department.

⁴ When a new lawyer truly cares about the kind of work to be done or clients to be served, she can build a career with conscious planning, rather than just hoping that the right cases will come along. John E. Bonine, *The New Private Public Interest Bar*, 1 J. ENVTL. L. & LITIG. xi (1986)

B. The Bigger They Come the Harder They Fall

While grassroots groups are likely to resemble the biblical David in terms of size and resources, their opponents are likely to be formidable because grassroots organizations are frequently pitted against both government agencies and corporations. Government makes an awesome opponent because of the economic and attorney resources at its command. Corporations are no less formidable, and often much more aggressive. Like government, corporations have ready access to attorneys. Corporations are typically represented by large corporate law firms with experienced attorneys, large staffs of paralegals, and powerful political connections. Like government, corporations are on their home turf in the courtroom, a distinct advantage. The biblical David had it easy compared to his public interest counterpart who often faces the twin Goliaths of government and corporate enterprise. Jonathan Harr's *A Civil Action* is still one of the best literary examples of the type of inequality in resources and dirty tricks a public interest attorney can find herself pitted against.⁵

Nevertheless, the public interest attorney should not automatically assume that she is in the weaker position and without leverage. Having practiced public interest law at the beginning of my career, I later found myself in a firm representing major ski and golf resort developers. One of my revelations during that period of my career was just how much fear the threat of a lawsuit by a public interest lawyer can create among the ranks of developers.

While developers may have the advantage in terms of resources, they can face severe constraints in terms of timing and bottom line. In such circumstances, a public interest lawsuit can sufficiently delay a project so that a building season is missed, which can be disastrous to the developer in terms of additional costs. Even without the delay factor, the additional expense of fighting a protracted public interest lawsuit can stall or stop a development project by decreasing the profit margin to a degree that the project no longer "pencils." The ripple effect of a threatened lawsuit can even affect the prospective financing of a project, creating leverage for the public interest group challenging it. When a development project is sufficiently egregious in terms of environmental, scenic, cultural, or historical impacts, such as a project sited on or near a sacred Native American burial ground, the publicity of a lawsuit may so stigmatize the project as to reduce the marketability and profit margins on sales of residential units.

⁵ JONATHAN HARR, *A CIVIL ACTION* (First Vintage Books 1996).

Delay and harassment are not, of course, legitimate bases to bring a lawsuit, and initiating a lawsuit for such reasons also violates ethical rules and other laws. There must always be an arguably sound legal and factual basis before a lawsuit may be filed. The public interest attorney should determine precisely what the legal standards are in her jurisdiction before proceeding.⁶ Nevertheless, while the public interest land use lawyer must always be wary of the potentially vast resources of her opponent, she should never underestimate the leverage or “fear factor” that may be generated by the threat of a legitimate political and/or legal assault on a development project.

II

THE PUBLIC INTEREST ATTORNEY AND HER CLIENTS: DIFFERENT STROKES FOR DIFFERENT FOLKS

A. Finding Public Interest Clients

1. Word of Mouth

As with attorneys in general, the public interest attorney’s fee schedule, if low, and success rate, if high, will often produce new clients with little or no additional effort or advertising. Because grassroots groups are typically cash-strapped, offering to take cases on a reduced fee or pro bono basis can quickly generate interest in the attorney’s services. Winning a high-profile case is even a better

⁶ Under the Federal Rules of Civil Procedure, courts are given discretion to impose sanctions for lawsuits brought for an improper purpose, such as to harass or cause delay, or suits unwarranted by law or lacking a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. FED. R. CIV. P. 11(b)(1), (2).

In the lawyer’s representation of a client[,] . . . a lawyer shall not: file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer’s client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

OREGON CODE OF PROF’L RESPONSIBILITY DR 7-102(A)(1) (2004).

“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” MODEL RULES OF PROF’L CONDUCT R. 3.1 (2003).

advertisement, as word will quickly circulate through the public interest community and result in inquiries concerning the attorney.

2. Becoming a Participant

Before word of mouth begins to take effect, obtaining clients may require significant legwork and information gathering. One highly effective strategy for meeting new clients begins with tracking local and regional land use and environmental issues. This can be accomplished in a number of ways, from reading the newspaper, to subscribing to public interest publications, to monitoring the Internet. Once the attorney becomes apprised of the pending issues, she should choose several that interest her and are likely to result in a legal proceeding, study them well and become involved.

The attorney's involvement in a land use or environmental proceeding may take any number of forms, some of which will lead to recognition more quickly than others. Submitting written comments on a land use proposal, which are then incorporated in a published environmental document, will often get the attorney's name out. Testifying at public hearings, especially if they are televised on local cable channels, is even more effective. Introducing yourself to the players on the public interest side and offering to help is also highly effective. Joining and actively participating in an active land use or environmental advocacy listserve is yet another means of becoming known.

Whatever approach is chosen, however, it is critical that the attorney's work and presentation be of high quality and professional. Submitting unsupported or poorly reasoned comments or presenting ineffective or weak testimony will do more harm than good. This strategy also assumes that the attorney has chosen issues and positions that she genuinely believes in. This will create an ideal circumstance in which the introduction to new clients will be a by-product of advancing a worthy cause.

3. Publishing and Teaching

Writing articles on local land use and environmental issues is another way to attract the attention of the local land use advocacy community. Editors of local and regional alternative publications are often article-starved and welcome any well-pitched article or editorial on a current topic. One advantage of publishing as a means of advertising is that once a good article has been developed it can often

be revised and submitted to a number of publications, thus leveraging the attorney's "advertising" efforts. Offering to teach courses or organize workshops on environmental and land use issues are still other ways to educate the public, advance a cause and potentially drum up public interest clients.

4. Relaxed Ethical Standard for Public Interest Solicitation

Obviously, the above suggestions also raise questions about the ethical rules regarding solicitation of clients. Fortunately, public interest attorneys are not constrained by the prohibitions on solicitation that govern the bar at large.⁷ Courts have recognized that the economic temptations that could lead attorneys to pressure or badger potential clients under ordinary circumstances simply do not exist in the public interest arena. Quite the opposite, the rigors of public interest litigation and the lack of tangible rewards have historically isolated the public interest community from the services of the legal profession. Relaxing the prohibitions on solicitation of public interest clients thus has the salutary effect of equalizing the public's access to justice.

B. The Public Interest Attorney-Client Relationship

1. First Encounters

Finding and meeting clients by becoming engaged in issues may create some temporary awkwardness in relating to clients as their attorney since the initial introduction was as a fellow partisan. Indeed, regardless of how the professional relationship was initiated, the public interest attorney is likely to experience such moments sooner or later. There are probably few areas of practice in which the lines between attorney and client, advocate and partisan, are as likely to blur as in public interest representation. This can be a satisfying experience, as there are few careers in which one can be paid for advancing causes one deeply believes in. One caveat about such situations is that the attorney must take appropriate measures if there are any potential conflicts of interest arising from the attorney and client having a mutual stake in a legal issue or cause.

⁷ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 10.02, 10-2 (1995); NAACP v. Button, 371 U.S. 415, 443 (1963).

2. *Avoid Over-Assimilation*

As noted above, there is certainly nothing wrong with identifying strongly with a client's position or with becoming personal friends with clients. Indeed, these are some of the "perks" of being a public interest attorney. However, the tendency for these lines to blur demands that the public interest attorney periodically engage in self-monitoring and, on rarer occasions, in image management. For example, the public interest attorney must never become so assimilated into the client group that she loses sight of the heightened ethical responsibilities she bears to her client. If deadlines are missed or confidences revealed, the attorney-client relationship will snap into focus all too quickly.

A flip side to this issue is the perception of third parties, including decision-makers and judges. Should the attorney be perceived as simply another member of the client group, albeit the spokesperson, much of the mystique and authority that are part of the attorney's toolbox may be lost. These caveats having been issued, the professional distance and elitism that typify most attorney-client relationships rarely occur in the public interest universe.

3. *Managing the Relationship*

In addition to establishing and maintaining appropriate attorney-client relationships generally, the public interest attorney should also give some thought to managing specific attorney-client interactions. In particular, the first meetings with the client are critical as they often set the tone for future attorney-client relations and may even determine if the representation will occur. These first meetings may be one-on-one with a representative of the group, or they may involve the attorney meeting with a group of people or the entire organization. In any instance, there are a number of things the attorney can do to make the best possible impression.

First, the attorney must do her homework. This will involve obtaining as much information as possible about the client, including the history of the client if it is an organization, as well as researching the subject matter of the representation if that is known. If too little is known about the client, or if the subject matter of the representation is unknown at the first meeting, this does not mean that the attorney should stop the initial information gathering process. To the contrary, the attorney should use the first meeting to gather information that

will allow the attorney to do her homework in preparation for the next meeting.

A useful rule of thumb for completing such research is to glean more information about the client's organization and the nature of the representation than even the client possesses. For example, if the client is an organization, the attorney could endeavor to discover the organization's recent history, its genesis, its past and current positions, its victories and losses, and notable members of the organization.

With regard to the subject matter of the representation, if the client seeks representation under a particular statute or local law, the attorney should research the origin of the law, including the political context in which it was enacted, important cases interpreting the law, whether or not the law has been applied to cases similar to the client's, and how the law is regarded by parties on both sides of the issue. Such background research can be a wonderful opportunity for creativity.

The attorney should not limit herself to the obvious sources like statutes and cases, but instead should range far and wide. Thus, in doing background research the attorney might find herself calling state legislators to divine the political forces underlying the enactment of a particular statute, poring through law review articles, researching back issues of newspapers for background information, and even chatting up locals who are often surprisingly rich sources of information.

In addition to gathering information with which to impress a new client, the public interest attorney should be on the lookout for documents, exhibits, or other materials relevant to the representation, of which the client may be unaware. For example, if the attorney is expecting to meet with a client regarding the client's challenge to a proposed subdivision, useful props for the attorney to bring to the meeting would include materials such as zoning maps, plats, aerial photographs, developer application materials, and the like. Of course, all of these information gathering exercises must be balanced against the attorney's time and resources.

As a corollary to the information gathering process described above, the public interest attorney should also give some thought to how to conduct herself during the meeting. Questions the attorney should ask herself include whether she should assume an active or passive role in the meeting and whether she should present herself as an impassioned environmental partisan or as a detached technician.

The bottom line is to let common sense and your own professional instincts be your guides. Finally, you should also try to maintain your sense of humor and even have some fun at these meetings. After all, they may be the beginning of a long and satisfying professional relationship.

Although the same general rules pertain to both individual and group meetings, it is worth mentioning a few additional tips for dealing with groups. Beginning with a rather mechanical but important consideration, in dealing with groups the attorney should pay attention to how she physically positions herself relative to the group. For example, if the meeting involves speaking to the group as a whole, the attorney may want to position herself near the front of the group or even to the main speaker's side, rather than being lost in the crowd. This way, the attorney can support the speaker, respond quickly to the speaker's signals, and make herself visible to the group. By considering such things, the attorney can take advantage of an opportunity to take center stage and begin acting as the group's advocate. This will provide the group a sense of how the attorney conducts herself professionally in hearings, courtrooms, and other forums.

If the attorney has been successful at gathering props, these can be particularly useful in a group situation. Using props, such as maps, overheads, and the like, can give the attorney the appearance of control, confidence, and showmanship. There is no harm in demonstrating a flourish in such group meetings.

To summarize, meetings with the client can provide the public interest attorney with a great opportunity to make a good impression on the client and to structure the attorney-client relationship to follow. Accordingly, the attorney should not attend these meetings expecting to improvise. Instead, such meetings should be the culmination of careful research, planning, and preparation on the public interest attorney's part.

C. The Public Interest Retainer Agreement

1. The Usual Rules

Well drafted and fair retainer agreements can protect the interests of both attorney and client. At the minimum, a good retainer agreement specifies the scope and nature of the representation, the hourly rates to be charged by the attorney and her staff, who is

responsible for costs, what those costs shall include, and other details related to the financial relationship between the attorney and client. The retainer agreement will also include basic but essential information such as the client's name, mailing address, telephone numbers, and the like. In the case of group clients, the retainer agreement may be used to designate a contact person for the group and to specify that person's authority to direct the attorney in the course of her representation.

For obvious reasons, the use of retainer agreements is strongly encouraged by bar associations and such agreements are standard in most law practices.⁸ Public interest attorney-client relationships should be no exception; however, there are a number of considerations unique to public interest representation, which must be addressed in the public interest retainer agreement.

2. Reduced Attorney Fees Agreement Issues

One such consideration arises from the potential conflict created when the attorney offers a reduced-fee agreement to a public interest client and later seeks to recover full attorney fees under statute or pursuant to settlement negotiations. This conflict may be easily avoided at the outset by putting language in the reduced retainer fee agreement recognizing that in attorney fees applications or settlement agreements the attorney will seek higher hourly rates, which are reflective of the market and the attorney's skills and experience. Similar provisions may be used which will allow the attorney to bill for fewer hours than actually worked while reserving the right to seek compensation for those hours actually worked in the event attorney fees are recovered from the opposing party. Such provisions establish that the representation was not undertaken on a pro bono basis and that the attorney had a contractual expectation of full fees in the event of an attorney fees award or settlement. Thus, such provisions can neutralize arguments that the public interest attorney is not entitled to an attorney fees award because there was no expectation of full payment or recovery at the outset of representation.

⁸ "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing . . ." MODEL RULES OF PROF'L CONDUCT R. 1.5(b) (2003).

3. *Attorney Fees Issues in Settlement Offers*

A more problematic situation arises when the public interest client is offered advantageous settlement terms conditioned on a waiver or a release of all claims for attorney fees.⁹ Obviously, such an offer places the interests of the attorney at odds with those of her client.

One frequently employed solution is to include language in the retainer agreement in which the client acknowledges that recovering attorney fees is a factor in the attorney's willingness to represent the client on a reduced fee basis. The provision would further provide that in consideration for representation on a reduced fee basis the client agrees that in the event a settlement offer is conditioned on a waiver of attorneys fees, the attorney is authorized to refuse the offer. While this solution would clarify the expectations of the attorney and client at the outset and protect the attorney's fee interests in the event of a settlement offer, it may run afoul of ethical rules, which prohibit an attorney from usurping the client's decision-making authority regarding settlement offers.

An alternative drafting solution would be to include in the retainer agreement language providing that in the event the client enters into a settlement agreement conditioned on a waiver of fees, the client will be obligated to pay the attorney's full fees. While this provision is identical in effect to that previously suggested, and is certainly a disincentive to the client to settle under certain terms, it skirts the potential ethical violation presented by the former provision.¹⁰

4. *Other Drafting Solutions*

In a similar fashion, the public interest retainer agreement may be used to address considerations such as the client's responsibility to

⁹ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 8.05, 8-27 (1993); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (allowing a losing party to offer a settlement agreement conditioned on waiver of attorneys fees.) *Evans* was a Civil Rights Attorney Fee Act case in which the Court found that conditioning a settlement offer on a waiver of attorney fees was not prohibited by the Act's attorney fee provision. Although the Court indicated that a settlement conditioned on a fee waiver could in some cases be contrary to the purposes of the Act, in this situation the settlement offered was consistent with the Act's goal of encouraging settlement.

This made questionable the effect of bar association opinions concluding that settlement offers conditioned on fee waivers violated the Model Code of Professional Responsibility (prohibition against an attorney's engaging in conduct "prejudicial to the administration of justice"). See also, Bill Winter, *Fee Waiver Requests Unethical: Bar Opinion*, 68 A.B.A. J. 23, 23 (1982).

¹⁰ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 8.05, 8-28 (1993).

undertake diligent fund-raising efforts and allocation of funds received from attorney fees awards. In addition to specifying agreements concerning attorney fees and costs, the public interest retainer agreement may be employed in a more creative fashion to provide structure for the unique and even synergistic relationships that can evolve between the public interest client and the public interest attorney. For example, a retainer agreement may specify that the contact person must purchase and maintain a fax machine to send and receive critical litigation documents, or that the contact person must obtain an Internet account that would allow the exchange of e-mail messages and electronic file documents with the attorney.

III

ORGANIZATIONAL AND LIABILITY CONCERNS: TO INCORPORATE OR NOT TO INCORPORATE AND OTHER VEXING QUESTIONS

A. Typical Evolution of the Grassroots Group

Grassroots environmental organizations tend to form in response to a specific issue and, not surprisingly, have limited lifespans, which reflect the waxing and waning of their issue of choice. Consequently, public interest attorneys often first encounter their grassroots clients in a formative stage with preliminary organizational details unresolved. Thus, the public interest attorney seeking the challenges and satisfactions of public interest litigation may initially find herself faced with the more mundane tasks of helping the new client select a corporate form (usually some form of non-profit), drafting by-laws and articles of incorporation, and filling out tax forms for 501(c)(3) status.

B. Choosing the Appropriate Status

One approach to a recurring problem is to find a colleague who is willing to assist grassroots groups with little money to spend on such matters in deciding upon and achieving an appropriate organizational status. While attorneys willing to undertake such work may be rare, they do exist. Some public-spirited attorneys have developed specialty practices devoted to meeting the organizational and administrative needs of grassroots groups. The other approach is to invest the time and research necessary to do it oneself.

Advising clients on the proper corporate status and filing the necessary documents can be a fairly routine matter. By developing

the necessary forms and automating their assembly to the maximum extent possible, by utilizing document assembly software for example, it should also be possible to keep fees and costs within a range affordable by most public interest groups.

C. Business Entity Issues: Director, Officer and Entity Liability

While a public interest client can be assisted in its organizational needs in a routine and cost-effective fashion, it is far from an unimportant task and must be approached with some degree of caution. The public interest client's corporate status may afford its members their best, and in some instances only, protection from liability for their public interest activities. Such liability may arise from a number of circumstances, including damages from injunctions or stays against an opponent who ultimately prevails in the litigation.¹¹

In the increasingly hardball world of land use and environmental litigation, public interest litigants frequently find themselves faced with liability from SLAPP suits (Strategic Litigation Against Public Participation) brought under theories such as defamation and interference with business relations.¹² Designed to be intimidating,

¹¹ See *Hockley v. Hargitt*, 510 P.2d 1123 (Wash. 1973) (discussing a provision under which the setting of the amount of a bond for injunctive relief is within the discretion of the court); See also WASH. REV. CODE § 7.40.080 (2004), WASH. REV. CODE § 7.40.085 (2004), and WASH. REV. CODE § 7.43.040 (2004) (discussing putting up bonds to get an injunction).

¹² SLAPP suits may follow unsuccessful citizen suits and are meant to discourage citizens from bringing such lawsuits in the future. These suits are usually based on theories (such as malicious prosecution or abuse of process) that are difficult to prove, and they almost never succeed in instances where the suit on which they were based was a citizen suit in which the plaintiffs sought to protect public values. In *Protect Our Mountain Env't, Inc. v. County of Jefferson*, 677 P.2d 1361 (Colo. 1984) (en banc), a developer brought a SLAPP suit against citizens and their legal counsel for bringing an unsuccessful challenge to the developer's plans. The district court refused to grant the citizens' motion to dismiss, but the Colorado Supreme Court concluded that citizen suits are protected by the First Amendment, and that this warranted a heightened standard of review for SLAPP suits. *Id.*

Some states have adopted legislation to address SLAPP suits. California has an anti-SLAPP suit statute creating a motion to strike any lawsuit that is based on the exercise of a person's First Amendment rights. CAL. CODE OF CIV. PROC. § 425.16. "Unsuccessful SLAPP suits may be followed by 'SLAPP-back' suits, in which citizens who were the targets of a SLAPP suit seek to recover damages for injuries caused by the initial SLAPP." MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 10.04, 10-15 (1995). These have been more successful than SLAPP suits. "In *Leonardini v. Shell Oil Co.*, a jury awarded compensatory damages of \$175,000 and punitive damages of \$5,000,000 in a SLAPP-back suit filed by an attorney who the Shell Oil company had sued after the

SLAPP suits typically bear frighteningly large damages requests. In view of these realities, it is incumbent upon the public interest attorney who endeavors to assist her client in organizational matters to stay constantly abreast of changes in the law and to advise her clients accordingly. The attorney who assists the client in achieving its corporate status may also find herself with an ongoing responsibility (and continuous nagging worry) to insure that corporate formalities are observed. For public interest litigants, their corporate status must be both uninterrupted and bulletproof.

Counseling clients on their organizational status will invariably raise peripheral issues, which the attorney may be asked to address. For example, once the specter of director liability is raised, particularly if this occurs in the context of a discussion of SLAPP suits, clients will want to know about the availability of insurance coverage. A number of insurance carriers offer special directors' policies, and additional coverage may sometimes be obtained by purchasing individual umbrella policies. Because such policies are, at the time of this writing, relatively inexpensive and can provide substantial dollar amounts of coverage, the cautious board member would be well-advised to seek coverage under both a directors' policy and a personal umbrella policy.

Having alerted her clients to the potential for liability and of the availability of such coverages, the public interest attorney should be careful to circumscribe the extent of her involvement in selecting an appropriate risk management strategy. Ideally, the clients will do their own shopping for coverage and, of course, make all final decisions. In any event, the respective responsibilities of client and attorney should be well defined and clearly understood.

D. Business Entity Issues: Tax Exempt and Charitable Status

No less important than the liability shielding function of corporate status is the fund raising ability created by an organization's status as a 501(c)(3) or other form of non-profit and/or charitable organization. The form of organization taken for financial reasons can be critically important to the success or failure of the organization because donations to such organizations may be deducted from the donor's taxable income, and because such organizations themselves may be exempt from income taxes. Because the form of corporate entity

attorney complained to a state regulatory agency about the cancer-causing potential of one of Shell's products." *Id.*

assumed by the grassroots organization involves issues relating to both protection from liability and income generation, these factors are typically considered together in the early stages of the group's existence.

There are, of course, downsides to organizing as a non-profit and/or charitable organization. For example, the increased fund raising ability limits the activities in which the organization can engage, most notably lobbying, and may create a general increase in potential liability to the IRS for non-compliance with IRS regulations. As noted above, if the public interest attorney lacks expertise in these areas, it will be necessary to enlist the assistance of a practitioner skilled in these areas or to develop the skills oneself.

E. Business Entity Issues: Standing

Another issue which should be anticipated at the early stages of representation is the effect of corporate status on standing. In many forums, an organization's assumption of corporate status may have no effect on its members' ability to obtain representational standing on behalf of the corporation. For example, under the *Warth v. Seldin* line of cases, non-profit corporations have been granted standing on the basis of injuries suffered by their members.¹³ This is not always the case and, unless properly advised, the newly formed public interest organization may run afoul of specialized and restrictive standing rules. For example, under Washington State's Growth Management Act, some public interest non-profit corporations were denied Administrative Procedure Act standing before the Growth Hearings Boards because their members failed to state expressly that they were testifying on behalf of their organization at local land use planning hearings.¹⁴

Thus, it is critical that members of newly formed non-profit corporations be fully advised that the incorporation process renders their organization a separate legal entity and of the consequences that such separate status will have for standing. Because there are often highly technical rules on standing that generate unpredictable consequences, public interest attorneys will sometimes advise a

¹³ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 6.07, 6-31 (1995). *See also* *Warth v. Seldin*, 422 U.S. 490 (1975); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Sierra Club v. SCM Corp.*, 747 F.2d 99, 107 (2d Cir. 1984).

¹⁴ *See* WASH. REV. CODE § 36.70A.010 (2004); *Project for Informed Citizens v. Columbia County*, 966 P.2d 338 (Wash. 1998).

public interest organization to litigate as an unincorporated association. Obviously, there will be trade-offs in such a decision, as a group must ponder forsaking insulation for its members from potentially ruinous liability to be assured of a player's seat in the courtroom.

Another strategy is the "shotgun" approach of having members of the organization also participate in the proceedings as individuals in the event their organization is denied standing. This approach, of course, exposes those individuals to precisely the risks which membership in a corporate organization is intended to minimize or avoid, namely personal liability for attorney fees, costs of injunction, SLAPP suits and the like.

F. Coalitions

One final issue worth mentioning in regard to group status is the formation of coalitions or umbrella groups. These organizations will encompass all of the issues discussed above, but they bring certain advantages as well. For example, a coalition of groups or an umbrella group can create a much more formidable appearance in the eyes of both the public and the decision makers. This in turn can leverage the bargaining power of the underlying groups. In some instances, high level players such as elected officials might be more willing to meet with an umbrella group rather than with a number of smaller organizations. Additionally, sometimes the formation of an umbrella group, with the appropriate corporate formalities, may provide an additional layer of insulation for members of the underlying groups in the event of a SLAPP suit or other legal action taken to intimidate their members.

IV

THE ADMINISTRATIVE PROCESS, PLAYERS & RECORD

A. The Administrative Process Itself

1. Importance of Timing

Public interest attorneys may find themselves becoming involved in a case at any one of the different stages of the administrative process that fall between the initial notice of a proposed action and the final administrative or judicial appeal. Ideally, but atypically, the attorney will find herself involved at the early stages and will thus be

able to participate in and guide the creation of the record (this issue is discussed later). One frequent misconception among beginning public interest practitioners representing clients at the early administrative stages is that the process will manage itself and that the attorney's role is one of oversight until the case evolves into a more traditional adversarial format. While scarce resources or other factors may occasionally dictate such a role, as a general rule such a hands-off approach represents a lost opportunity to take early control of the process.

Obviously, for every administrative decision there will be an administrative process which precedes it and provides for an appeal process in its aftermath. Underlying the administrative process will be a set of procedural rules governing such things as notice requirements, deadlines, and standards of review. Such rules will, of course, be codified in the relevant official code but may also appear in simplified form (sometimes misleadingly so) in pamphlets or booklets supplied to the public. More sophisticated agencies may even provide flow charts, timelines, and other graphic representations of the process. Agency and government officials will normally be able to articulate the process to some degree but are likely to be unfamiliar with aspects with which they have no first-hand experience. In other words, there will at least appear to be a predictable, structured, and stable administrative process in place. Unfortunately, such appearances will in many instances prove to be illusory, resulting in unpleasant surprises for the attorney and a potentially unfair proceeding for her client. The potential for such results highlights the need for active participation in the process at the earliest possible opportunity.

2. *Fluidity in Agency Process*

In reality, administrative processes are often as much a function of agency culture and practice, the players involved, and the unique circumstances of a particular case as they are of any formally adopted rules. Thus, cases under the same statutory framework may vary across agencies or jurisdictions. Even cases within the same agency tend to display a remarkable and disconcerting degree of variability. This is especially likely in hotly contested cases in which legal counsel for each side can be expected to magnify any inherent procedural malleability to mold the process into a shape most advantageous to their respective clients.

Agency culture and practice is perhaps the most insidious extra-legal influence on administrative process as well as the most difficult to correct. Agency culture and practice may supplant official rules as early as the time of their promulgation. This is particularly likely to occur when agency rules are highly complex, poorly drafted, or otherwise difficult to interpret and thus invite creative and unintended application by the agency. Agency culture and practice may deviate from procedural rules in a more gradual fashion. Such procedural drift can result from any number of causes, including modifying procedures to accommodate convenience, reliance on informal procedural statements, or recollection rather than re-reading of codified rules.

Procedural rules can also be expected to shift with the prevailing political winds. Such political forces may originate within the agency itself or may be part of the larger political context within which the agency functions. Regardless of whether such procedural aberrations result from an initial misinterpretation of the rules or the gradual accretion of years of unchallenged ad hoc and informal interpretations, the resulting procedural framework is likely to be treated by the agency as official and, if challenged, may even be loyally defended by the agency.

3. Agency Personnel

Equally influential as, and intertwined with, agency culture and practice are the players themselves. The cast of any major land use or environmental case will involve not only the obvious protagonists, the parties, and their legal counsel, but also a host of other players, from lower level agency staff, to agency decision makers, to politicians. As in a theatrical production, the action on stage is only part of the story, and the underlying events and relationships may never be fully revealed or understood. Nevertheless, to the extent that the lines of communications and interrelationships do manifest themselves, it is important to be aware of them and, where appropriate, to take advantage of or counteract them.

One of the more obvious and frustrating examples of the human element in administrative processes is that of agency personnel changes. For example, the most competent and environmentally informed personnel seldom seem to last long in the same position. Predictably, their replacements are either unfamiliar with their new cases or with agency procedure in general, and consequently, are difficult to work with. In the worst cases, new personnel second

guess their predecessors, sometimes unwinding gains the public had previously made in the process. In some cases, personnel changes may be the result of political machinations such as unfunded mandates in which an agency's work is ostensibly blessed by the prevailing political forces but funding for the agency's staff is withdrawn.

4. Some Practical Guidelines

As noted above, administrative processes are influenced by internal and external political forces. Indeed, agency policies and practices are notorious for changing with shifts in the political winds. Such forces may result in incremental drift in agency policy and practice or may be more direct; for example, when an elected official takes an interest in a particular case and overtly or covertly attempts to influence its outcome. Depending upon the strength of the political signal and the independence and integrity of the recipient agency, agency judgment may be unaffected or abdicated entirely.

For these and other reasons beyond the scope of this Article, administrative processes are in practice far more complex, fluid, and unpredictable than one would initially expect. In some instances, such realities may demand complex and sophisticated corrective responses. Nevertheless, it is possible to formulate a set of general guidelines to serve as a starting point for dealing with the flux of administrative procedures.

The first step is information gathering. The attorney should begin by consulting the relevant statutes and regulations and follow-up with secondary sources such as practice manuals, deskbooks, and agency guidelines. Next, she should make direct contact with the agency to determine how it intends to carry out the process. The attorney should not rely on any one source; instead, she should attempt to contact as many levels of agency authority as possible. This will avoid the pitfall of being misled by inexperienced or poorly trained personnel unfamiliar with the process. For example, agency staff who are not directly involved in the process tend to underestimate the importance of administrative proceedings as well as the level of formality required. Relying on these casual representations can result in the attorney being underprepared and easily ambushed by opposing counsel. It is also often fruitful to discuss procedural issues with government legal counsel. Government attorneys often possess a high degree of familiarity with procedural matters and are usually willing to discuss them forthrightly, even if they represent opposing

sides. If it is possible to do so without engaging in an ex parte contact, in rare instances it may be necessary to contact the decision makers themselves to garner insights into the procedure. From this body of information, the attorney should determine how the agency intends to conduct the proceeding. The first and most obvious use for this information is to allow the attorney to prepare her representation properly. The second use of this information is to assist the attorney in evaluating the process itself and, if necessary, in modifying it.

Having determined the agency's intended conduct of the proceeding, the attorney should critically compare this with her own independent determination of how the proceeding should be conducted based upon her analysis of the applicable law. If the agency's proposed proceeding will be conducted in a fashion inconsistent with governing law and will tactically disadvantage her client, the attorney should consider persuading the agency's staff to modify it. Such persuasion can be accomplished in a number of ways, for example, educating the agency about the governing law, contacting and negotiating with agency legal counsel, and lobbying elected officials to direct the change. If persuasion fails, and the issue merits it, the attorney should consider preserving the issue in the record for later appeal or, in the most serious cases, mounting an immediate legal challenge.

Even in those instances where one would on the surface appear to benefit by the procedural status quo, opportunities will be missed or skirmishes lost if the fluid nature of the administrative process is misunderstood or ignored. Therefore, the public interest attorney should find herself questioning almost all agency procedures and challenging them when appropriate. In some instances, the process may be in such a state of flux that the alert practitioner is actually able to define the process.¹⁵ Such an opportunity should not be missed, or worse, be left to opposing counsel.

¹⁵ For example, the Washington Supreme Court in *Weyerhaeuser v. Pierce County*, 873 P.2d 498 (Wash. 1994) expressly allowed cross-examination of witnesses in land use proceedings. Prior to this case no one had even attempted to do this, even though theoretically it had been available since the beginning of modern land use practice in Washington. The court found that the privilege of cross examination given in the county's Hearing Examiner Code must be read in conjunction with the purpose of the Code, which is to ensure and expand the principles of fairness and due process in public hearings. Because the Code emphasizes expanded principles of fairness in public hearings, the nature of cross examination required must be determined in light of that express purpose.

B. The Players

Land use and environmental litigation do not take place in a vacuum. Instead, the issues unfold, are identified, and are resolved in something of a theatrical context, complete with its own cast of *dramatis personae*. These “players,” and how interactions with them may help or hinder the public interest attorney, are discussed below.

1. Agency Staff

Obviously, agency staff plays a critical role in the administrative process. At the higher levels, staff members may determine agency policies and procedures. Agency staff may also work “in the trenches” by gathering information, processing applications, interacting with the public and so on. Tactically, agency staff can be a key source of information for the public interest attorney as well as a means for influencing agency policy and procedure.

Perhaps the biggest challenge for the public interest attorney is gaining access to agency staff. In doing so, the public interest attorney faces a number of hurdles. Such hurdles may be as mechanical as having to navigate through phone trees and playing phone tag with staff voicemail. A more serious set of hurdles arises from built-in biases that agency staff may hold regarding what they consider the agency’s mission and who they perceive as their clients or customers. For example, in the land use context, planning department staffs typically perceive their agency’s mission as partnering with developers to achieve orderly development within their jurisdiction. Because planning departments have the most day-to-day contact with developers, they frequently implicitly or explicitly come to treat developers as their clients or customers, and, accordingly, grant them greater access. Developers are also typically accorded greater access for another reason, namely that they tend to provide financial and political support for the elected officials who in turn exercise financial or political control over the agency. On the other hand, such biases may favor the public interest attorney. There are certainly many agency staff members who have public interest or environmentalist biases, and who may be actively asserting these leanings within the agency context.

Once the public interest attorney has gained access to agency staff, these relationships should be cultivated and maintained. Agency staff members are often able to provide insights into agency interpretation of laws, how policies and procedures will be implemented, the

agency's position regarding contested issues, and a wealth of other information germane to the public interest attorney's work. In addition to the information gathering function of such contacts, the public interest attorney can also use them to achieve negotiation and persuasion goals. In short, even having a reliable e-mail relationship with a well positioned agency staff member can be a powerful asset for the public interest attorney.

2. Elected Officials

The role played by elected officials in a land use or other administrative proceeding will vary. In some cases the elected officials may take a hands off approach. In other proceedings, for example, in a land use matter where elected officials such as county supervisors make the final administrative decision, elected officials may be key players. As with agency staff, it is critical for the public interest attorney to attempt to gain access to elected officials both for information gathering and persuasion purposes.

Unlike communications with agency staff, however, communications with elected officials may be subject to rules against ex parte or private contacts. Simply stated, ex parte communications with an elected official acting in a quasi-judicial proceeding are likely to be prohibited as a violation of the opposing party's due process rights.¹⁶

The possibility for confusion between permissible "lobbying" of an elected official with impermissible "ex parte contacts" is especially prevalent in land use proceedings where the same elected officials may sometimes function in a legislative capacity and other times in a quasi-judicial mode. As a general rule of thumb in land use cases, proceedings are quasi-judicial when a specific piece of property is involved, for instance, where the subject matter of the proceeding is an application for entitlements for a planned unit development. In contrast, the adoption of zoning measures for a large area would likely be considered legislative and, therefore, not subject to prohibitions on ex parte contacts, even though specific properties were severely affected.¹⁷ One possible solution to the dilemma posed

¹⁶ Ex parte contact is private, nonpublic advocacy, made by one party in the absence of the other. William W. Eigner & Robert L. Wernli, Jr., *Lobbying Guidelines and Rules for Ex Parte Contact in California*, CAL. REAL PROP. J., Vol. 21, No. 2 (Spring 2003).

¹⁷ An example of the guidelines used by a court in finding that an action regarding a matter was quasi-judicial in nature can be found in *Natural Res. Def. Council, Inc. v. California Coastal Zone Conservation Comm'n.* 129 Cal. Rptr. 57, 61 (Cal. App. 1976).

by the tactical need to communicate with an elected official who may be subject to the *ex parte* rules is to put the communication into the record, thus turning an otherwise private communication into a public one.

As is the case with agency staff, the goal with elected officials is to stay in the loop of communications and avoid being tactically isolated from the decision making process. Additionally, like with agency staff, such contacts can be accomplished in any number of ways, from in person meetings to telephone calls and e-mailing.

3. Attorneys

Foremost in the cast of players in an adversarial proceeding, at least from the public interest attorney's point of view, is opposing counsel. While opposing land use counsel can be expected to fit within the usual range of attorney stereotypes, they also possess distinguishing characteristics worth noting. For example, in almost every geographical area there is one attorney or law firm that will become the most used by developers and have the strongest connections with local decision makers. In one jurisdiction where I practiced, the reigning "establishment" attorney was a man who had been the head of the local planning department before resigning to pursue a law degree. Having obtained his law degree, he returned home to develop an extremely successful land use practice. Not only did this attorney have an extensive working knowledge of the mechanics of land use practice and local land use politics, he also had significant connections with the planning department and local government. He was a formidable, though not invincible, opponent.

As a practicing public interest land use attorney, and, therefore, an outsider, I often suspected that the prominent land use attorneys' political connections afforded them an advantage in the land use proceedings in which I was embroiled. These suspicions were confirmed when I became a developer's attorney myself. While there is usually nothing illegal or unethical about political contacts, as a tactical matter the public interest attorney must be aware that they

There, the permit application was determined to be quasi-judicial because a panel was obligated to weigh information presented in a public hearing and to record the grounds for its decision. Other examples of quasi-judicial proceedings include consideration of applications for conditional use permits, use permits, variances, planned unit development permits, building permits, proposed parking districts, and appeals of a governmental commission's decision. Also, although zoning is generally considered a purely legislative act, the matter may be quasi-judicial when site-specific zoning action is contemplated. Eigner & Wernli, *supra* note 16, at 37.

exist and be prepared to deal with the inequities they may create. In practical terms, this may mean that the public interest attorney must redouble her efforts to stay in the loop with government officials, since gaining political contacts will never occur as naturally as it does for politically well connected developers' attorneys. This is not to say, however, that a sufficiently savvy, socially adept and dedicated public interest attorney could not forge equivalent relationships with the government and decision makers. Indeed, this is an ideal situation for which one should always strive.

4. Consultants

In addition to their political connections, establishment counsel will also have ready access to architects, engineers, and consultants who will be able to provide them with the scientific and technical information that is often so critical in land use and environmental litigation. These supporting players will often provide such information to establishment counsel as a matter of professional courtesy, but in the typical scenario the developer will have created a team of attorneys and consultants who feed information back and forth and are mutually supportive in their efforts to achieve their clients' goals. In many instances, the consultants will also have forged relationships and established credibility with the agency staff and decision makers, thus giving even more built-in leverage to the developer employing them.

In some instances, it may be possible for the public interest attorney's clients to retain their own experts to rebut or otherwise neutralize the information developed by the developer's consultants. In some cases, public interest consultants may be available to work on a no-fee or reduced-fee basis. In any event, the challenge for the public interest attorney will be to develop sufficient credible information to rebut the information submitted on the record by the developer's consultants.

One caveat to remember in working with consultants is that they do not always end up with the conclusions you may want. Any ethical consultant will report data and reach conclusions based upon their professional standards and practices and not on what the client wants to hear. However, client expectations can certainly shape the form of the consultant's output. For this reason, it is usually a good idea for the attorney to retain and work with the consultant so that the consultant's initial observations and final work product are protected

by the attorney-client privilege.¹⁸ Also, the attorney should not expect the consultant to automatically discriminate between data and conclusions that help or undermine the client's position. Thus, the attorney should review the consultant's work carefully and, if ethically possible, minimize or delete damaging information and emphasize positive information. Of course, editing and shaping must be done in a manner that does not disturb the information and ensures it is not misleading in any way.

If limited financial resources make it impossible for the public interest client to retain his or her own consultants, it may be possible for the client to use lay persons who have experience in the subject matter to develop information. For example, in the land use context, local people who have lived for years in the area under consideration may have far greater insights into the land's history, geography, hydrology, flora, and fauna than professional consultants who have rather minimal "on-the-ground" contact with the land.

5. *Academics*

In any proceeding, the public interest attorney should do sufficient research to determine whether the issues in question have been the subject of academic scholarship. In the event the scholarship is disadvantageous to her client, she will at least be forewarned and can prepare a rebuttal. In the event the scholarship is favorable, it is more ammunition to use against the opposition.

However, the creative public interest attorney should not stop with merely a review of existing scholarly literature. In many instances it may be possible to find academics who are interested in the issues in question and who could generate scholarship supporting the client's position. Because land use cases often last for years, it is often possible to generate substantial amounts of scientific, historical, anthropological, or other scholarly documentation, which will contribute to the public interest attorney's effort.

6. *The Public*

Last, but certainly not least, is the public. Most large-scale land use or administrative cases are played out against a backdrop of a struggle between the parties to control public opinion. If the stakes are high enough, developers may retain public relations firms to craft press releases and other written materials to use in the battle for

¹⁸ See FED. R. EVID. 501.

public opinion. The public interest attorney should anticipate this and be aware of any potential opportunities for press releases or other public communications that may support her client's position. While the public interest attorney need not attempt to master the skills of a public relations consultant, she should be aware that the press will frequently look to attorneys for materials to use in their reporting. Consequently, the public interest attorney should try to develop at least some mastery of delivering a good "sound bite." In many instances, the public interest client, particularly if it is of the well-established and large group variety, will have many members who are skilled in public relations. In every large-scale land use proceeding I have witnessed, the public interest groups were able to influence public opinion by distributing flyers in mass mailings and other forms.

C. Discovery

1. Relaxed Discovery Rules (Usually)

Because public interest land use and environmental litigation may occur in an administrative context in which there are either no discovery rules or relaxed discovery rules, discovery issues will not necessarily plague public interest attorneys. However, when such issues do arise, they are often overwhelming. As with litigation in general, there is no area of public interest land use and environmental law more likely to be abused than the discovery process.

2. Discovery Abuses Nevertheless

While assembling a compendium of discovery abuses is beyond the scope of this Article, a number of the worst culprits bear mentioning. Most notably, one tactical use of the discovery process is to bury one's opponent under an avalanche of paper in the form of requests for admissions, interrogatories, and requests for production of documents. Such discovery devices can be oppressive not only in the sheer volume of responses they require, but also in the way they can be used to invade the public interest clients' privacy and disturb their peace of mind.

In cases where the public interest attorney is representing an organizational client, such as a public interest nonprofit corporation, she may find herself facing interrogatories directed to the client's board members, officers, and other organizational representatives.

These interrogatories may request personal information that is arguably irrelevant to the proceedings. The effect of such interrogatories on the public interest attorney and her client can be debilitating. Clients may find themselves feeling fearful and intimidated by the seeming ability of their opponent's counsel to coerce them into making personal information public. The public interest attorney is likely to feel overwhelmed at the prospect of advising multiple members of her client's group and in defending their right not to answer the interrogatories.

The paperwork and logistics that must be managed by the public interest attorney can quickly become enormous when, for example, multiple parties adverse to the public interest litigant submit their own sets of interrogatories and requests for production. Such requests subject the public interest attorney to double duty in defending her clients. The requests for production themselves can impose considerable burdens. In the course of monitoring a particular environmental abuse, in which production of documents is sought by opposing counsel, the burden on the public interest litigants of identifying, locating, copying, and assembling such documents can be crippling.

Even more challenging discovery issues can arise when opposing counsel attempts to elicit testimony during the discovery period by requesting depositions. Not only may the public interest attorney's clients find themselves intimidated and harassed by the prospect of traveling to another location to be, in effect, interrogated by opponent's counsel, the simple cost in terms of time and money to attend the deposition will likely be a severe drawback to the client. The process is likely to be even more stressful for the public interest attorney who may have little or no experience in defending and protecting a witness against an experienced trial attorney. The harassing effects of a hostile discovery process are exacerbated in multi-party litigation when the public interest attorney and her clients may find themselves barraged with questions and subpoenas for depositions from all opposing parties.

To avoid discovery "overload," the public interest attorney should be familiar with rules of pretrial procedure. These rules are designed to avoid the tactical use of discovery to overburden another party. Using these rules attorneys can advance the appropriate motions to take advantage of the protective rules.¹⁹ In addition, the public

¹⁹ See FED. R. CIV. P. 26(b)(3) (describing process for obtaining discovery).

interest attorney should not be shy about explaining to the judge or tribunal that her client is a public interest organization with limited resources to respond to excessive discovery requests. I have seen instances in which judges are very receptive to such arguments and are quite willing to place appropriate limitations on the opposing party's burdensome discovery requests.

3. Discovery from the Public Interest Point of View

In addition to fending off any inappropriate and irrelevant discovery requests by opposing counsel, the public interest attorney must not neglect her own discovery. Thus, in a land use or environmental proceeding the public interest attorney may find herself with her hands full as she struggles to defend against inappropriate requests from opposing counsel, respond to appropriate ones, and monitor responses to her own discovery requests. Decisions regarding what documentary discovery requests to make are likely to be complicated for the public interest attorney because of the limiting factors like lack of resources and inexperience. Likewise, the public interest attorney may find herself faced with scheduling depositions, which could be expensive when costs such as paying for a court reporter to attend are factored in.

4. Innovative Discovery Strategies in the High-Tech Age

One way to minimize the discovery burdens faced by the public interest attorney is to utilize high-tech aids such as telephone conferencing and transmission of documents by e-mail. For example, the telephone can be used to conduct depositions, hold hearings on motions, and even present expert testimony in court.²⁰ Such use of the telephone to reduce costs and save time may not be done unilaterally. In most cases it would require some form of judicial authorization and possibly even the consent of opposing counsel. However, the increasing frequency with which such methods are used, and the likelihood that a judge would understand the economic necessity of such methods in public interest litigation, suggests that judicial permission would be forthcoming.

Requesting discovery documents in digital form via e-mail can also save time and money. For example, in those instances where the public interest attorney finds herself served with non-form discovery requests that require re-typing the requests in the response document,

²⁰ MICHAEL D. AXLINE, ENVIRONMENTAL CITIZEN SUITS § 10.03, 10-8 (1995).

there is nothing wrong with requesting that opposing counsel simply e-mail the requests in digital format. This way, the responses can be drafted on opposing counsel's own form. However, one caveat to bear in mind is that the responses should be served in hard copy format to avoid transmitting unwanted information, which may have been intended to be deleted.

Although not a discovery device per se, the Federal Freedom of Information Act (FOIA)²¹ and state counterparts²² in many instances could be used to obtain information from governmental entities for the administrative record. For example, in some instances if it is suspected that the opposing party is engaging in unfair or prohibited ex parte contacts with the decision maker via e-mail, it may be tactically worthwhile to use the appropriate FOIA request to obtain copies of such e-mail. Of course, the chilling effect this may have on all governmental communications to parties on both sides of the dispute in question is something to be considered.

D. The Record: Documentary and Graphic Evidence

In any land use or environmental battle that ultimately results in litigation, building a good record is critically important. For example, in most administrative cases the record is completed entirely at the administrative level and then is closed, usually forever, in all subsequent judicial proceedings. Thus, it cannot be overstated that the record building process is not only critically important, but there is usually a limited time-period to when it can be built and added to. Consequently, the public interest attorney must be careful not to view the process narrowly or restrictively. The following paragraphs provide specific guidelines to keep in mind during the record building process.

1. Admissibility

In cases where land use litigation begins in a judicial court or before some other form of tribunal that applies the traditional rules of

²¹ 5 U.S.C.A. § 552(a)(3)(A), (E) (2004).

²² The state counterparts may be very useful. *See, e.g.*, CAL. GOV'T CODE § 6250 (2004). In California, because of the strong public policy in favor of disclosure of public records, such records must be disclosed unless they come within one or more of the categories of documents exempt from compelled disclosure, listed in CAL. GOV'T CODE § 6254 (2004). These exemptions are construed narrowly, and the burden is on the public agency to show that the records should not be disclosed. *Rogers v. Los Angeles County*, 23 Cal. Rptr. 2d 412 (Cal. App. 1993).

evidence, the admissibility of any piece of evidence is a key consideration. Thus, the first principle in such cases is to determine the admissibility rules. This may be done by review of the applicable statutes, regulations, ordinances, and case law. This also may be done by review of secondary sources, such as practitioner's guides, and by consultations with other attorneys and representatives of the tribunal in question. In cases governed by traditional evidence rules, traditional discovery rules are likely to apply; theoretically, there is little chance that either side will be blind-sided by unexpected evidence.

However, in most administrative land use cases (e.g., those that initially take the form of a legislative action such as adoption of a general plan) there is no formal discovery and typically there are almost no rules on the admissibility of evidence. Even hearsay evidence is admissible. Because the creation of the administrative record is so wide open, often the only limitations on the persuasive material submitted to it are the creativity and resources of the public interest attorney and her clients. Not only is the record wide open, normally one is under no obligation to show his or her evidence to the other side prior to submission. Although I certainly would not recommend this, I have seen public interest groups submit massive amounts of written materials to a board of supervisors by simply leaving paper bags full of documents with the supervisors' clerk. In other words, not only is building a good record critical, it is also often a no-holds-barred process that requires out-of-the-box thinking.

2. Think Outside the Box

As explained above, building an administrative record is a perfect opportunity to think outside the box. One example of thinking outside the box occurred in my own practice before the State of Washington Growth Hearings Board. In a pre-hearing meeting before a three-member panel of the Growth Hearings Board, a member of the board informed the assembled parties and counsel (including myself as counsel for the public interest parties) that they should not include newspaper articles in the record. Noting this order, I nevertheless reviewed all relevant statutes and ordinances and found no prohibition on the type of material admissible in the record for review before the Growth Hearings Board. At my instruction, my clients then proceeded to assemble a documentary record that included local newspaper articles relevant to the litigation. Having assembled these articles and other documentary materials for our record, my clients

then meticulously indexed them, had them professionally bound, and presented the entire package to the Growth Hearings Board. There was never any challenge to the inclusion of the newspaper articles by opposing counsel or any reference to the articles by members of the Growth Hearings Board. Ultimately, we won our case. While it is impossible to tell whether the newspaper articles played a role in this victory, it is difficult to imagine that they did not because they presented compelling evidence of land use abuses in the subject matter county that were documented by third party professional observers.

Another way to think outside of the box is to remember that record building does not occur solely within the confines of an administrative proceeding. That is, record building requires more than submitting testimony and documents generated during the proceeding itself. To the contrary, almost every event, from the initial awareness of the potential land use or environmental conflict through the final appeal, may be relevant to the record. Indeed, even this definition may be overly restrictive; for example, the broad historical context in which the conflict arises may itself have record building relevance. Consequently, a good rule-of-thumb to follow is that every piece of relevant evidence generated in any form and at any time before the final gavel falls should be considered for inclusion in the record.

3. Record-worthy Events

One way to think outside of the box is to conceptualize evidence in terms of record-worthy events. Thus, the public interest attorney should think creatively about what might constitute record-worthy events and how they might be preserved for incorporation in the record and packaged for easy review by decision makers. Examples of record-worthy events include such things as letters, memoranda, e-mail messages, and other written communications between parties or entities associated with the conflict. In addition to the written communications of the client and the client's allies, the attorney must also keep track of and preserve potentially record-worthy communications from and between opponents, local government, and other parties with potentially adverse interests to the client.

Beyond such obvious written communications, the public interest attorney and her clients should also be prepared to document land use or environmental abuses by more graphic means. For example, clients should be prepared to undertake field trips to document the on-

the-ground effects of alleged abuses. End-products of such efforts might include the ability of field trip participants to testify in administrative hearings, as well as photographed and videotaped evidence. In cases where noise or noxious odors are an issue, parties should seek to document these circumstances through field trips as well. However, because such documentation may involve expensive equipment or the use of technical consultants, the ability to produce such documentation may be limited. Nevertheless, the attorney must never forget that in the absence of recorded documentation by scientific instruments, testimony of witnesses present at the site is a worthy form of evidence for inclusion in the record.

Additionally, if there have been public protests or other political actions that present your position in a positive light, these events should be documented and put into the record. This is especially true when there has been sympathetic press coverage of the issue.

Another form of record-worthy events is a written description of the other party's conduct. For example, developers will often invite potentially opposing parties to view the development site or to otherwise gather and share information. This can be a very positive step in the process and may relate to meaningful understandings and agreements. On the other hand, if an offer is extended and the opposing parties fail to appear or outright reject the offer, this damning information could appear in the record in documentary or testimonial form. Clearly, any failure to accept an invitation to meet and confer may cast the uncooperative party in an unfavorable light at later stages of the hearing.

One last record-worthy event, and one which can pay off in the long run, is to give a name to the area or natural feature you are trying to preserve. For example, if your group is trying to preserve a marsh or wetland, you will probably get little public relations mileage from telling your story in terms of trying to protect "that little marsh" on the west side of town. On the other hand, if you can have the marsh officially named, say the "Old Millrace Marsh," or "Pioneer Marsh," or "Allison's Marsh," you will have a much better story to tell and will be able to generate much more public and press interest. Assuming the various legal requirements are met, it may be possible to bring the name before an official geographic naming board. Once the name is made official, it will begin to appear on maps, personalizing the feature even further and creating ever greater incentives for its preservation. The naming process itself may even be newsworthy evidence of the public support for the feature.

There are many ways such record-worthy conduct may occur. The challenge is in seeing the conduct through the decision makers' eyes and preserving it in a credible fashion.

4. Work the Press

The public interest attorney and her clients should always be prepared to capitalize on having their position presented in the press. Newsworthy events in the typical lifespan of a land use battle include formation of the public interest organization, clashes between the organization and its opponents, and land use proceedings and litigation. At each stage, the public interest organization should be prepared to issue a press release or have a designated spokesperson be interviewed by the press. Press coverage, however, can backfire. The organization's spokesperson can be misquoted, quoted out of context, or the quote could be ignored, and the resulting article can be slanted in favor of the opponent's position. One way to counteract such unintentional negative publicity is to request a draft of the article before it is published, which may provide at least some opportunity for correction.

Furthermore, it is not always necessary to wait for the press to seek out the organization. Well-crafted letters to the editor or editorials written by members of the group can also be employed to gain press ink. Just as developers often employ highly skilled consultants like "ghost writers" for their press releases, it may also be possible, if resources permit, for the public interest group to do the same. On the other hand, the sincere and impassioned letter or editorial of someone with a known and indisputable claim in the subject matter of the proceeding can often have a powerful and persuasive effect. One advantage of developing a first-rate editorial is that in many cases, it may be possible to have the editorial published in many newspapers or other publications at roughly the same time with only minor variations. Submitting to the record all of the different publications containing your editorial can demonstrate the importance of your issue, as well as the amount of public support it has generated.

Additionally, the public interest attorney should always be aware of and ready to capitalize on evidence generated by third parties, including evidence not generated for purposes related to the specific conflict. Such evidence may include articles from newspapers, magazines, and journals (e.g. law review articles). In addition, the public interest attorney and her clients should look to industry publications and the publications of environmental organizations.

For example, in a Shorelines Management Act case I litigated in Washington State, my public interest clients challenged the issuance of a permit allowing a large corporation to operate an asphalt batch plant on the banks of the Columbia River. In the ensuing litigation, I introduced into the record articles from asphalt industry publications attesting to the noxious odors produced by hot asphalt. I obtained the articles simply by requesting them from the national asphalt association over the telephone. The articles dramatically supported my clients' position and possibly contributed to our ultimate success.

Similarly, it is possible to find a multitude of highly credible articles addressing relevant litigation topics such as the true social costs of urban sprawl in publications by organizations like the Sierra Club and the Wilderness Society. It is also possible to find a mother lode of highly detailed and credible publications generated by the government. For example, upon the enactment of its Growth Management Act, Washington State created, published, and disseminated a virtual library of technical information related to land use issues, particularly urban sprawl. There is also an ever increasing compendium of such information found on the Internet.

The key to all of the above strategies, however, is to get the documents in the official record. While positive documentation, such as newspaper articles, may be effective in turning public opinion and indirectly influencing decision makers in the early stages of the proceeding, if it is not in the record it will have no direct effect on the decision maker, especially if there is a judicial appeal. In other words, no matter how good the news is, and no matter how much public support and good press it represents, it does not exist in the eyes of the final decision makers if it is not in the record.²³

5. Work the Agencies

In the same way that the public interest attorney and her clients can "work the press" to develop credible third-party information for the record, they can work the agencies as well. For example, if a public interest land use advocacy group found itself challenging a land use

²³ This assumes that the final decisions are not de novo, which is most often the case. De novo review is only present when an administrative decision is unwarranted by the facts, meaning that an agency action is adjudicatory in nature and the agency fact finding procedures are inadequate, or additional issues are raised in a proceeding to enforce nonadjudicatory agency action. See 5 U.S.C. § 706(2)(F) (describing de novo review under the APA); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). As long as there is a determinative reason for the final action taken, de novo review is not warranted. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

decision that would significantly impact salmon spawning areas, the group should consider contacting state and federal agencies (e.g., the NOAA Fisheries Service) to persuade them to weigh in on the issue or to at least draft documents stating their position. The group could then put these documents in the record. Even if the agencies do not produce any written documents, an agency representative making a statement supporting your position can be written up as a quote and entered into the record, since hearsay rules typically do not apply. Ideally, and if possible, agency comments on the subject matter in question should come from the highest level possible (e.g., the highest ranking official within a department).

One thing to keep in mind when working with agencies is that one agency may not know what the other is doing. Thus, to use the salmon spawning example above, even though the land use process may require that the planning department in charge notify other relevant agencies, it may not have done so, or it may not have provided information which would alert the relevant agencies to the critical nature of the proposed land use action. Thus, the public interest attorney and her group should not assume that the relevant agencies are necessarily well informed about, or even aware of, the issues in question. This may even be a positive circumstance as it may provide the public interest group with the opportunity to inform an agency and shape its response. Another thing to keep in mind is to contact the agencies early in the process. Agencies often move slowly; thus, it is best to provide them with the greatest amount of lead time possible.

6. Work the Politicians and High Profile Officials

As a corollary to working the press and agencies, the public interest attorney should not neglect politicians and other high profile officials, including tribal officials. Once a sympathetic supporter is found, she or he can be asked to go on record as supporting the public interest position. Just how the political or tribal supporter does this will vary with the circumstances, but it can include issuing a formal letter, contacting land use decision makers, issuing press releases, or testifying at public hearings.

7. Mine the Internet

In addition to the sources above, the public interest attorney should not neglect a thorough search of the Internet for supporting

documentation. Examples of potentially rich sources of information include websites of organizations that address similar issues to those faced by the client organization and official websites of governmental entities. In many cases it may be possible to find entire Environmental Impact Reports online, from which can be harvested a wealth of environmental documentation relevant to the project at hand.

8. Assert Control over Agency Documents

Many land use actions involve drafting and subsequent implementation of a departmental or agency document. One obvious example from land use planning is the general plan. Typically, succeeding drafts of the general plan are circulated to the public and consulting agencies for review. While each draft will include changes from the prior draft, the changes are not always highlighted, thus allowing certain critical changes to sneak by the public interest attorney and her clients. This is particularly true in PDF documents which can be read by Adobe Acrobat and other readers, but which do not allow any alterations of the document, or electronic comparisons with earlier documents. When changes between key documents are not highlighted, the advantage clearly goes to the more well-heeled development interests who are able to employ small armies of attorneys to search out all of the changes between drafts and to respond accordingly. While there are a number of strategies to avoid this, one high-tech method would involve requesting the agency to provide subsequent drafts in redline so that the changes in each draft can be tracked. In the case of a recalcitrant agency, it might be possible to use a state or federal FOIA request to obtain the document.

The same principle may apply to environmental documents as well, such as those generated under NEPA and the various state versions of NEPA (e.g., California's CEQA and Washington's SEPA).²⁴ Often, however, internal drafts are not circulated to the public. While the public may not be seeing the successive drafts, it is entirely possible that the drafts are being circulated to the developers, their counsel, and consultants. This may be the case, for example, if the developer is being required to shoulder the cost of generating the documents. Obviously, it can give the developer a tremendous advantage to be in

²⁴ National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4370(f) (2004); CAL. PUB. RES. CODE § 21000 (2004); WASH. REV. CODE § 43.21C.010 (2004).

control of an important environmental document. While solutions to this problem will vary from case to case, the public interest attorney should at least inquire as to whom certain documents are being circulated, ask that she and her clients be kept within the loop, and request to be allowed the same opportunity to comment.

One unique solution to the problem of circulation of documents occurred in response to a legal challenge I brought against Clark County, Washington, on behalf of public interest clients. Because the sheer volume of documents being generated made it economically impossible for all the documents to be circulated to all the parties entitled to them, Clark County set up a documents library in the county attorney's office where any member of the public could review and copy key documents.

In conclusion, the public interest attorney should not only be aware of what agency documents are being circulated, she should also be in the circulation loop and have some control over the format of the documents to allow meaningful review (e.g., redlined versions).

9. Packaging and Presenting the Evidence

Having decided upon the submittals to the record, the public interest attorney is then confronted with the question of packaging and organizing the information. These tasks can indeed be daunting, such as when the novice public interest attorney is presented with seemingly truckloads of materials that have been gathered by dedicated clients for years. Some of the vexing mechanical questions that arise in the face of abundant and manifold varieties of potential evidence include whether to submit audio or video tapes, transcriptions of those tapes, or both, and whether to use photographs, color copies of photographs, digitized copies of photographs, or some combination of the above. Once the attorney has resolved this first level of questions, she must then decide how to present and organize the selected materials. Such decisions are invariably complex because they cannot be made in isolation and instead are subject to considerations of time, money, expertise, and ultimately, admissibility. While it is impossible to formulate a set of universally applicable rules for dealing with such issues, it is nevertheless possible to set forth general principles, which may be helpful.

The first principle is to make the evidence as easily accessible and understandable as possible. In other words, do the work for the tribunal. Conversely, never expect the tribunal to penetrate an unorganized, unexplained, or otherwise undecipherable mass of

evidence for you. It probably will not happen, even with the most conscientious and experienced tribunal. This means, as mentioned above, avoiding the equivalent of simply dropping off a brown paper bag full of unorganized materials as I have seen one group do.

If material needs to be photocopied, as it almost invariably will, (1) use the highest quality photocopying technology; (2) copy at an appropriate, easily readable scale; (3) preserve all relevant information (for example the date and name of the newspaper in which an article appears); and (4) eliminate all unnecessary or distracting markings on the documents. In other words, preserve the maximum amount of information consistent with accessibility and professional appearance. If possible, consider highlighting or underlining relevant portions of textual evidence to immediately draw your audience to critical information.

When technical data or lengthy documents are submitted, the public interest attorney should always consider drafting a cover letter, which summarizes the contents of the accompanying document, explains how the information it includes supports her client's position, and quotes key portions of the underlying document. In other words, the public interest attorney, if possible, should summarize, simplify, and spell out the meaning and importance of any technical data or reports she submits as evidence.

If you have photographs, consider making color copies with multiple photographs on a single page, arranged in a meaningful manner with explanatory captions. For particularly powerful photographic evidence, you may want to have it enlarged and mounted on a hard backing so that it can be used as an exhibit in a public hearing or courtroom. If you have audio tapes, consider having them professionally transcribed or, at the very least, summarized in writing.

As just explained for documentary evidence, any evidence in a format that is not immediately accessible (such as audio tapes, video tapes, and CDs) should be accompanied by a cover letter summarizing and distilling the contents of the format in question and explaining how it supports the client's position. In other words, one cannot simply expect that every decision-maker will review every piece of evidence, especially if the evidence is in some form, such as a video tape, which may be inconvenient or impossible to review.

Having assembled a large amount of documentary evidence, organize it carefully and thoughtfully. For example, in some instances a chronological organization may be most accessible, while

in other instances a topical or even a geographical organization may prove more functional.

Having professionally packaged and carefully organized one's documentary evidence, it may be appropriate to index it. Such an index should itself be thoughtfully organized and clearly presented. Adding a brief explanatory text to each entry in the index can create a powerful storytelling tool, enabling the public interest attorney one more opportunity to present her story in full.

Finally, consider having the entire package of documents indexed, bound, and tabbed. This step can produce many benefits, from making it easier to introduce the documents formally into the record and making the evidence more accessible to the tribunal, to creating a powerful courtroom tool for the public interest attorney herself.

One final tip for managing your evidence is to provide courtesy copies to the members of the tribunal. For example, if a five member planning commission is reviewing the land use action in question, you may want to extract key pieces of evidence from your record package and have them put in binders. Make one for each member of the planning commission. Both photographic and textual evidence can be presented very powerfully this way. These binders can also contain a brief explanation or summary of your side's position, and state how the evidence supports your case. Such courtesy binders should also have a table of contents with entries that concisely tell your side of the story, much the way headings in a well-drafted motion or appellate brief would. In short, the only limitation on such materials is the creativity of the person compiling them.

Of course the materials in the binders must also be in the record. The advantage of the binder system is that if they are provided early enough, the decision-makers can take them home with them, study them, and add their notes to them.

10. Get it in the Record

As previously noted, another general principle for record-building is making absolutely certain that the assembled documentation and other evidence makes it into the record. This is not nearly as easy or straightforward as it appears, especially in local administrative proceedings such as land use proceedings. This is true for a number of reasons, including the inexperience of local tribunals with large and complex records and the occasional unwillingness of local tribunals to assist a potential litigant. In some instances, in rural jurisdictions that are just now beginning to experience serious land

use battles for example, or with newly formed tribunals, there may not even be procedures for dealing with a record. Thus, simply turning over one's carefully prepared record to the person in charge of such things in an administrative proceeding does not necessarily mean that those documents will be lodged in the formal, official record for the proceeding.

While creativity and attention to the details of a particular proceeding are necessary to avoid the misfiling of one's record, there are several preventative techniques that may be employed in most cases. For example, one can inquire on the record during a proceeding as to the proper procedure for filing one's record. Then one can repeat in the same proceeding that this procedure has been followed and state for the record the documents and other evidence which have been filed. If the proceeding is being recorded and/or transcribed, such statements on the record at least give the public interest attorney a toehold in placing misfiled documents back into the record.

The cautious public interest attorney should also consider submitting either prior to, during, or after the proceeding a written statement describing the items that have been placed in the record on behalf of the client. Where documents are submitted to an agency clerk or other official outside of a public hearing, the attorney should have copies of the documents time- and date-stamped by the filing staff person.

11. Managing the Record Between Tribunals

If the attorney has successfully placed critical information in the record (including bound and indexed documentary evidence, charts and transparencies used in presentations, audio tapes, video tapes, physical evidence, and any other thing the public interest attorney has been able to think of that might be helpful in winning the case) the attorney must monitor the record to ensure that it is preserved in its entirety and transmitted from tribunal to tribunal in the event of an extended appeal process. This does not mean that the attorney needs to make daily phone calls to the tribunal or otherwise engage in behavior likely to lead to sleepless nights and ulcers. What it does mean, however, is that at appropriate stages of the administrative process, (e.g., when a land use hearings examiner's decision has been appealed to a board of county commissioners or from a board of county commissioners to a state trial court), the attorney must insure

that the record is intact and will be transmitted to the appropriate tribunal in its entirety.

Typical pitfalls in the process include lower tribunals making black and white copies of all documents in their record to send to the next tribunal in the administrative or appellate process. Such copying may result in huge losses of information (not to mention a dramatic effect) when detailed color copies are transformed into less informative black and white copies. Another frequent casualty of transmitting a record is the loss of any oversize or non-documentary exhibits such as charts, video tapes, audio tapes, or other physical exhibits.

Often these potentially disastrous losses can be prevented simply by calling the transferring and receiving tribunals and making special arrangements for problematic parts of the record. In many instances, the attorney may simply be able to pick up the exhibits herself, transport them to the next tribunal, use them in her presentation, and have them re-included in the record. But even this process is fraught with risks. For example, since clerks seldom communicate effectively with the actual decision makers, unless careful arrangements have been made with the decision makers or judges themselves (preferably documented in writing or embodied in the form of an official court order) the appellate tribunal may reject any materials not included in court transmitted evidence. In the worst case, these materials will be excluded from all subsequent proceedings. Thus, since there is not a set of rules for managing evidence that works in every circumstance, one should always be aware of the status and location of the critical evidence and be prepared to take action to get it before the proper tribunal.

E. The Record: Testimonial Evidence

All evidence exists in a hierarchy of credibility and persuasive power. As discussed below, although such a hierarchy exists with regard to the documentary evidence, it is even more apparent when it comes to testimonial evidence.

1. Planning Staff Testimony

In most land use hearings, land use staff will have prepared a written report, which will have been circulated to the decision-makers and the public. Also, land use staff will be the first to testify. In most instances, planning department testimony will be highly credible and persuasive to the decision-makers. This is true for a number of

reasons. For example, the decision-makers will likely be very familiar with the planning staff from having worked with them over the years, and having heard them present testimony on many occasions.

For the public interest attorney, there are at least two tactical considerations to keep in mind with regard to planning staff testimony. First, the public interest attorney and her client group should already have been working to persuade planning staff to accept their position on key issues. Second, regardless of whether the persuasion process has been successful, the public interest attorney should have determined, if possible, how the planning staff would testify and be prepared to rebut their testimony if necessary.

2. Consultant and Professional Testimony

Consultant and professional testimony is typically highly credible and persuasive. Again, as with planning staff testimony, the land use developer's consultants may have the home court advantage from testifying before the decision-makers on many occasions. While one may safely assume that it would be impossible for the public interest attorney to persuade a developer's consultant to change her position, it is not out of the question to provide the opposing consultant with data supporting the public interest group's position. Ethical consultants would probably take this into account in forming an opinion. Likewise, there is probably little harm in at least asking the developer or the developer's consultant to describe what his/her testimony will be like; although, one should not be surprised if such a request is rebuffed.

If the public interest attorney is fortunate to have expert consultant testimony supporting her position, she should be certain to have worked with the consultant sufficiently. This will ensure that the consultant knows the issues to focus on, which ones to downplay, and otherwise be generally aware of how best to craft the testimony to support the public interest client's position. Also, the public interest consultant's credentials, if impressive, should be documented in a resume or curriculum vitae, for example, and lodged in the record in support of the consultant's testimony.

3. Attorney Testimony

Attorneys typically testify at land use hearings. Thus, the public interest attorney should be prepared. As with any witness's

testimony, the public interest attorney should be careful to base her testimony on facts supported by substantial evidence in the record. The public interest attorney should also consider using props during her testimony, such as a large scale graphic like an aerial photograph. If it seems appropriate for the particular hearing, the attorney may even introduce a bit of dramatic support into her presentation, for example, by asking everyone in the room opposed to the project in question to stand up (assuming the public interest attorney and her client are opposing the project). If a substantial number of people stand up, the attorney should recite the event in the record so that the dramatic effect of the showing of group support influences both the present and future decision-makers reading the record.

4. Lay Testimony

Lay testimony can be very powerful. There are few things more powerfully persuasive than a group of well-informed, outspoken, and passionate citizens who take time out from their busy lives to testify in a public hearing. Essentially the same guidelines for testimony described above apply to lay witnesses: (1) they should be well-informed; (2) they may use props; and (3) if any witness has special training or expertise relating to her testimony this should be stated and documented in the record by way of a resume or curriculum vitae. If there are a large number of lay witnesses willing to testify, it may make sense to choreograph the order and timing of their testimony to further emphasize the solidarity of their opposition to the project.

5. The Charismatic Witness

The public interest attorney should always consider the possibility of finding a charismatic speaker who will testify in support of the issue in question. Many politicians and Native Americans are charismatic speakers that typically welcome the opportunity to speak in favor of something they believe in. With every type of speaker previously discussed, timing can be crucial. For example, if the public interest attorney is fortunate to have secured a charismatic speaker, she should consider having this person testify last, as people tend to remember the first and last testimony that was given.

6. Cross-Examination

Whether or not to cross-examine witnesses in a land use hearing is largely uncharted territory. In my land use practice in California,

Washington, and Oregon, I have never seen a cross-examination. Nevertheless, there is some precedent for this, for example, in the Washington state case of *Weyerhaeuser v. Pierce County*.²⁵ Even in those instances where cross-examination is not expressly allowed or prohibited, the public interest attorney may want to request to cross-examine a witness who has presented evidence of a dubious and harmful nature. If the request is denied, the denial of the request to cross-examine itself may be a basis for an appeal.

F. The Record: Standards of Review and Timing

Because the standard of review will vary from case to case and jurisdiction to jurisdiction, it is beyond the scope of this Article to describe the different standards for reviewing the various types of

²⁵ See *Weyerhaeuser v. Pierce County*, 873 P.2d 498 (Wash. 1994). Here the court expressly allowed cross-examination of witnesses in land use proceedings based on provisions of the County Hearing Examiner Code; the court found that the privilege of cross-examination given in the code must be read in conjunction with the purpose of the code, which is to ensure and expand the principles of fairness and due process in public hearings. Because the code emphasizes expanded principles of fairness in public hearings, the nature of the cross examination requirement must be determined in light of that express purpose. This case did not address due process or appearance of fairness doctrine arguments.

The right to cross-examine witnesses in a quasi-judicial proceeding is one of fundamental importance that exists even without express statutory provision as a right of due process or right to a hearing. P.G. Guthrie, Annotation, *Right to Cross-Examination of Witnesses in Hearings Before Administrative Zoning Authorities*, 27 A.L.R.3d 1304 (2004). There are many examples of cases in which the courts did not rely on specific statutory provisions in holding that a party to a hearing before an administrative zoning authority had a right to cross-examination of witnesses. See, e.g., *In re White*, 779 A.2d 1264 (Vt. 2001); *People ex rel. Klaeren v. Village of Lisle*, 737 N.E.2d 1099 (Ill. App. 2000); *Plymouth v. County of Montgomery*, 550 A.2d 1033 (Pa. Commw. Ct. 1988); *Parsons v. Bd. of Zoning Appeals*, 99 A.2d 149 (Conn. 1953); *Bd. of Adjustment v. Willie*, 511 S.W.2d 591 (Tex. Civ. App. 1974).

However, in the unpublished opinion *DMP Dev. Corp. v. Fresno*, the court stated that it is unaware of any legal right possessed by a land use applicant to cross-examine any person who produces information at an administrative hearing. No. 10311 2003 WL 1711285 (Cal. App. 5 Dist. Apr. 1, 2003).

Even if a right to cross-examination is found, it may not exist to the same degree required in formal adjudications. In *South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas County*, the board's procedure satisfied minimal requirements of due process because it met the right to present one's own evidence, and the right to rebut adverse evidence; here the board allowed those in opposition of the amendment to submit written rebuttal or cross-examination type questions that it could respond to or ignore as it pleased. 557 P.2d 1375, 1385-86 (Or. App. 1976), *reh'g denied*, 559 P.2d 512 (1977). See also *Pisani v. Old Lyme Zoning Bd. of Appeals*, No. 559452, 2002 WL 1446643 (Conn. Super. 2002); *City of Topeka v. Shawnee County Bd. of County Comm'rs*, 845 P.2d 663 (Kan. 1993).

evidence described in this Article. In most cases the standard will probably be some variation of the “substantial evidence” test. Naturally, the public interest attorney should be aware of this standard and how it applies to her evidence. On the other hand, the public interest attorney should not hesitate to include evidence that by itself fails to meet this standard, if when made part of a larger body of evidence it rises to the level of substantial evidence.

“Traditional” judicial litigation proceeds under the theory that there should be no trial by ambush. Thus, the system of pretrial discovery rules is set up to allow each side to know the key evidence of its opponent so that it can adequately prepare to meet it. In most land use and other administrative hearings that do not follow the traditional rules of discovery and evidence, there are no such limits. For this reason, the public interest attorney should always be aware of the strategic implications of when her evidence is entered into the record.

For example, if the public interest attorney has retained consultants who have drafted a detailed analysis of the issues, she should consider whether this document should be entered early or late in the hearing process. If the document is entered too early, it may trigger a counter-study by the opposing party. If, on the other hand, the document is entered too late, say the last week of the hearing process, the attorney and her clients may be subject to accusations of stonewalling their opponents. Even worse, the decision-makers may not have time to adequately review the report and it may not be considered in the decision-making process.

Of course, these timing issues also apply to the public interest attorney’s opponents. Thus, just because there have been no major record entries at a certain point, the other side may still be harboring them and waiting for the most strategically optimum time to introduce them into the record.

G. Procedural Uses & Abuses

The following subsections briefly describe a number of tactical and strategic ploys that the public interest lawyer is likely to face in high stakes land use litigation. There are, of course, variations of these tactics and strategies that the public interest attorney should anticipate and counter.

1. The E-mail Grapevine

E-mail is ubiquitous in legal practice. Accordingly, the public interest attorney must assume that on any large development project multitudes of e-mails are being exchanged between the developer's team of attorneys, engineers, architects, consultants, and the like. However, because developers typically have established relationships with government officials, particularly planning department officials as well as elected officials, the public interest attorney should always assume a steady flow of information along these lines. By way of one example, I have been involved in at least one hotly contested land use battle in which the local government routinely e-mailed to the developers' counsel all incoming e-mails received in opposition to the developers' project. This gave the developers considerable advantage in anticipating the opponents' strategies and means of countering them.

To counteract this form of e-mail networking, the public interest attorney should try to develop her own collegial relationships with government officials, which can be conducted by e-mail. In an extreme case, the public interest attorney may even consider attempting to gain possession of e-mail correspondence between developers and governmental officials through Freedom of Information Act requests. This is an extreme and intrusive act and should be used only as a last resort or in the case of egregious improprieties by the other side in a land use battle.

2. Process Without Parity?

The public hearing process can be considered a mainstay of the democratic process in this country. The public hearing provides a forum for a project proponent and for all the project's opponents as well. This does not mean that the public hearing process is not subject to abuse. There are several ways such abuse can happen.

The first of such abuses is what might be called the "too much of a good thing" process. Many land use processes, for example, approval of a major subdivision or a community plan, may take place over many years and involve many hearings. The danger here is that the public may conserve its energies by ignoring earlier hearings and plan instead on participating more fully in the later hearings. The flaw in this strategy is that, without early public interest participation, the subsequent agenda and shape of the ultimate outcome may achieve

sufficient political momentum, which will be impossible to alter, regardless of how much energy is spent later in the process.

The reverse can also happen. In this scenario, the public may invest itself so deeply in the earlier hearings that its collective energy is depleted long before the crucial final hearings where the approvals are set in place. For example, many of the early hearings may be merely informational or for purposes of political outreach, with the real work to be done in the later hearings. In some cases, the public interest groups may wear themselves out attempting to attend all the early meetings. Consequently, they may lack the resources, willpower, and energy to make a strong finish in the final hearings, which turn out to be politically the most important. In some instances, the public may even be misled into believing that these early hearings constitute the entire process, and so they tune out of the process and miss the later hearings. Thus, public interest groups should form their own strategy that will allow them to have effective members attend and influence all of the meetings.

One issue closely related to the sequencing of public hearings in an extended land use proceeding is the stacking of the early hearing boards or tribunals. In an extended land use hearing procedure, the earliest hearings boards are typically filled by members of the public. While such members of the public should include individuals representing a diverse range of interests, they more frequently seem to be made up of developers, their representatives, or other parties with a substantial interest in supporting the project at hand. While the public may be given a seat or two on such boards, this may amount to token gestures if they are unable to achieve consensus or form voting majorities with other members. Because such early hearings can frequently set the tone and agenda for all future meetings to come, the players involved at these early stages can play a determinative role in the final outcome. In other words, and as cynical as this may sound, the act of selecting members for such boards is sometimes a political act undertaken to achieve a desired outcome, all under the guise of grassroots-level democratic participation.

3. Ex Parte or Aren't They?

The types of land use hearings contemplated in this Article include those that are purely legislative, as well as those that are quasi-judicial or judicial. In the cases involving quasi-judicial or judicial proceedings, there will almost certainly be prohibitions on unilateral communications with the decision-maker, otherwise referred to as ex

parte communication. Because penalties for improper ex parte contacts can be severe, including nullifying a winning decision, the public interest attorney must be certain to review and understand the applicable rules.

However, even in the cases where ex parte contacts are prohibited, the public interest attorney may often present the decision-maker with materials supporting her client's position, as long as the materials are also in the record. As noted elsewhere in this Article, it is almost always a good idea to present the decision-maker with copies of supporting documentation, including a persuasive summary of the key issues and arguments and examples of the most compelling evidence (e.g., color photographs of the alleged environmental harm caused by the opponent's actions). If there are no limitations on ex parte contacts, presentation of such courtesy copies likewise remains a good idea.

4. The "Cram Down"

One method which could conceivably be employed by either side in a land use proceeding, but is seemingly most frequently associated with developers, is the "cram down." Under this scenario, the developers communicate to the elected officials certain reductions or compromises that they would be willing to accept to have their projects approved. At the public hearing, after the impassioned testimony of the project opponents, the elected officials deliberate and then "cram down" the developers' projects to a lower density or other reduction. Such a ruse gives the elected officials the appearance of supporting the project opponents at no real political cost because the developers have agreed to the reductions in the first instance. Such a "cram down" can also be perceived as such a victory to project opponents that they will frequently pull back from further efforts to reduce the project. Again, this is a tactic which could be used by either side in a land use proceeding.

5. Timing is Everything

The timing of information put into the record is almost always a strategic issue. With regard to the overall proceeding, the public interest attorney must be careful not to introduce key evidence so early that her opponents will have ample time to develop a rebuttal. On the other hand, she must not withhold such information until the end of the hearing process, causing the decision makers to have

limited time to consider it or to use the information in reaching alternative conclusions.

Even within the context of a particular hearing, the parties may engage in tactical timing maneuvers. For example, one side may wait until the other side has completely finished its testimony before presenting its own. This allows the parties testifying last the opportunity to rebut the testimony of the early party, and also to benefit from the positive psychological effect on the listener of having had the last word. Thus, the public interest attorney should consider choreographing her clients and witnesses so that they do not give away all their arguments in the beginning of the hearing and yet, do not wait so long that the hearing closes before they can present their key evidence.

One other timing issue on a macro scale is providing the agencies, consultants, and press ample time to develop materials that the public interest attorney can use in support of her case. In particular, agencies should be given sufficient lead time as they typically move at a slow pace, no matter how well intentioned.

6. *Getting the Last Word in*

As noted elsewhere, developers and local planning departments often have ongoing working relationships. Public interest advocacy groups may come and go, but major developers typically remain on the scene, and, logically, develop long-term relationships with departmental and agency officials. Developers have another advantage; they have the funding and the teams of attorneys, engineers, architects, and consultants that local governments may lack. Thus, it is often the case that local governments will allow the developer's legal counsel and consultants to "shoulder the load" in certain large-scale development projects. Most notably, and perhaps the most threatening to the public interest attorney, is when the developer's attorneys are given the opportunity to draft the complex findings used to provide legal support for a project. Whether or not this practice is ethical, it appears to be common.

How the public interest attorney can overcome developer-assisted governmental processes will vary from case to case and will involve creativity and a certain assertiveness to put oneself into the process. At the very least, the public interest attorney should inquire as to whether such collaborations will indeed occur and, if the answer is yes, should request the opportunity to participate on an equal footing with the developers.

H. Injunctions

Almost all public interest attorneys will sooner or later find themselves confronted with the dilemma of whether or not to seek an injunction preventing further environmental abuses during the course of the litigation. Not only is the public interest attorney likely to encounter this dilemma, she is likely to encounter it multiple times. It is the nature of land use and environmental litigation to involve some proposed or ongoing action by some party that will cause environmental harm if allowed to continue unabated. Because a contested case may take years to be resolved (this is especially true for land use and environmental cases which, upon appeal, are frequently remanded for further proceedings rather than decided on the merits), unless the on-the-ground wreckage of the environment is somehow stopped, the damage will have been done before the case is resolved.

Fortunately, there exists a well established legal mechanism for preventing this scenario: the injunction. An injunction, which is simply a court order directing a party either to engage in an action or to cease an action, can often be obtained at the beginning of a legal proceeding to protect the subject matter during the course of the litigation.²⁶

²⁶ Under 28 U.S.C. § 1365(a) (2004), the district court has discretion to determine which form of relief is best suited to abate current violations and deter future ones. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57 (1975); *Sampson v. Murray*, 415 U.S. 61, 88 (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 (1959).

In most federal and state courts, the language of irreparable injury figures prominently in the various tests for preliminary relief, and the only injury that counts is injury that cannot be prevented after a more complete hearing. *See* *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 386 (7th Cir. 1984) (“Only if he will suffer irreparable harm in the interim—that is, harm that cannot be prevented or fully rectified by the final judgment after trial—can he get a preliminary injunction.”); *Sun Oil Co. v. Whitaker*, 424 S.W.2d 216, 218 (Tex. 1968) (holding that a plaintiff seeking a preliminary injunction must show “probable right on final trial to the relief he seeks and probable injury in the interim”); *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

CAL. CIV. PROC. CODE § 525 (2004) has been construed to allow preliminary injunctions in order to preserve status quo until merits of action can be determined. *Hartsif v. Wann*, 293 P.2d 65, 66-67 (Cal. App. 1956).

In Washington, according to *Fed. Way Family Physicians, Inc. v. Tacoma Stand Up for Life*, 721 P.2d 946 (Wash. 1986), Washington Civil Rule 65 and WASH. REV. CODE § 7.40.020 both allow temporary injunctions if the plaintiff shows that he has a clear legal or equitable right, that he has a well-grounded fear of immediate invasion of that right, and

The problem with injunctions, however, is that they can create substantial economic risk for the party enjoined, which is in turn typically shifted back to the party successfully obtaining the injunction. For example, if one party successfully obtains an injunction against another party that causes the party to cease an activity—proceeding with construction of a large subdivision for example—such cessation of activity will subject the enjoined party to huge economic losses. In the subdivision example, the developer might be liable for the contractual losses to contractors who were retained to proceed with the construction on a certain schedule. There may also be additional costs if the market for homes in the subdivision takes a downturn after the time the houses would have been marketed had the construction of the subdivision not been enjoined. Such losses are properly placed upon the enjoined party if the enjoined party is the loser in the lawsuit.

However, if the enjoined party prevails, the losses suffered by the enjoined party can sometimes be shifted to the party who sought and obtained the injunction in the first instance. The transfer of losses of the enjoined party to the enjoining party, where the enjoined party prevails in the lawsuit, is accomplished by statutory and case law in virtually every American jurisdiction.²⁷ As a reflection of this protective policy, and to further protect the rights of the enjoined

that the acts complained of are either resulting in or will result in actual and substantial injury to him.

Oregon Rule of Civil Procedure 79A(1)(a) allows preliminary injunctions “[w]hen it appears that a party is entitled to relief” and the relief consists of restricting an act that would produce injury to the party seeking the relief if continued during the litigation.

²⁷ Virtually all states have some type of codified security requirement. Whether the applicable bond provision is contained in a statute or a code of civil procedure varies. These bond provisions determine a court’s ability to exempt applicants from bond requirements. FED. R. CIV. P. 65(c), which has been copied by a number of states, provides that bond “shall” be required but allows the amount of the bond to be set “in such sum as the court deems proper.” About half of the circuits consider it a discretionary provision, reasoning that the phrase “such sum as the court deems proper” literally allows the trial judge to dispense with the bond. Reina Calderon, Note, *Bond Requirements Under Federal Rule of Civil Procedure 65(c): An Emerging Equitable Exemption for Public Interest Litigants*, 13 B.C. ENVTL. AFF. L. REV. 125 (1986); Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*, 46 HASTINGS L.J. 1863 (1995). See *California ex rel. Van De Kamp v. Tahoe Reg’l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (“[t]he court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review.”). The Tenth Circuit has not held the bond itself to be mandatory: “[A]t this point we do not decide, nor do we even suggest, whether a bond is mandatory to validate the preliminary injunction[.]” *Coquina Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 (10th Cir. 1987).

party, many jurisdictions require the party seeking the injunction to post a bond sufficient to compensate the enjoined party for potential economic losses in the event the enjoined party prevails in the lawsuit. Because public interest litigants, particularly grassroots organizations, are typically cash-strapped, the prospect of liability for costs associated with obtaining an injunction will potentially cripple the groups' efforts to protect against environmental damage occurring during the litigation.

The decision of a public interest organization to seek an injunction becomes even more intimidating when the potential personal liability for members, officers, and directors of the organization is considered. As explained earlier in this Article, it is possible to provide some insulation from liability to members of a public interest organization by incorporating the organization. Officers and members of the board of directors, who are most at risk, can achieve additional protection by purchasing umbrella coverage through their insurance carriers. However, when the challenged action is on the scale of a large high-end subdivision or luxury ski resort, subjecting the enjoining parties to the risk of potential damages for millions of dollars, even members of the most carefully incorporated and fully insured organization are likely to eschew seeking an injunction. This can be a heartbreaking and demoralizing decision for both the public interest client and its attorney, especially when ground is being broken on the challenged project at the onset of a protracted legal battle over its right to proceed. Even if the developer loses the legal battle in such situations, if the project is substantially underway or completed, it would be the rare court that would exercise its discretion in favor of requiring the project to be dismantled. Such a result is even more likely in the event that a great deal of economic value has been invested in the project during the course of the litigation. Thus, the public interest litigant who, out of a combination of fear and prudence, declined to obtain an injunction may well find itself with a pyrrhic victory.

The risks to the public interest litigant seeking to enjoin development projects are not lost upon project proponents. When faced with a legal challenge by a public interest litigant, a savvy and well-advised developer will often proceed with the project on the assumption that economic risks to the public interest opponent will deter it from seeking an injunction. If the developer's assumption proves correct, the next step in this strategy is to put as much product in the ground as possible, as quickly as possible, in the hopes of

outlasting the active litigation. Thus, a large project substantially underway can decrease the probability that the project will in any way be impeded by a legal action regardless of its outcome, simply by proceeding full steam ahead.

Of course, these are largely generalizations. The laws determining such things, such as the standard for issuance of an injunction, how the risk will be allocated between the parties in the event the enjoining party loses the lawsuit, whether a bond will be required by the party seeking an injunction, and whether a party may proceed with a project during the pendency of an administrative proceeding or appeal, will vary from jurisdiction to jurisdiction. However, it is a rare jurisdiction that will provide a legal framework allowing the public interest litigant to enjoin an opponent's development project without incurring any liability or risk for potential damages to the enjoined party. This does not mean, however, that lawsuits challenging environmentally irresponsible projects should not be undertaken if the public interest litigants are unable to enjoin the project during its legal proceeding.

Even if the project is ultimately completed, such lawsuits may nevertheless have a deterrent effect on subsequent projects that have a high probability of significant adverse impacts. This deterrent effect can result from a number of factors. First, obviously, the expense, increased risk, and stress experienced by the project proponent is likely to be substantial, even if the proponent ultimately succeeds. If the lawsuit is sufficiently high profile, the negative publicity it generates may further decrease the profits realized by the project proponent if the publicity decreases the marketability of the product. Moreover, and although this may be rare, there is the chance that even if the litigation fails to achieve any on-the-ground benefits, it may nevertheless result in setting salutary precedents for future public interest litigation.

I. The Settlement

1. Settlement Tools: Transfer of Development Rights, Conservation Easements, Monitoring Programs

Before proceeding in any settlement negotiations, the public interest attorney should develop a list of innovative and positive solutions to the present impasse. A toolbox of such solutions would include transfer of development rights programs, dedication of

conservation easements, and voluntary monitoring programs applicable to such things as water quality and quantity, presence of threatened and endangered species, and so on.

2. Don't Just Object; Provide Alternative Plans

One complaint often leveled against public interest opponents to development projects is the negativism suggested by opposing a project without an acceptable alternative in hand. Thus, public interest players should endeavor to develop detailed alternative projects to those they oppose.

3. Don't Negotiate Against Yourself

One rule that most developers follow is never to negotiate against yourself by offering concessions that have not yet been discussed. This same rule applies to the public interest attorney. Avoid putting compromising solutions on the table before they are discussed or before signals have been given that such concessions may be necessary.

J. Attorney Fees

As with injunctions, the ability to obtain attorney fees in public litigation is often a determining factor of whether or not to proceed with the legal challenge. Also, like injunctions, the risks associated with attorney fees provisions are a two-edged sword. For the cash-strapped public interest litigant, the possibility of obtaining attorney fees by prevailing in the lawsuit may provide the sole means of financing a legal challenge. On the other hand, the possibility that the project proponent may be awarded attorney fees against the public interest litigant, should the proponent prevail, may provide a powerful disincentive for the public interest party to commence an action.

How the competing benefits and risks associated with attorney fees awards will play out in any given legal conflict will depend upon a number of factors, including the nature of the public interest attorney fees provision in the retainer agreement, the strengths and weaknesses of the public interest litigant's case, the resources available to the public interest litigant, and the laws governing attorney fees in the particular case. Regarding the nature of the attorney fees laws, there are a number of possible scenarios. As with other aspects of land use and environmental law, these scenarios typically represent an underlying policy bias.

One of the more insidious and arguably anti-public interest attorney fees provisions was recently enacted in Washington State. Under this law,²⁸ a party that loses three succeeding land use proceedings is liable for the attorney fees of the prevailing party. This law has several deleterious effects. First, it denies the successful public interest litigant attorney fees unless the issue is litigated all the way to the appellate level. Second, this system effectively deters public interest litigants that are unsuccessful in the lower courts from appealing, and thereby creating new and potentially favorable precedent, because once the public interest litigant reaches the appellate level it is subject to the risk of paying the other side's attorney fees if it loses.

This is not the only attorney fees provision with an anti-public interest bias. To some degree, any attorney fees provision that provides attorney fees to the prevailing party is likely to be a deterrent to the public interest litigant. This is because, even though such a system would appear to be equal in its effect, since public interest litigants seldom start out on an equal economic footing with their opponents, the public interest litigant is at a higher risk of losing and thus, being exposed to an attorney fee award to the opposing party. Even in those cases where the public interest attorney is able to tell her clients that they have a strong chance of prevailing, she may often find herself nevertheless recommending that the clients abandon the conflict if they would be unable to withstand the economic loss of paying the other side's attorney fees. Except in the near mythical event of a guaranteed slam dunk victory, the public interest attorney will never find herself able to assure her clients that the probability of winning a case is so high that it reduces to zero the economic risk of having to pay the other side's attorney fees.

As gloomy as the above discussion may sound, it does not mean that there are no scenarios in which the attorney fees provisions will benefit the public interest litigant. To the contrary there are number of legal systems in which attorney fees are available only to the prevailing public interest litigant, but not to the prevailing opposing party.²⁹ Such laws reflect the underlying social policy of allowing

²⁸ See WASH. REV. CODE § 64.38.050 (2004), which allows a court to award reasonable attorneys' fees to the prevailing party.

²⁹ Statutes authorizing citizen suits usually provide that parties will be entitled to awards of attorney fees when they are prevailing or when a court determines that an award is appropriate. To be entitled to such a fee award, a party must be able to demonstrate some success on the merits. Fees that should be awarded where appropriate has been

public interest litigants to act as private attorneys general for the beneficial social purpose of assisting overburdened government and identifying and prosecuting environmental wrongs.³⁰

Unfortunately, at the present time such statutes are almost completely limited to federal law and are extremely rare in the land use area, which is almost exclusively governed by state and local law. One can only hope for social and political enlightenment that will result in a legal framework at the state and local level allowing public interest litigants to enjoin environmental abuses during the pendency of a legal challenge. Such a framework would also award public interest litigants attorney fees upon the successful conclusion of such a challenge but without exposing the litigants to the economic risks of paying for their opponent's damages and attorney fees.

CONCLUSION

This Article is written for the solo public interest practitioner. It assumes that such practitioners, while long on dedication and heart, are typically short on time and resources in comparison to the opponents they must face in the typical high-stakes land use battle. Accordingly, this Article attempts to guide them with a background understanding of the world they are entering and arm them with a few practical pointers, which may just be enough to tip the scales in their

interpreted to mean that the success need not be extensive or major but must relate to the purposes of the statute involved. *Ruckelshaus v. Sierra Club*, 463 U.S. 680 (1983).

Success is often measured differently in citizen suits. *Nat'l Wildlife Fed'n v. Hanson*, 859 F.2d 313 (4th Cir. 1988). Environmental litigation is generally undertaken to force the relevant agency to perform properly its statutory responsibility, and even a remand may be of significance in the environmental context. *Golden Gate Audobon Soc'y, Inc. v. Army Corps of Eng'rs*, 732 F. Supp. 1014, 1023 (N.D. Cal. 1989). Awards are appropriate when a plaintiff has achieved at least some of the same general type of relief sought by the litigation. *Sablan v. Dep't of Fin. of N. Mariana Islands*, 856 F.2d 1317, 1325 (9th Cir. 1988); MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* § 8.03, 8-6 to 8-9 (1995).

³⁰ The Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412(d)1(A) (2004) requires a fee award to prevailing parties whenever the United States is a defendant. This Act is available in any suit against a federal agency pursuant to the APA. To obtain judicial review of agency compliance with NEPA, the plaintiffs may be eligible for attorney fees (under EAJA) by suing under the judicial review provisions of the APA. MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* § 8.03, 8-9 (1995).

Also, under FED. RULE CIV. PROC. 54(d), a court has discretion to deny or reduce costs allowed against a nonprevailing plaintiff if the parties are unevenly matched in resources and the losing party conducted the litigation in good faith. MICHAEL D. AXLINE, *ENVIRONMENTAL CITIZEN SUITS* § 8.06, 8-35 (1995); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp 294 (S.D.N.Y. 1987); *Martin v. Frontier Fed. Sav. & Loan Ass'n*, 510 F. Supp. 1062 (D.C. Okl. 1981).

favor. Ultimately, of course, the best teacher is experience itself. Painful experiences sometimes provide the most useful lessons. And in those times, when all else fails, remember that you are fighting the good fight, and win or lose there can be no greater satisfaction than that.