Some 2024 Resolutions for Environmental Lawyers

By David G. Mandelbaum | January 5, 2024 | The Legal Intelligencer

You are reading this column in the first days of 2024. This might be an apt opportunity in the "environmental practice" column to consider what we environmental lawyers ought to resolve to do to elevate our practices in the new year. My observations are no more profound than anyone else's. But as I begin my fifth decade in this line of work, I feel at least moderately comfortable playing the grizzled—but I hope not yet hoary—veteran.

Remember that the "lawyer" part is fundamental.

You cannot be a good environmental lawyer without being a good lawyer. We often tell ourselves that we are different from regular lawyers. We belong to a special "secret handshake" practice that marries legal understanding and scientific and technical learning in a way that people outside the guild cannot. Even if that were true—and it is surely a controversial assertion—we would conduct our business better if we were better lawyers. Indeed, I have a litigator friend who often says that "environmental lawyer" is an oxymoron because in his experience "environmental" lawyers exhibit such poor advocacy skills.

So let us resolve to be better. Some specific, not comprehensive, thoughts follow.

Help the litigation process.

The matters we all handle have the purpose of achieving some client goal and should have the purpose of achieving it through some sort of resolution. For those of us who litigate, we know that litigation works best and results in settlement more reliably when the parties each have a path to obtain a judgment.

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The litigation process does not work well without help. There are often parties in a matter whose objective is to delay resolution. Our job in each case is to advocate for application of the usual rules of procedure to achieve an outcome.

We all hope to be retained in complex matters with a lot at stake. In those matters, conventional approaches often do not work well. Consider a conventional litigation case management order: initial disclosures, document production, fact depositions, expert reports, expert depositions (if permitted), motions, trial. If you have participated in a multiparty CERCLA allocation case, you know that that approach is a prescription for years of discovery most of which, as a practical matter, could never be used at trial.

Unless the judge has had a similar matter, he may need help crafting a more effective case management plan. Familiar solutions like bifurcating liability and "damages" do not really work in the allocation case. Liability presents a secondary issue for most parties in a strict liability statutory case. The case almost always boils down to disputes over how the court will allocate among the parties (that is, what is the algorithm, formula, or methodology), and what the inputs are to that formula. Discovery mostly goes to the inputs, but it is the formula that matters most.

The lawyers can help by thinking "backward." In our example, a judgment consists of a list of shares that add up to 100%. In order to render that judgment, the court will require facts that to input into the formula to compute those shares, and no other facts. In order to know what facts will matter, the court needs the formula. Therefore, the initial phase of the case might well involve litigation over the formula. Upon resolution of that issue, most cases would settle, in fact. We have to help the judge see that.

In the same way, permit appeals often involve one or two central issues that render development of detailed facts unnecessary; the matter will settle after those issues are settled. Alternatively, as the toxic tort litigators have learned, a "bellwether" example can short cut plenary litigation.

But litigation is not consensual and the parties do not always have the same goals. Therefore, we may be called upon to litigate over the process. We help that advocacy by being clear about the endpoint and the path to it: what the judgment will look like and what it will take to get there.

Help the regulatory process.

The environmental regulatory process is designed to approve new activity and new facilities only slowly. We have designed a process to err on the side of denying approval. And yet, that is a terrible approach for the problems we face now. If we wish to decarbonize, for example, we need lots of new facilities and new infrastructure in a hurry.

This is a problem for all of us, whether our practice is for private clients, NGOs or the government. Gov. Josh Shapiro has loudly touted his success in repairing the collapse of I-95 in Philadelphia, and taking less than two weeks to do it. That result flowed in part through an exemption for the requirements of the National Environmental Policy Act for repairs and a waiver of most other reviews and procurement rules. But that cannot be a universal solution for conventional permitting issues. Indeed, the Environmental Rights Amendment to the Pennsylvania Constitution might preclude an agency from ignoring environmental impacts of an action. And the same could be said for every one of the statutes and regulations under which we work and things such as the Pennsylvania Environmental Justice Policy.

I don't know the solution, but we should be resolved to work on it.

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Learn more environmental law.

All of us will feel more comfortable in 2024 trying to handle matters a lot like the ones we handled in 2023 and 2022. But if we were to broaden our knowledge we could better serve our clients and shift our practices as new issues arise. It is the time of year for articles about "3 leading developments of 2023" or "5 legal issues to watch in 2024." Consider developing a list of issues that you are fairly sure will come up in someone's practice this year and as to which you are not fully fluent. Here is a start:

- Regional Greenhouse Gas Initiative
- Methane Rule
- Environmental Rights Amendment
- PFAS
- Pennsylvania Environmental Justice Policy

Learn more nonenvironmental law.

This is a corollary to the recognition that the salient part of "environmental lawyer" is "lawyer." I do not edit the appellate opinions I assign to my law students. An important part of learning about "Superfund litigation" or "oil and gas law" is learning about the civil procedure, tort, and contract issues that get litigated along with the narrow environmental statutory issues on which the class may focus. Apart from general law topics, there are a host of energy, land use, products liability, insurance, bankruptcy and other tort issues that would make each of us better at what we do if we understood them better.

Some of the things about which we need to learn aren't even law. Appropriate and efficient use of generative artificial intelligence seems to be on that list.

Figure out how professional relationships work now.

Law practice always involves other people. In fact, you will often hear environmental lawyers speak of the centrality to their practices of their relationships with regulators, courts or other counsel. While one should always be wary of a call to relationships to the exclusion of the merits, relationships can surely help get a meritorious position heard.

The ways we interact changed in 2020. I doubt most of us have figured that all out. We could all fixate on returning to the office five days a week and conducting all our business in person, but that is not likely to happen any time soon. Consider this analogy within the memory of some.

Law firms used to have libraries and most days most of the young lawyers could be found there. That made the library a social hub in each office, and it helped in forming bonds within the organization. We don't have libraries like that anymore, and yet we have figured out how to make law offices bond. We might pay some real attention this year to how we maintain and build the relationships within our organizations, with our clients, and with the other lawyers in our matters.

That might make us happier as well.

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