

A CRITICAL MORAL DILEMMA WITHIN ANIMAL LAW IMPACT LITIGATION

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Abstract

Animals, as legal clients, deserve the same rights as people when being represented by attorneys. There is no Model Rule of Professional Conduct to guide attorneys on how to ethically represent their animal clients. This gap in the law demonstrates an uncertainty in how lawyers are meant to fulfill their moral and legal obligations for their animal clients. Using the Nonhuman Rights Project’s representation of two elephant clients, Beulah and Karen, as a test, this Article proposes a Model Rule to fill the moral gap. If this proposed rule was incorporated into the Model Rules, Beulah and Karen’s attorneys may have ethically been required to use a different litigation strategy that may have been more successful, and could have changed Karen and Beulah’s lives.

I. Introduction

When the purpose of bringing a case is to create precedent that will positively impact animals, even if it costs the life of the individual animal client listed in the lawsuit, a moral dilemma arises for which attorneys have no legally binding authority. When the outcome of a

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case will affect large numbers of people—or animals—the suit may be considered impact litigation.² This Article offers an overview and evaluation of the moral dilemma animal law attorneys pursuing impact litigation face, proposes a Model Rule of Professional Conduct, and explores moral obligations through the Nonhuman Rights Project (NhRP) action featuring elephants Beulah and Karen. Both Beulah and Karen tragically died before the resolution of their case.³ NhRP’s action hinged on a writ of habeas corpus demanding Beulah and Karen’s fundamental right to liberty and recognition of their legal personhood, as well as a request for their release from the Commerford Zoo to an elephant sanctuary.⁴ The outcome of Beulah and Karen’s case could positively affect large numbers of animals in captivity, which is why the suit is impact litigation.

Since Beulah and Karen are elephants protected under the Endangered Species Act (ESA), the NhRP could have filed a complaint for injunctive relief against the Commerford Zoo alleging violations of the ESA.⁵ Instead, the NhRP pursued a habeas corpus claim that focused on securing legal personhood precedent, foregoing any claims under the ESA.⁶

Current ethics rules tell attorneys to “abide by a client’s decisions concerning the objectives of representation,” and to “consult with the client as to the means by which they are to be pursued.”⁷ Attorneys who work at animal law advocacy organizations, such as the NhRP,⁸ represent animals in a general sense by advocating for them through the law, as well as through litigation with the corresponding attorney-client relationship.⁹ Litigation counsel at animal organizations represent nonhuman clients, which poses unique ethical problems. There is no way to talk to or counsel an animal client, the current rules are not set up to deal with animal clients, and the purpose of bringing an animal lawsuit oftentimes is impact litigation, as opposed to solely providing individual relief for the animal client.

Absent a model rule of professional conduct that addresses the scope of representation and allocation of authority in representing nonhuman animals, animal lawyers are left to their own moral compasses—and the wishes of donors—to determine how best to represent and pursue a case. A moral dilemma arises when the purpose of bring-

² Jeffrey S. Gutman, *Impact, Law-Reform, and Test-Case Litigation*, CRAFTING AND PREPARING THE LAWSUIT, FEDERAL PRACTICE MANUAL FOR LEGAL AID ATTORNEYS 3 (Jeffrey S. Gutman ed., 2013).

³ *Clients, Beulah, Karen, Minnie (Elephants)*, NONHUMAN RTS. PROJECT, <https://perma.cc/AZ2C-RV97> (accessed Sept. 25, 2022).

⁴ *Id.*

⁵ ENVT’L CONS. ONLINE SYSTEM, *Listed Animals*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/XR6G-Z8YH> (accessed Sept. 25, 2022); 16 U.S.C. § 1540(g)(1)(a).

⁶ NONHUMAN RTS. PROJECT, *supra* note 3.

⁷ MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS’N 1980).

⁸ *Litigation: Challenging the Legal Thinghood of Autonomous Nonhuman Animals*, NONHUMAN RTS. PROJECT, <https://perma.cc/XFS8-JAA8> (accessed Oct. 17, 2022).

⁹ This Article will refer to these types of attorneys as “animal lawyers.”

ing a case is to create precedent that will positively impact many animals going forward, at the cost of the life of the animal client listed in the lawsuit. Is potentially securing good precedent that recognizes animal legal personhood worth an animal dying while their case is pending when a different claim may have saved their life?

This Article draws attention to a similar case that dealt with endangered captive animals, outlining the suit's victory under the ESA and underscoring how the ESA could have been successful in Beulah and Karen's case. Furthermore, this Article examines whether the decision to pursue the habeas corpus claim and forgo a claim under the ESA—which could have potentially saved Beulah and Karen before they died—was justified. Finally, this Article explores how attorneys can use the existing ABA Model Rules of Professional Conduct and suggests the formulation of a model rule governing the representation of animals. Ultimately, this Article argues that a professional conduct rule should guide animal advocates in cases where multiple claims might be raised to advance their client's interests.

II. Background

This section describes the existing law, facts, and history necessary to understand the moral dilemma of animal law impact litigation. The first subsection introduces NhRP's clients, Beulah and Karen; provides factual and legal background relating to their case; and offers a brief overview of NhRP's habeas corpus claim. The second subsection explains the relevant parts of the ESA and compares the case to *PETA v. Wildlife in Need and Wildlife in Deed (WIN)*.¹⁰ The third subsection provides a synopsis of a philosophical argument justifying NhRP's litigation strategy using a utilitarian framework. The final subsection summarizes the ABA Model Rules of Professional Conduct governing the representation of clients with diminished capacity and demonstrates the parallels to the representation of animal clients.

A. *Karen and Beulah's Case: The Habeas Corpus Route*

Karen and Beulah were elephants owned and exploited by the Commerford Zoo, a traveling zoo that also presented circuses and fairs.¹¹ Beulah was born in the wild in Myanmar in 1967, imported to the US sometime after 1969, and was purchased by the Commerford Zoo in 1973.¹² The Commerford Zoo frequently forced Beulah to perform, give rides to, and be power-washed in front of audience members.¹³ Beulah died from blood poisoning induced by an untreated

¹⁰ *PETA v. Wildlife in Need and Wildlife in Deed*, 476 F. Supp. 3d 765, 776 (S.D. Ind. 2020).

¹¹ NONHUMAN RTS. PROJECT, *supra* note 3.

¹² *Id.*

¹³ *Id.*

uterine infection on September 15, 2019.¹⁴ Following her death, NhRP released the following statement:

Under threat of a bull hook, the Commerford Zoo stole from Beulah her freedom and anything resembling a natural existence for an elephant. Prior to her appearance at the Big E, Beulah hadn't been seen for almost a year, only to be subjected to one final round of forced labor, her suffering apparent to anyone who truly cares about elephants and doesn't have a vested interest in exploiting them as the Commerford Zoo and Big E do. Beulah, as well as the two other Commerford elephants, Karen and Minnie, can be made to live this way because elephants are still considered "things" with no rights: a legal anachronism we are urging the Connecticut courts to remedy.¹⁵

The Commerford Zoo was aware of Beulah's fatal uterine infection when they forced her to travel and perform in her final fair.¹⁶ Photos of Beulah before her death show her alone suffering in a makeshift pen in a parking lot.¹⁷

Karen was born in the wild in 1981, then imported to the US in 1984.¹⁸ She was owned by an animal trainer before the Commerford Zoo bought her and was heavily used in the Zoo's circuses and fairs.¹⁹ Karen was forced to dance, bow, "high five," and give rides to audience members for food.²⁰ Following her tragic death at the young age of thirty-eight in March of 2019, NhRP released the following statement:

[NhRP] elephant client Karen died of kidney disease at 38 years old. Karen had been receiving what the USDA considers "appropriate care" at the time of her death. While much remains unknown about how long Karen had been sick, or if she was suffering from other ailments when she died, we know she died at a much earlier age than elephants typically do. We also know "appropriate care" is meaningless if you remain a prisoner subjected to forced labor.²¹

The Commerford Zoo had numerous United States Department of Agriculture (USDA) violations related to their elephant care and facilities.²² Yelp reviews described the elephants as "sedated," "sick," and "sad;" facilities as "filthy" and a "stockyard of despair;" and the experience as a whole as "an abomination."²³ Both Beulah and Karen's lives of suffering and tragic deaths were avoidable according to NhRP:

¹⁴ *Id.*; Courtney Fern, *How Elephants Beulah and Karen Died*, NONHUMAN RTS. BLOG (Feb. 19, 2020) <https://perma.cc/JCD9-B8VA> (accessed Sept. 25, 2020).

¹⁵ Nonhuman Rights, *Statement on the Death of our Elephant Client Beulah*, NONHUMAN RTS. BLOG (Sept. 18, 2019) <https://perma.cc/FY9A-ERQ3> (accessed Oct. 17, 2022).

¹⁶ Fern, *supra* note 14.

¹⁷ *Id.*

¹⁸ NONHUMAN RTS. PROJECT, *supra* note 3.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Fern, *supra* note 14.

²² NONHUMAN RTS. PROJECT, *supra* note 3.

²³ *Id.*

The Commerford Zoo chose to deny Beulah and Karen the opportunity to heal, thrive, and regain their dignity in a sanctuary, claiming it was for the elephants' own good while the USDA looked the other way. . . . It is in large part because of elephants' rightlessness that information about their well-being is so difficult to obtain and so often fails to bring about any positive change in the lives of imprisoned elephants.²⁴

NhRP maintains that the government's failure to protect Beulah and Karen from the Commerford Zoo—a known violator of animal welfare standards—illustrates the urgent need for courts to recognize fundamental legal rights for elephants.²⁵ Prior to the deaths of Beulah and Karen, NhRP filed a petition for a common law writ of habeas corpus in Connecticut Superior Court, Litchfield County on November 13, 2017.²⁶ This habeas petition demanded recognition of the legal personhood and fundamental right to bodily liberty for Beulah and Karen, as well as another of Commerford Zoo's elephants, Minnie.²⁷ NhRP petitioned the court to release Beulah, Karen, and Minnie to Performing Animal Welfare Society (PAWS) ARK 2000 natural habitat sanctuary.²⁸

A writ of habeas corpus is a “remedy available to effect discharge from any confinement contrary to the constitution or fundamental law.”²⁹ To successfully invoke jurisdiction of a habeas court, the “petitioner must allege an interest sufficient to give rise to habeas relief.”³⁰ Furthermore, the alleged interest must be guaranteed by either “statute, judicial decree, or regulation.”³¹ However, under the law, “only a ‘person’ may invoke a common law writ of habeas corpus and the inclusion of elephants as ‘persons’ for that purpose is for [the] [c]ourt to decide.”³² Therefore, in this case it was up to the Superior Court of Connecticut in the Judicial District of Litchfield at Torrington to determine whether an elephant was a ‘person’ for the purposes of invoking “this land’s laws that protect the liberty and equality interests of its persons.”³³

Unfortunately for Beulah, Karen, and Minnie, the court denied the petition for writ of habeas corpus.³⁴ The court found the petition

²⁴ Fern, *supra* note 14.

²⁵ Nonhuman Rights, *supra* note 15.

²⁶ NONHUMAN RTS. PROJECT, *supra* note 3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ Fuller v. Commissioner of Correction, 71 A.3d 689, 691 (Conn. App. Ct. 2013) (citing Baker v. Commissioner of Correction, 914 A.2d 1034, 1039 (Conn. 2007)), *cert. denied*, 80 A.3d 907 (Conn. 2013).

³⁰ *Id.* at 692 (citing 914 A.2d 1034, 1040 (Conn. 2007)).

³¹ *Id.*

³² Petition for Writ of Habeas Corpus at 8, *cert. denied*, Nonhuman Rts. Project, Inc. *ex rel* Beulah v. R.W. Commerford & Sons, Inc., 65 Conn. L. Rptr. 647 (Conn. Super. Ct. 2017) (Petition No. 101).

³³ *Id.* at 4, *aff'd sub nom.* Nonhuman Rts. Project, Inc. v. R.W. Commerford & Sons, Inc., 216 A.3d 839 (Conn. App. Ct. 2019).

³⁴ *Id.* at 1.

“wholly frivolous” and denied it for lack of subject matter jurisdiction.³⁵ Following the dismissal, a string of motions, appeals, new petitions, oral arguments, and more dismissals ensued.³⁶ Two years into the case, both Beulah and Karen died.³⁷ After three contentious years, the case concluded without recognition of elephants’ legal rights due to the Connecticut court’s unwillingness to engage.³⁸

B. *A Different Route: The Endangered Species Act*

NhRP’s goal is to secure good precedent that recognizes the legal personhood of at least some animals.³⁹ NhRP formulated a novel legal theory utilizing habeas corpus to reach that goal. As with most impact litigation, once a legal theory is developed, attorneys must wait to test that theory until cases with “good facts” arise. Beulah and Karen’s case is one of six cases that NhRP is litigating under their habeas corpus theory.⁴⁰

NhRP undoubtedly cares about their animal clients and wants to see them released to accredited sanctuaries, but NhRP also has an agenda: Establishing precedent that can be utilized to recognize legal personhood for at least some animals.⁴¹ That agenda is good for animals. However, to advance their agenda, NhRP solely focuses its suits on legal personhood theories, leaving out other potentially successful legal theories and/or claims.⁴² One such alternative claim is one that accuses the keepers of endangered wildlife to be in violation of the ESA for harming, harassing, and wounding animals in their possession.

The ESA declares:

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation; (2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction; (3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people; (4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to— (A) migratory bird treaties with Canada and Mexico; (B) the Migratory and Endangered Bird Treaty with Japan; (C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; (D) the International Convention for the Northwest Atlantic Fisheries; (E) the International Convention for the High Seas Fisheries of the North Pacific Ocean; (F) the Convention on International

³⁵ *Id.*

³⁶ NONHUMAN RTS. PROJECT, *supra* note 3.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Litigation*, *supra* note 8.

⁴⁰ *Id.*

⁴¹ *Our Story*, NONHUMAN RTS. PROJECT, <https://perma.cc/Y3YV-WGPD> (accessed Oct. 2, 2022).

⁴² *Id.*

Trade in Endangered Species of Wild Fauna and Flora; and (G) other international agreements; and (5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.⁴³

Congress enacted the ESA in 1973 to protect endangered and threatened species and ecosystems.⁴⁴ A majority of ESA provisions address federal agency actions such as licensing, permitting, and funding.⁴⁵ However, the ESA also prohibits private individuals from harming a listed species.⁴⁶ For example, any individual, including zoos and circuses, is impacted by the provisions in the ESA.⁴⁷ The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) must list species as endangered or threatened. When appropriate, both agencies must also designate critical habitats.⁴⁸ Further, the ESA prohibits agencies from taking actions that expose a listed species.⁴⁹

Under the ESA, FWS and NMFS must list a species as endangered if the species is in danger of extinction in all or a significant portion of its range.⁵⁰ A species must be listed as threatened if it is likely to become endangered in all or a significant portion of its range in the foreseeable future.⁵¹ Under either category, distinct population "segments" may be listed even if a species is abundant elsewhere.⁵² FWS and NMFS must make a listing decision solely on the basis of statutory biological criteria.⁵³ In other words, the agencies cannot consider economic, social, or political factors in deciding whether to list a species as endangered or threatened.⁵⁴ As of 2016, approximately 2,200 species are listed as threatened or endangered under the ESA.⁵⁵

The ESA also contains a citizen-suit provision, which permits private citizens to bring an injunctive action against any person in violation of the ESA or its regulations.⁵⁶ Among other things, Section Nine of the ESA makes it unlawful for any person "to . . . take" any endan-

⁴³ 16 U.S.C. § 1531(a) (1973).

⁴⁴ *See* 16 U.S.C. § 1531(b) (describing the purposes of the Endangered Species Act).

⁴⁵ PAMELA D. FRASCH ET AL., *ANIMAL LAW IN A NUTSHELL* 288 (3rd ed. 2021).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 16 U.S.C. § 1532(6).

⁵¹ 16 U.S.C. § 1532(20).

⁵² 16 U.S.C. § 1532(16).

⁵³ 16 U.S.C. § 1533(b)(1)(A).

⁵⁴ *Id.*

⁵⁵ FRASCH ET AL., *supra* note 45, at 282.

⁵⁶ 16 U.S.C. § 1540(g)(1)(A); *see also* *Graham v. San Antonio Zoological Soc'y*, 261 F. Supp. 3d 711, 736 (W.D. Tex. 2017) (explaining the purpose of ESA's citizen-suit provision).

gered species within the United States.⁵⁷ Section Nine also requires the government to prove general intent to commit such a take in violation of the ESA. However, ‘take’ and other terms in the ESA are broadly defined, making the determination about whether a person has committed such a take difficult.⁵⁸

“Take” under the ESA means “*harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.*”⁵⁹ Regulations promulgated by the FWS further define the terms “harm” and “harass.”⁶⁰ “Harm” is “an act which actually kills or injures wildlife.”⁶¹ “Harm” also includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁶² “Harass” is defined as “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.”⁶³

PETA v. WIN illuminates how the ESA can assist animals in similar situations to Beulah and Karen. In *PETA*, the non-profit zoo defendant and its operators declawed their big cats to make handling them easier, prematurely separated the big cats from their mothers, and subjected the big cats to stressful and unnatural hands-on public interactions.⁶⁴ *PETA* alleged that such acts harassed, harmed, or wounded the big cats under the ESA.⁶⁵ After noting that the defendants’ use of the big cat cubs in “Tiger Baby Playtimes” significantly disrupted normal behavioral patterns and thus constituted “harassment” under the ESA, the court granted *PETA*’s permanent injunction.⁶⁶ This precedent proves that citizens and animal lawyers can successfully seek injunctive relief against a zoo for ESA violations.

Nhrp could have succeeded using the ESA in Beulah and Karen’s case by showing a “taking” under the ESA similar to that in *PETA*. Like the defendants in *PETA*, the Commerford Zoo forced Beulah and Karen to participate in stressful, hands-on, public interactions that significantly disrupted normal elephant behavioral patterns.⁶⁷ Subsequently, like the *PETA* defendants’ conduct established a “take” under

⁵⁷ 16 U.S.C. § 1538(a)(1)(B); Graham, 261 F. Supp. 3d at 736; *People for the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of Western Maryland, Inc.*, No. 17-2148, 2018 WL 434229, at *3 (D. Md. Jan. 16, 2018).

⁵⁸ *Id.*

⁵⁹ 16 U.S.C. § 1532(19) (emphasis added).

⁶⁰ *PETA*, 476 F. Supp. at 776.

⁶¹ 50 C.F.R. § 17.3 (2022).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *PETA*, 476 F. Supp. 3d at 769–70.

⁶⁵ *Id.* at 769.

⁶⁶ *Id.* at 784–85.

⁶⁷ NONHUMAN RTS. PROJECT, *supra* note 3.

the ESA, the Commerford Zoo's conduct should constitute a "take" under the ESA as well.

The victory in *PETA* demonstrates the viability of bringing ESA claims to help endangered captive animals. If nothing else, NhRP could have raised multiple claims to advance Beulah and Karen's interests. The decision to pursue a habeas corpus claim and forego an ESA or other animal cruelty claim was surely a strategic one. Several questions remain: Had NhRP counseled Beulah and Karen, would the elephants have agreed to go with the risky, novel legal theory? Or would the elephants have preferred to secure a more certain outcome under the ESA? Does their opinion matter, and, if so, to what extent?

C. *The Philosophical Argument Justifying NhRP's Actions*

All NhRP's animal clients are endangered species.⁶⁸ Some of those animals, like Beulah and Karen, have died while NhRP was representing them.⁶⁹ Due to their status as endangered species, NhRP could have saved Beulah and Karen had they invoked other claims, like those available under the ESA. However, NhRP's mission to secure legal personhood for at least some animals focuses on establishing precedent in the law. Therefore, NhRP chose to pursue long-term goals instead of pursuing other claims and potentially saving Beulah's and Karen's lives. Does the long-term goal of securing precedent for legal personhood—that could positively affect masses of animals—outweigh the cost of foregoing short-term goals that focus on the individual?

Utilitarian philosophers would answer the above question in the affirmative. Under utilitarianism, the guiding principle of conduct should be the amount of happiness produced for the majority.⁷⁰ According to philosopher Peter Singer, the "classical utilitarian regards an action as right if it produces as much or more of an increase in the happiness of all affected by it than any alternative action, and wrong if it does not."⁷¹ Thus, an action is good if it is for the benefit of a majority. NhRP encountered a moral dilemma when prioritizing the long-term precedential goal over a short-term individualistic one. A utilitarian framework could resolve this tension, providing a philosophical defense for the undesirable outcome in Karen and Beulah's case. Simply put, the cost of Beulah and Karen's lives were worth the benefit of pursuing precedent because the benefit of such precedent would affect a large number of animals.

When NhRP secures precedent that establishes legal personhood for animals, animal lawyers across the country can bring suits citing

⁶⁸ See *Frequently Asked Questions*, NONHUMAN RTS. PROJECT, <https://perma.cc/5LTB-VN82> (accessed Sept. 23, 2022) (stating that NhRP's current clients are chimpanzees and elephants).

⁶⁹ NONHUMAN RTS. PROJECT, *supra* note 3.

⁷⁰ Ruut Veenhoven, *Greater Happiness for a Great Number*, 11 HAPPINESS STUD. 605 (May 30, 2010), <https://perma.cc/8DCZ-72VG> (accessed Sept. 26, 2022).

⁷¹ PETER SINGER, PRACTICAL ETHICS 3 (2nd ed. 1993).

that precedent as support. Subsequently, animal lawyers would finally have a solid avenue for getting courts to recognize animals' right to bodily liberty and integrity. With this new avenue available to animal lawyers, more claims will be brought, more suits filed, more victories won, and more animals released to sanctuaries. To secure these future victories, organizations like NhRP need to bring test cases. Meaning that individual interests need to be sacrificed for the greater good.

The utilitarianism purpose of morality is to make life better by increasing the number of good things in the world and decreasing the number of bad things.⁷² Good precedent would allow lawyers and activists to move animals out of laboratories and zoos into sanctuaries, thereby maximizing happiness and minimizing suffering. Sacrificing Beulah and Karen's individual interests meant NhRP could advocate for the interests of their entire species. The benefit outweighed the costs under a utilitarian framework, which justifies NhRP choosing to pursue long-term goals over short-term individual interests.

NhRP made the decision on how to best represent clients Beulah and Karen. NhRP made that decision *for* Beulah and Karen. If Beulah and Karen had been counseled, would they choose to pursue their own personal short-term goal, or agree on the long-term precedent goal? Nowhere else in the legal world do we see lawyers making the final call on such important strategic legal decisions. This begs the question: should there be a model rule for professional conduct that governs these types of decisions? Current ethics rules do not deal with such situations involving animal clients, but they do address representation of clients with diminished capacity.⁷³ The following section will outline the ABA model rule on diminished capacity, which can be used as a resource in drafting a new model rule for representation of animal clients.

D. ABA Model Rule on Diminished Capacity

A basic understanding of the model rules for representation and for diminished capacity will help develop a model rule for animal lawyers. Concerning basic representation, under ABA Model Rules of Professional Conduct Rule 1.2, a lawyer is required to "abide by a client's decisions concerning the objectives of representation and," as required by Rule 1.4, "shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."⁷⁴ Thus, a lawyer must not make decisions regarding the purpose of representation, and the lawyer must do as the client wishes regarding how to pursue the goals of representation. Had these rules applied to animals, NhRP would be in direct violation.

⁷² Stephen Nathanson, *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA PHIL., <https://perma.cc/F837-B4E9> (accessed Sept. 23, 2022).

⁷³ MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 1980).

⁷⁴ *Id.* at r. 1.2, 1.4.

The rules further state that “[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”⁷⁵ This suggests that a lawyer may act without express authorization as long as the lawyers and clients have previously discussed that action. Additionally, under the model rules, “a lawyer shall abide by a client’s decision whether to settle a matter” in civil cases.⁷⁶ In criminal cases, “the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.”⁷⁷ This demonstrates that clients—not lawyers—decide whether and how to end a case.

Some clients lack the capacity needed to make executive decisions about their cases, but the rules still provide a guide for how to represent them.⁷⁸ ABA Model Rule 1.14 deals with clients with diminished capacity, providing that:

The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters. When the client is a minor or suffers from a diminished mental capacity, however, maintaining that ordinary client-lawyer relationship may not be possible in all respects. . . . Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. For example, *children as young as five or six years of age . . . are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. . . .* [S]ome persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions. The lawyer has a duty, so far as reasonably possible, to maintain a normal lawyer-client relationship with the client.⁷⁹

Here, animals can be compared to young children—they may lack the capacity to make certain decisions, but they hold valuable opinions regarding who should have custody of them. While we cannot glean that information from animals through oral conversation, a lawyer or judge could determine what the animal would prefer by honestly weighing the realities of daily life in captivity. Would an animal prefer to live at a road-side zoo where they are forced to perform unnatural behaviors, or at a sanctuary where they can be left alone to decide what they do each day? The answer is not hard to find—the animal would of course prefer to live at a sanctuary.

Next, the model rules address what to do when a client with diminished capacity faces a risk of substantial physical, financial, or other harm.⁸⁰ This is relevant to animal lawyers because most, if not

⁷⁵ *Id.* at r. 1.2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at r. 1.14.

⁷⁹ *Id.* (emphasis added).

⁸⁰ MODEL RULES OF PRO. CONDUCT r. 1.14(b) (Am. Bar Ass’n 1980).

all, of animal lawyers' clients face substantial harm. The model rules state that when a client with diminished capacity faces substantial risk of harm, the lawyer may take reasonable actions to protect the client.⁸¹ These actions include "consulting with individuals or entities that have the ability to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."⁸² Animal lawyers should be authorized under the model rules to take similar protective actions for their animal clients.

The section of the ABA model rule on diminished capacity is especially helpful for animal lawyers who are unable to form lawyer-client relationships due to the animals' inability to give informed consent, or if a court finds that an animal does not have standing to sue. Under the model rules, when "a person with seriously diminished capacity is threatened with imminent and irreparable harm, a lawyer may take legal action on behalf of such a person even though the person is unable to establish a lawyer-client relationship or to make or express considered judgments about the matter."⁸³ In these emergency circumstances, the model rules provide that the lawyer "has the same duties . . . as the lawyer would with respect to a client."⁸⁴ The ABA model rules on diminished capacity offer a baseline for representation of animal clients. The following section will take a deeper dive into what a model rule for animals should look like.

III. Model Rule for Representing Animals

This section will focus entirely on a proposed model rule for representing animals. Basing the proposed rule on current ABA rules governing representation of clients with diminished capacity, this section will demonstrate what an effective rule would look like and explain how the rule will help guide attorneys faced with moral dilemmas inherent in animal law impact litigation.

Animal lawyers need a model rule of professional conduct for the representation of voiceless animal clients. Such a rule would provide a guideline of representation and help navigate the moral dilemmas of animal law impact litigation. While animal lawyers certainly care about the wellbeing and legal status of animals, having a model rule would ensure that lawyers paused and considered the wishes of their animal clients before proceeding with a preconceived agenda. Animal lawyers have been accused of using animals to push forward their own agendas of bringing cases for the sole purpose of media publicity.⁸⁵ Having a model rule in place would not only offer guidance for navigat-

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at cmt. 9.

⁸⁴ *Id.*

⁸⁵ Jordan Weissmann, *This New Lawsuit From PETA Isn't Just Absurd, It's Cruel*, SLATE (Sept. 25, 2015, 5:34 PM), <https://perma.cc/QT9U-AZJ2> (accessed Sept. 19, 2022).

ing these moral dilemmas, but it would also justify why a case was brought.

The Author proposes the addition of the following model rule:

*ABA Model Rule 1.19.*⁸⁶ *Animal Clients:*

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, because the client is an animal, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the animal client has diminished capacity, is at risk of substantial physical, mental, or other harm unless action is taken, and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and in appropriate cases, seek the appointment of a guardian ad litem, conservator, or guardian.

(c) When representing an animal client, the lawyer may take into consideration the long-term interests of not only the individual client, but the species as a whole.

(d) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

A model rule for animal lawyers would provide clarity for the lawyer's role in the animal client-lawyer relationship. The normal client-lawyer relationship assumes that the client, when properly advised and assisted, is capable of making decisions about important matters.⁸⁷ However, when the client is an animal who lacks the ability to speak or communicate, maintaining the normal client-lawyer relationship is not always tenable.

For example, an elephant lacks the authority to make legally binding decisions.⁸⁸ Still, an elephant often has the ability to form preferences about matters affecting her own well-being.⁸⁹ Just as "children as young as five or six years of age . . . are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody," elephants' opinions, which can be assumed by comparing the conditions in which they will live, should be taken into consideration when determining their fate in court.⁹⁰

⁸⁶ The Author uses language from Model Rule 1.14 in framing proposed Rule 1.19. MODEL RULES OF PRO. CONDUCT r. 1.14 (Am. Bar Ass'n 1983).

⁸⁷ MODEL RULES OF PRO. CONDUCT r. 1.14 cmt. 1 (AM. BAR ASS'N 1980).

⁸⁸ *In re Nonhuman Rts. Project, Inc. v. Breheny*, No. 52, 2022 WL 2122141, at *4 (N.Y. June 14, 2022).

⁸⁹ See Rachel Fobar, *Nothing to do, Nowhere to go: What Happens When Elephants Live Alone*, NAT'L GEOGRAPHIC (Jan. 31, 2022), <https://perma.cc/42XN-DCB7> (accessed Oct. 2, 2022) (explaining the effect on elephants' brains when living alone in zoos and their preference for living in herds).

⁹⁰ MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 1980).

If a lawyer reasonably believes that an animal client is at risk of substantial physical, mental, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then the animal lawyer should be allowed to take protective measures deemed necessary. Such measures include consulting with experts; using a reconsideration period to permit clarification or improvement of circumstances; and consulting with animal advocacy groups, professional services, animal protective agencies, or other individuals or entities that are able to protect the animal client. In taking any protective action, the lawyer should rely on factors such as the wishes and values of the animal client to the extent known, the animal's best interests, and the animal's social connections.

The animal lawyer should always consider and balance the animal's ability to appreciate the consequences of a decision, the substantive fairness of a decision, and the consistency of a decision with the known, long-term best interests of the animal when deciding on behalf of the animal. If the lawyer needs guidance determining the animal's ability to appreciate the consequences of a decision, the fairness of a decision, or what the known long-term best interests of the animal are, they should seek guidance from an appropriate expert.

In an emergency where the health or safety of an animal is threatened with imminent and irreparable harm, the animal lawyer should be permitted to take legal action on behalf of the animal even though they are unable to establish a client-lawyer relationship or to make or express considered judgments about the matter. The animal lawyer should only act if they reasonably believe that the animal has no other representative available. In emergency situations, the lawyer should only take legal action on behalf of the animal to the extent reasonably necessary to avoid imminent and irreparable harm. A lawyer who commences representation of an animal in such emergency situations has the same duties as the lawyer would with respect to a client. A lawyer who acts on behalf of an animal in an emergency should take steps to solidify the relationship or implement other protective solutions as soon as possible.

This model rule can easily be applied to animal impact litigation. Applying these guidelines will provide animal lawyers with a framework for ethical and professional representation of animals. When multiple claims are available to an animal, the lawyer should consult these rules to determine which avenue to pursue. While it may be in the best interest of a species to avoid individual short-term goals, the individual being represented should still be treated with dignity and respect, weighing the costs and benefits of any particular decision on the individual as well as the species.

IV. Conclusion

Lawyers who represent humans have clear-cut and basic instructions on how to represent their clients. The Model Rules of Professional Conduct tell those attorneys to “abide by a client’s decisions concerning the objectives of representation,” and to “consult with the client as to the means by which they are to be pursued.”⁹¹ There are no comparable instructions for attorneys who represent animals. The current rules are not set up to deal with animal clients. The absence of a rule regulating the representation of animals creates uncertainty and leaves animal lawyers to self-regulate in these situations. A model rule dealing with the representation of animals should be added to guide animal lawyers.

When the purpose of bringing a case is to create precedent that will positively impact animals, even if it costs the life of the individual animal client listed in the lawsuit, a moral dilemma arises for which attorneys have no legally binding authority. The benefit of pursuing and potentially securing good precedent that recognizes legal personhood of at least some animals *is* worth the cost of an individual animal dying while her case is pending, even given the possibility that a different claim could have been used to save her life. The potential benefit of good precedent is worth the sacrifice of the individual because the outcome of good precedent could affect large numbers of animals.

The case of Beulah and Karen, two elephants represented by the NhRP, who both died while their case was pending, illustrates the moral dilemma of animal impact litigation. The NhRP chose to pursue habeas corpus to demand recognition of Beulah and Karen’s legal personhood and fundamental right to bodily liberty and their release to a sanctuary, instead of pursuing a claim under the ESA.⁹² *PETA v. WIN* demonstrated how the ESA was successful in that case and how it could also be successful in Beulah and Karen’s case. However, the outcome of Beulah and Karen’s case could positively affect large numbers of animals in captivity, and the legal theory the NhRP put forward could establish novel precedent for animal lawyers.

The NhRP could have filed a complaint for injunctive relief against the Commerford Zoo alleging violations of the ESA and requested a permanent injunction because Beulah and Karen were elephants protected under the ESA. Instead, the NhRP chose to pursue the habeas corpus claim focused on securing legal personhood precedent, foregoing any claims under the ESA. The *PETA* victory underscores how the ESA could have been successful in Beulah and Karen’s case. By examining the decision to pursue the habeas corpus claim and forgo a claim under the ESA—which could have potentially saved Beulah and Karen before they died—that decision is still justifiable under

⁹¹ MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS’N 1980).

⁹² NONHUMAN RTS. PROJECT, *supra* note 3.

a utilitarian framework. However, there should be an ethical framework for attorneys to ensure that the proper factors are considered when deciding a litigation strategy. The ABA Model Rules dealing with diminished capacity assist a formulated model rule governing the representation of animals, drawing on the limitations of the client-lawyer relationship in clients with diminished capacity. In the end, the best solution to the moral dilemma of animal law impact litigation is a professional conduct rule that can guide animal lawyers in cases where multiple claims might be raised to advance their client's interestss.