

TRAITS AND TOOLS FOR ETHICAL ENVIRONMENTAL ADVOCATES IN FLORIDA

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I. INTRODUCTION

The personality traits of the lobbyist and the successful advocate in court are often overlooked when we talk about ethics and professionalism. Environmental advocates, despite believing in a high moral justification for their positions, are often frustrated

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when better-financed efforts gain an inside track. It takes a certain preparation and personality to carry off influencing the decision makers.

If you are a public interest advocate for the environment in Florida, whether as a legislative or administrative lobbyist, or before the courts, the suggestions of this article may help you foretell and structure the success of your approach. The tools and traits are meant to encourage you to find and enhance an effective place and style for your advocacy. By organizing the great capabilities of your personal effectiveness, you can advance the causes you support.

Suggestions here take you from the basics of registering to lobby the executive and legislative branches, to profiles of effective lobbying in the modern style, deciphering administrative agencies and the cabinet, ethical conflicts, preparation of clients pre-suit and handling sanctions and other hardball tactics during litigation. The goal of this article is that you will build an outline of your approach with specific points to enhance your effectiveness, and go forward with effective ethical advocacy.

II. INFLUENCING LEGISLATIVE BODIES

Lobbyists are a fixture of the system with 80,000 in Washington, D.C. by the 1990s. There were hundreds registered with the Florida legislature in the 2000 session. There must be thousands, at least part-time, at the city and county levels in Florida.

Most environmental advocates have to influence local or state legislative bodies from time to time. Most of the advice herein about the state legislature is adaptable to local governments, which have their own registration procedures, fewer members and easier access.

A. Preliminaries: Register as a Legislative Lobbyist, and Research

In addressing legislators, including at local offices or by telephone, you may need to register beforehand, and file reports as a lobbyist. The Florida Legislature defines a 'lobbyist' as "a person who is employed and receives payment, or who contracts for economic consideration, for the purpose of lobbying, or a person who is principally employed for governmental affairs by another person or governmental entity to lobby on behalf of that other person or governmental entity."¹ It defines 'lobbying' as "influencing or attempting to influence legislative action or nonaction through oral

1. FLA. STAT. § 11.045 (2000).

or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature.”² Consult the Guide to Lobbyist Registration and Reporting, available from the Office of Legislative Services’ Lobbyist Registration Office.³ The forms are online, but original signed documents must be filed to comply. At the local level, inquire with the city or county clerk or attorney or check the Code for any requirements.

The web site <http://www.leg.state.fl.us/> also connects you to a great deal of descriptive matter on the members (photos, biographies, and maps of districts) and their committee assignments and what they are sponsoring. For instance, in the 2001 legislature, the 63 new House members figure into 120 total. Many come from prior positions in local government. Most Senators were previously in the House. Take the material a step further and ask around about their personalities.

B. Identify Your Place in the Lobbying Hierarchy

Legislative lobbyists in the modern style can be described in terms of a hierarchy. Look over the four profiles and honestly consider where you now fit. Do not despair; suggestions follow on how to elevate your status.

Premier lobbyists’ techniques deserve the consideration of everyone else who lobbies. They are personally close to top legislators and achieved this because they have quality information and are competent and reliable. Closeness may mean they socialize with legislators (attend sporting events, hunt, fish, drink, golf). They are close enough friends to a few that they are like family, or business partners. Most legislators and aides would know and greet them. The sign of their access is that their phone calls, even to cabinet members, speakers, and committee chairs, are recognized and personally returned, not screened. Usually they were high-performing former state officials or legislators, or former aides of top people, or are notable from statewide political campaigns or parties. While their access is guaranteed, they do not take it for granted.

2. *Id.*

3. Available at <http://www.leg.state.fl.us> - offices located at 111 W. Madison St., Room G-68, Tallahassee, FL 32399-1425, phone (850) 922-4992.

They constantly maintain their own accessibility with cell phones and beepers and personal presence.

The premier lobbyists' method is to be the best informed, and they are relied upon for the accuracy of their information above all. They stay so well informed that they are virtually an unpaid staff to the government. They look like the people they influence, with impeccable dress and grooming and manners. They personally know all the staffers, secretaries, and aides. They are "fixers," to match up each legislator with what he or she wants (within the limits of campaign contributions and gifts). What legislators want may be a program, connections to others, campaign assistance, help for powerful constituents, or even simple things like an award or social inclusion. Premier lobbyists are at the ultimate bargaining table due to their capability. There, they personally craft the outcomes, or "deals," that make the essential compromises of a functional government. They are devoted to their work year-round and carry the history and memory of state affairs from session to session. If you are not "Premier," maybe you are "Second Tier?"

Second Tier lobbyists are known to many of the legislators as some of the campaign managers, fund raisers, party officials, or former legislators or aides, or some are presidents of large corporations or senior partners of law firms, or perhaps heads of important organizations, or former members of state boards or commissions or former holders of important local office. Their access is such that their phone calls to most top aides and members are recognized and screened, with return or response at least from someone. Their history may include a few legislative sessions as a lobbyist or member or aide. They are greeted, when seen, by many legislators and aides from outside their home area. They may be less fully devoted to the legislature than the Premier lobbyists, and work at other efforts also. They are highly informed and facilitate a lot in local and state politics. If the Second Tier is not your job description, try Third Tier.

Third Tier lobbyists are known to and recognized mainly by the local legislative delegation and their aides. They have helped legislators get speaking engagements, some have helped with contributions to campaigns, and they have appeared at hearings and been quoted in the press to have some public profile. They may have some extra credentials (attorney, head of local group, a scientist without especially high recognition in their field, or a small business owner). They have attended some parts of the legislative sessions, but for a limited time or for fewer issues. They are busy with more local issues usually, but are not in the inner circle of key state insiders. Being more a part of the crowd, they miss a lot of the

action and act more through the local delegation. The higher ranks use them to sound out questions and new information. Many think of themselves as Premier, although their phone calls are usually screened and lower staffers usually respond.

The *Grassroots Tier* is the most abundant and growing kind, and hugely important to the system. These lobbyists write and occasionally meet local legislators. They focus on local issues or act as local contacts on state issues. They would need an introduction to almost all of the legislators. They may have had a bit role in local campaigns: making calls, or handing out leaflets, or working polls. Their phone calls would be screened as a courtesy and if there is a reply it is a "thank you for your concern." They may have gone to the legislature for a couple days on an issue. A bit rough-cut in grooming or dress, perhaps, they care about issues, but have erratic information about any given topic, as lobbying is only a small portion of their life.

Hopefully, each understands just how many in the Grassroots Tier are needed to accomplish anything in a legislative agenda, where inertia is the rule. A few years back, then Speaker Thomas P. 'Tip' O'Neill told the Sierra Club it was the top lobby in the country, passing even the National Rifle Association, because of how well it mobilized its members' responsiveness. Grassroots lobbyists are a big part of that effectiveness. They have a collectively large share of the power, because all the other lobbyists are turning to a grassroots style of manufactured constituent support to sell their own efforts. From the view of the legislators, a constituent contact carries the implied reminder: accountability attaches to this decision. That's effective.

C. Rise in the Hierarchy by Referring to this Checklist

You may improve your lobbyist status, perhaps rapidly, by taking one step at a time as suggested by each question. Everyone postures as if holding a better status, but his father's advice to Laertes still holds: "to thine own self be true." Know your fit in the hierarchy, and improve upon it, by following this approach:

1. The source of my being useful to and recognized on sight by legislators is now (Check one, then work toward the next one on the list):

- I write them or letters to the editor on issues;
- I speak at hearings so they have seen me or read news articles quoting me;
- I have met many of them when they campaigned;
- I have had them speak to my organization;

- I helped get them an award for legislative achievement;
- I worked in their campaigns (made calls, leafleted some) or gave contributions in small amounts;
- I worked as their campaign advisor for key issue or strategy;
- I was one of a few key fundraisers or contributors to their campaign;
- I was the main manager or fundraiser to campaigns;
- I socialize some with legislators, such as hunt, fish, drinking buddy, golf partner;
- I am like family to some legislators as I socialize and personally interact with them so much.

2. My personal communication style (Check all that describe you, then work on all that are not checked):

- I have a personal touch for learning the names of staffers, secretaries, and aides;
- I have a high level of energy in conversation with others;
- I gather information to myself like I'm a magnet;
- I love making contacts and following up with them;
- I do my "homework" to have information on all aspects of what I handle;
- I use cell phones, beepers, and am always accessible;
- I work on legislative policy "24/7";
- When teamed up with another, I am the more talkative out-front person when approaching a public official, rather than the more reserved;
- I have great recollection of the history of development of what I work on, to bridge between prior years and drafts and the present discussions.

3. My appearance and image (Check all that describe you, then work on any that are not checked):

- I place a lot of importance on my personal appearance (dress, hair);
- I look like one of the people these legislators spend time with when among their friends and business associates;
- I react with vigor against anyone's suggestion I am an extremist or zealot;
- I react with great attention and urgency to any suggestion that I have inaccurate information or that I am not being honest.

4. My personal connection with legislators (Check the one that most fits you, then work on the next level by following other suggestions in this evaluation):

- They do not know me without an introduction;
- A few would recognize me at a reception, and come to greet me;
- Almost all the local delegation would come greet me at a reception;
- Almost all the aides as well as local delegation would come greet me at a reception;
- Many legislators from outside my home area would greet me at a reception;
- Many aides, as well as legislators, from outside my home area would greet me;
- Most legislators and aides would know and greet me.

5. How well-known I am? (Check your level now and work to the next one):

- My phone call to members of the local delegation would not be recognized;
- My phone calls to members of the local delegation would be recognized and returned;
- My phone calls to some top aides and top officials of the legislature would be returned; and
- My phone calls to cabinet members, speakers and committee chairs would be returned.

6. My lobbying credentials (Check what applies and work to better it in some way):

- I'm involved with local issues;
- I'm a professional person in a local practice (attorney, scientist, etc.);
- I've been highly recognized in my profession (bar association, scientific commission etc.);
- I've lobbied once before in Tallahassee for a week;
- I've lobbied an entire legislative session;
- I've lobbied a few legislative sessions;
- I've lobbied many legislative sessions;
- I'm the holder or former holder of a high position in my field (President of a large corporation; head of a national or large state organization; former member of a state board or commission or holder of important local office like county commissioner);

- I'm a notable in political campaigns or parties in the state;
- I'm a former state legislative aide;
- I'm a former state legislator.

7. How cooperatively I work (If any do not apply to you, work on them):

- I work in coalitions with non-traditional allies (i.e. some compatible large corporate interests, where you help their efforts and they help yours);
- I use grassroots and call on them for e-mails, letters, and to visit with me if possible (clients, local constituents);
- I am willing to be one in a system of hundreds of state lobbyists;
- I'm already virtually an unpaid staff of government due to the depth of my information;
- I'm intent enough to get to the ultimate bargaining table and apply give-and-take until I personally craft an outcome;
- I'm able to agree in my collective effort on the projects to pick out who is the "deal" maker for my clients, and give that person the authority for the ultimate compromise;
- I'm ready to staunchly defend the imperfect outcome I will have to agree to, and defend those whom I convinced to accept it .

D. Lobby in the Modern Style

Use these axioms of modern lobbying (derived from a book written about national lobbyists).⁴ Develop them into your own "mind set" as a lobbyist:

- Use media and public relations for any public issue, as a great influence;
- Get into a coalition (sometimes of nontraditional allies, meaning combinations with other oddly compatible lobby interests);
- Gear up grassroots lobbying letters, calls and e-mails; plus have clients or local constituents go or accompany you to visit members and aides;
- Become depended-upon for information and background as part of an "entire industry," a kind of "unpaid staff" that provides the resources lacking in government employees;
- Initially collect background information and make contacts. Then, for the most part, function in the network with social contact including organized speaking, retreats, educational sessions, and personal involvement with the legislators.

4. JEFFREY H. BIRNBAUM, *THE LOBBYISTS* (1993) (the author followed nine top corporate lobbyists about Washington, D.C., by permission, in 1989 and 1990 for a truly inside story).

Perhaps only at the end you may need to ask for a legislator's help;

- Make your goal to be *accepted and trusted*. A test for acceptance is whether the phone calls are returned. The significance of trust is total. Your goal is to be *at the center and always there*;
- If you are the type that is a strategist and generalized, then bring around with you the experts on details, or have them ready for an immediate answer from a phone call;
- Be viewed by the legislator as a friend and resource;
- Use an appropriate label other than lobbyist, like consultant, or lawyer;
- Obey the pecking order that a Cabinet member or legislator is at the top, followed by their staffs, then the lobbyists. This is true in the domination of conversation and presence at any event;
- Constantly test the wind invitingly about issues, sound out if anyone senses how your message is received.

E. Approach to Use to Hostile, Neutral and Favorable Legislators

Everyone researches the personality and background of officials they will approach. But what do you do if they allow you to approach them? To persuade a legislator to accept your point, appeal to the degree of personal "environmental ethic" they seem to have:⁵

Hostile or uncaring listeners should respond best to protecting the environment *to serve the needs of humans* (economy, orderly society, efficiency). You can "sell" these by:

- Being satisfied to just start moving their opinion slightly your way;
- Stressing common ground;
- Using sound logic with extensive evidence;
- Working on your own image as a calm, reasonable, fair, and informed person;
- (Any image or appearance flaws quickly translate to rejection by them);
- *Generally caring* ones should also want to protect the environment *from respect for its "intrinsic value."* These *Neutrals* should be shown not only how they are directly affected by the urgency, but given background understanding and blends

5. THE RIGHT THING TO DO (James Rachels, ed., McGraw-Hill 2d ed. 1999) (The three ethical levels are included in the editor's introduction to Chapter 23 on Preserving the Environment).

of logic and emotional appeal. Presumably this is your largest target audience.

- *Philosophically committed* may align with stressing, “What kind of *people would we be* if we destroyed the natural environment?”⁶ Approach these *Favorable* ones with emotional appeal, urge their public commitment, give action assignments, and teach your supportive reasoning to use as they go to others.⁷

Upon seeing you approaching the legislator will be pleased. You will be recognized as carrying a sensible approach to their perspective, with the information they need to reach agreement and get what they want, too.

F. Give a Legislator What He/She Wants

A biography of a prominent state lobbyist⁸ gave his working motto as “Give a man what he wants.” You may think you cannot “give a man what he wants.” First, however, realize that many people do not know what they want, or they want some things that are easily given. Some may want to be flattered, others given opportunities to speak to or meet a larger constituency, some may want an award, others to be shown great natural features, some like to attend professional sports events, hunt, fish, or eat (Limit your activity to campaign contribution caps and gift sizes under the ethics rules, and reporting). Try going the social route only if you have the personal chemistry of a perfect companion; otherwise link up with someone who does.

Some who have been aggressive enough to reach state office have insatiable ambition, and you can be in the marketplace of helping satisfy their need to rise toward the top. An environmental person can be one with a lot of influence to a population of neutral or swing voters with less political party identities and more issue affiliations. As not every politician cares to get a positive environmental-activism reputation, there are limits, but few wish to end up with a negative one. Try to learn to read the legislator and identify what you can deliver out of what he or she wants. They all like good press.

Surely, delivery of a payback of the kind suited to your cause is essential. If it is good will or a campaign worker, just ensure that it happens. Combined with being liked and trusted, delivery of what

6. See *id.* at Chapter 23.

7. THE SPEAKERS' HANDBOOK (Harcourt Brace 5th ed. 2000) (specifically chapter 20c).

8. John Dorschner, *The Great Persuader*, THE MIAMI HERALD SUNDAY MAGAZINE, May 3, 1998 (a biography and portrait of the work style of lobbyist Ron Book).

the legislator wants is not only gratifying, but also a powerful force in the lobbyists' setting.

G. Follow the Rules to Handle Conflicts of Interest in Lobbying

Legislative lobbying is quirky about conflicts of interest, comparative to litigation. The Rules Regulating the Florida Bar (hereinafter the "Rules") address conflicts of interest. Rule 4-1.7 of Rules, entitled "Other Conflict Situations," describes some as difficult to assess. Fundamentally antagonistic interests may not be represented in negotiation, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them. There are two key rules. First, the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to, and relationship with, the other client. Second, each client consents after consultation.

One need not be an attorney to lobby; but when an attorney does have clients, the Rules apply. If the client can accept the conflict, the lobbyist sometimes feels an advantage. This is the chance to craft a compromise each client can accept. Representing two affected interests may help sell the compromise legislatively using the coalition format.

III. INFLUENCING EXECUTIVE AGENCIES AND THE CABINET

A. Preliminaries: Register as an Executive Branch Lobbyist

In appearing before the executive branch, including the Governor and Cabinet, you may need to register and file reports as a lobbyist. Section 112.3215, *Florida Statutes*, states: "Any person who, for compensation and on behalf of another, lobbies an agency of the executive branch of state government with respect to a decision in the area of policy or procurement may be required to register as an executive branch lobbyist."⁹ Exceptions are for attorneys in formal administrative hearings, for example. Consult the guide.¹⁰ The forms are online, but original signed documents must be filed to comply.

9. FLA. STAT. § 112.3215 (2000).

10. Available at <http://www.ethics.state.fl.us> or Executive Branch Lobbyist Registration, 111 W. Madison St., Room G-68, Tallahassee, FL 32399-1425, phone (850) 922-4992.

B. Steps to Follow in Approaching Regulatory Agencies

An activity by a regulatory agency may place a young staff member in the lead, but there are larger numbers of persons involved in a controversial matter. A good example of this is the number of persons included in enforcement decisions at EPA described by Professor Joel Mintz.¹¹ Enforcement may start with a range of people potentially reporting a problem, then various investigators may evaluate it, and then a prosecutor will handle the decisions. However, behind the prosecutor are regional administrators or division directors, in communication with state politicians and environmental officials, and assistant administrators at EPA's headquarters who also deal with political figures, and the overall Department of Justice and state attorney general. The enforcement process is rigorous with many choices involved.

Therefore, whether you are involved with making regulations, or their enforcement, consider the many persons that will ultimately be involved. Many of them may be approached and lobbied by interested parties. Reaching each level may be needed, and some of the advice above on lobbying techniques before legislative bodies may be useful. There is a great difference in what you can do to help a politician with contributions and social connections, however, and what you can do to influence a regulatory agency staff or prosecutor. Generally, the better the information you give them to be effective, the better they can do their job. Registering your opinion of the performance with upper echelons of the agency and those influencing the agency should accompany your approach. The squeaky wheel gets the oil. The staff or prosecutor will need the funds and blessings of others to be able to keep your expectations in a priority position.

C. Steps to Follow in Approaching the Florida Cabinet¹²

To be successful before the Cabinet, you participate in both the meeting of the aides on the Wednesday of the week before the Cabinet meets, and the Cabinet meeting itself, usually on Tuesday of every other week. The aides' list (an essential item to use) is available from the Governor's Cabinet Affairs office, (850) 488-5152, or you may visit the web site for each Cabinet member. Notices of

11. JOEL A. MINTZ, ENFORCEMENT AT THE EPA (1995) (see particularly Chapter Two, describing EPA's enforcement process and the Superfund program).

12. Kent J. Perez & Edwin A. Bayo, *Florida's Cabinet System Y2K and Beyond*, FLA. B.J., Nov. 1974, at 68; see also <http://www.ethics.state.fl.us/>.

both meetings should usually be in Florida Administrative Law Weekly.

The Governor and Cabinet sit together for various functions. An interesting topic is the Administration Commission, which determines many comprehensive planning and land development matters, the Land and Water Adjudicatory Commission, which is quasi-judicial (this may preclude meetings with you to discuss an item) hearing appeals on some of the same growth management matters, and the Board of Trustees of the Internal Improvement Trust Fund, which handles land acquisition and public lands. Some matters can be delegated to staff for decisions.

The Cabinet is the Governor and six Cabinet officers until the year 2003, when there will be three fewer Cabinet officers by constitutional amendment.

IV. COURT AND ADMINISTRATIVE HEARING CASES – IDENTIFY AND PREPARE YOUR ENVIRONMENTAL AND LAND USE CASE PLAINTIFFS WITH PRECAUTION

Clients are often selected out of a larger number of potential plaintiffs, in consultation with the attorney who will bring the case. The first concern for selection is of course for the best standing. Another factor is what will be the core interest of each plaintiff. For instance, an environmental group is likely to work for the best outcome for resources, while a homeowners group may need to be very focused on its own stake in property values. An individual neighbor may prefer personal compensation, while an environmentalist further away lacks a compensable solution and will want to obtain good precedent. Many cases have multiple clients, but why have ten environmentalists who will all undergo the time and cost of being deposed, when one or two will do?

In most cases, a client should know to expect:

1. A deposition will be taken of them;
2. They will probably be required to attend and pay their share of mediation;
3. The defending parties will look for possibilities of seeking their costs if they prevail;
4. The defending parties will evaluate whether they can seek sanctions including at least attorneys' fees, or bring a SLAPP suit, which may be costly and aggravating to defend (*See infra*).

A. *Before Suing, Take Steps to Ward Off the Potential Slapp Suit and Sanction Attempts*

Before you begin your suit, read this. It is meant to save you months of agony and work.

It is currently necessary to evaluate the possibility that a developer or polluter or government unit whom your lawsuit targets, will sue or seek sanctions from your client and perhaps you and your firm. This practice is termed “Strategic Lawsuits Against Public Participation” (SLAPP) by public interest practitioners. Set up to preclude or control the potential damage of SLAPP tactics.

Formal sanctions in comprehensive plan consistency cases may stem from Section 163.3215 (6), Florida Statutes:

(6) The signature of an attorney or party constitutes a certificate that he or she has read the pleading, motion, or other paper and that, to the best of his or her knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or for economic advantage, competitive reasons or frivolous purposes or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the court, upon motion or its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (*emphasis added*)

This means both you and your client need to have: (a) Read the verified complaint before signing; and (b) Made a “reasonable inquiry” beforehand into its purpose.

Consider the likely scenario: The client will be deposed perhaps a year after the suit begins. They will then be asked about the purpose of the suit, their recollection of what inquiry they made about its facts and justification, if they recollect actually reading particular phrases of the pleading before signing, and what they meant by each allegation.

This scenario can put the plaintiff's attorney on the spot. The client would like to make firm statements about what they did, but they have had too much time to forget. Saying they acted on advice

of counsel may not be reasonable as to factual allegations. So, for the “reasonable inquiry,” why not have both the attorney and client “overdo” the preparation, to negate an improper purpose, such as:

- Read the plan’s provisions, the ordinance, the minutes of staff or commission, the development order, the application for the development order, any reports of any sources, the statutes and rules and city code provision you are suing under;
- Attend any city meetings on it;
- Attend environmental group meetings on it;
- Meet with city planning staff and discuss it before suit;
- Read the news clippings about the controversy; then, make lists of each of these things both the signing attorney and the signing client did for a reasonable inquiry, and save the list in your file to refresh recollection at the clients’ deposition. Include having the client form a statement as to what is the purpose of the suit, or why they decided to sue, and even write that up for their recollection;
- Finally, have your client not only read the entire verified complaint before they sign, but have them initial each paragraph they have read in an extra copy for their recollection later. For each paragraph, a list of how they know what is alleged can be made. For instance, beside a traffic allegation, note the planner’s report on traffic exceeding the level of service, combined with the level of service in the plan. From this you can also answer interrogatories. You know the client will be deposed, so tell them up front, and help them over-prepare.¹³

For federal cases, sanctions under Rule 11, Fed. R. Civ. P. may apply. These and the frivolous suit provisions of state law have been called substantially similar.¹⁴ The federal cases have developed the analysis of these motions in great detail. The SLAPP-preventative suggestions above can be used to rebut Rule 11 sanction attempts.

B. If “Slapped,” Gear Up Your Affirmative Defenses

When counterclaims, usually as tort actions for defamation or interference, are brought, take a deep breath, read the pleading and outline it carefully, and then work to kill it off with a Motion to Dismiss, or a Motion for Summary Judgment. Usually these are

13. See *Friends of Nassau County, Inc. v. Nassau County*, 752 So. 2d 42 (Fla. 5th DCA 2000).

14. See *In re Section 20 Land Group, Ltd.*, 252 B.R. 812 (Bankr. M.D. Fla. 2000).

jury trial claims, tried separately from the environmental case. Tort law principles give many defenses based on free speech. Motions are evaluated using case law analogies. Possible responses for reference are discussed here. Immediately attack pleadings that are too vague to state a cause of action. Enough attempts to state a cause of action will result in dismissal with prejudice.¹⁵

Require the time, place and nature of the alleged defamation or interfering remarks to be especially specific. While oral statements need not be set out verbatim, as one would expect written ones to be, they must at least set out the substance with sufficient particularity to enable the court to determine whether their "publication" might be tortious.¹⁶

Seek dismissal based on affirmative defenses that appear on the face of the pleading. "[I]t matters not that the defect or fact which appears on the face of the complaint would otherwise have to be raised by the answer of the defendant as an affirmative defense."¹⁷ Facially insufficient allegations are dismissed as a matter of law.¹⁸

Some affirmative defenses that may appear on the face of the counterclaim include:

Pure opinion and fair comment. *Colodny v. Iverson, Yoakum, Papiano & Hatch* discusses how giving ("publishing") to a newspaper a letter which states "pure opinion" is non-actionable.¹⁹ Only communication of facts, or facts mixed with opinion, is actionable at all. The affirmative defense of *fair comment* is "akin" to pure opinion and also applies, as *Colodny* describes. To decide pure opinion, the court examines the statement in its totality, and the context in which it is made, including all the words and cautions used by the person making it and all the surrounding circumstances and the medium and audience. The "determination of whether a statement is one of opinion is a question of law."²⁰

In matters of public controversy, the general facts about the controversy are ones of which a newspaper's audience is expected

15. See *American Seafood, Inc. v. Clawson*, 598 So. 2d 273 (Fla. 3d DCA 1992).

16. See *Nezelek v. Sunbeam Television Corp.*, 413 So. 2d 51 (Fla. 3d DCA 1982).

17. See *Hawkins v. Williams*, 200 So. 2d 800 (Fla. 1967); see also FLA. R. CIV. P. 1.110(d) (permitting affirmative defenses appearing on the face of a prior pleading to be asserted as grounds for dismissal for failure to state a cause of action).

18. See *Kurtell & Co. v. Miami Tribune, Inc.*, 193 So. 2d 471 (Fla. 3d DCA 1967).

19. See *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917 (M.D. Fla. 1996).

20. See *Demby v. English*, 667 So. 2d 350 (Fla. 1st DCA 1996).

to be aware.²¹ Context, cautionary terms, medium, and audience under the pleadings may show a matter of pure opinion is involved.²²

Qualified privilege and lack of requisite degree of malice. Limited public figure status and public controversy are discussed in *Della-Donna v. Gore Newspapers Company*.²³ A “public controversy” means “any topic upon which sizeable segments of society have different, strongly held views” or “whether a reasonable person would have expected persons beyond the immediate participants in the dispute to feel the impact of its resolution. If the issue was being debated publicly and if it had foreseeable and substantial ramifications for non-participants, it was a public controversy....”²⁴

A limited-purpose public figure in such a controversy is one playing a sufficiently central role in the public controversy to which the alleged defamation was germane. Persons can become public figures through no purposeful action of their own, or involuntarily. But where one initiates a series of purposeful, considered actions, igniting a public controversy in which they continue to play a prominent role, they are limited public figures. In *Della-Donna*, this was true of an attorney and trustee of a large private trust in litigation over its beneficiary.

The consequence of the limited public figure status is that statements against it (that are not pure opinion) must involve “express malice” in a *defamation* action (described as ones not “made for a proper purpose in light of the interests sought to be protected by legal recognition of the privilege”).²⁵ Three elements all must be present as the primary motivation: ill-will; hostility; and evil intention to injure and defame. The three elements are not present on the basis of only generalized feelings of hostility and malice toward the other person. This also requires “actual malice,” meaning a statement made with knowledge that it was false or with reckless disregard of whether it was false or not.²⁶

Even more is required for *interference* claims. A “sole basis” of express malice must be present.²⁷ It would not be a sole basis if, for example, another basis is apparent, like a statement containing a bona fide claim with a threat to protect it appropriately.

21. *Id.*

22. See *Colodny*, 936 F. Supp. 917.

23. *Della-Donna v. Gore Newspapers Company*, 489 So. 2d 72 (Fla. 4th DCA 1986).

24. *Id.*

25. *Nodar v. Galbreath*, 462 So. 2d 803 (Fla. 1984).

26. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

27. *Boehm v. Am. Bankers Ins. Group, Inc.*, 557 So. 2d 91 (Fla. 3d DCA 1990).

Statement of bona fide claim. Stating a bona fide claim and threatening to protect the claim by appropriate means is not actionable for interference.²⁸

A person who interferes with the business relations of another with the motive and purpose, at least in part, to advance (or protect) his own business (or financial) interests, does not interfere with an improper motive. But one who interferes only out of spite, or to do injury to others, or for other bad motive, has no justification.²⁹

While there may be no case addressing it, it seems that interfering to advance one's own environmental interests is not interfering with an improper motive either, and you could offer a jury instruction fashioned accordingly, citing public participation provisions like the "fullest extent" one of Section 163.3181(1), *Florida Statutes*.

There are many others of this nature.

C. Make Appropriate Use and Recognition of Personality Traits of Lawyers

Finally, try a short inquiry into the nature of yourself in comparison to those you deal with in litigation. *Circle only seven (7) of the below views of the attorney who you think is more likely to win a hearing on a motion.*

1. One should take action only when sure it is morally right.
2. Most people are self-centered.
3. It's always best to reveal your real reasons if you want to get cooperation from people.
4. There is no excuse for lying to someone else.
5. Sometimes people have to get hurt if important things are going to get done.
6. People can be trusted.
7. Life in the "fast lane" sounds great.
8. I am not very resistant to the influence of others around me.
9. Sometimes we all have to cheat a little to get what we want.
10. Often I enjoy just sitting around thinking.

28. RESTATEMENT (SECOND) OF TORTS §773

29. See Florida Standard Jury Instruction MI 7.2.

11. It is always better to go for a win than to settle for a tie.
12. Often I feel worried.
13. People who can't make up their minds are a pain.
14. I don't let social competition bother me.

Analysis: The above is derived from what some psychologists argue can be used to evaluate for a "Machiavellian personality type."³⁰ Some psychologists attribute the type to being frequent in people who win at games or move up the ladder in organizations and politics.³¹ Whether the type is valid is a matter of scientific debate. Those that credit it might be inferred to project that lawyers with the personality type would be more successful in hearings, negotiations, or trials, but this is unknown. It occurs here because it may be one example to give you insight into yourself, your opposing counsel, or clients. The answer is that items #2, 5, 7, 9, 11, 13 and 14 on the list are Machiavellian traits. By Machiavellian, the meaning is not necessarily negative, but it is suggested that such personalities do tend to succeed. Item #9, about cheating a little, may run afoul of professional ethics when applied to lawyers. Thus one adopting a Machiavellian approach must reconcile such external limits on their actions if not their outlook.

The concept of the psychologist is discussed in terms of a "duplicity" component. Manipulators are identified as action oriented, focused on self-interest, willing to cut corners, and casual about rectitude. Contrasted to them are moralists.

This foray into psychology (by one with no psychology training) is meant as food for thought. Manipulators and moralists (if people may really be differentiated this way) may be faced with one another in the courts. As people entrusted with the business of others as representatives in the courts, we need to place a part of our focus on what role personality plays in our efforts.

V. CONCLUSION

An environmental advocate can foretell somewhat the likelihood of their success and improve their approach, using the aforementioned principles. Our environmental lobbying will benefit from realizing our own "fit" in the lobbying hierarchy and acting in

30. MASTERS & MCGUIRE, *THE NEUROTRANSMITTER REVOLUTION* (1994) (particularly the chapter titled "Serotonin and Social Rank among Human Males").

31. ALAN C. ELMS, *PERSONALITY IN POLITICS* (1976) (Describing the distinct personality syndrome in the chapter on The Machiavellian Personality.).

specific ways to improve it. Hopefully, a lobbyist will outline his or her own "to do" list that will enhance his or her effectiveness through the answers to the self-survey.

For those influencing executive agencies, an outline of the various persons forming a piece of the decision-making is helpful, along with a specific action list regarding each one. Some of the lobbying techniques spill over here.

For those before the courts and in administrative hearings, a specific list of client preparatory advice should be personalized to the case similar to the suggestions. Anticipate sanction attempts by a prepared approach such as the foregoing sampling of affirmative defenses.

Ultimately a lot depends on the personal traits of the lawyers involved. Recognition of the traits you have and will face-off against will help you prepare. Where manipulators are identified (some say they are abundant among successful people in law and politics) corresponding "hardball" toughness within ethical constraints is an option to consider. But your approach must match your traits. When you prepare the approach, you can remain ethical and be effective.

