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ETHICAL CONSIDERATIONS FOR THE ENVIRONMENTAL LAWYER

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A. Introduction

The practice of environmental law requires lawyers to understand and apply complex legal, technical, political and moral concepts on a daily basis. Although the ethical problems faced by environmental lawyers are not unique, the issues posed are often exacerbated by the nature of the practice, with its technical and scientific aspects, its political overtones, and its significant implications for public health and safety.[2] Many of these ethical issues arise from the conflicting dual roles of environmental lawyers: the "zealous advocate" of their clients and the "protectors of the public interest."[3]

To date, the American Bar Association's ("ABA") Model Rules of Professional Conduct[4] ("Model Rules") and the various states codes and rules of professional conduct provide the most consistent guidance on how to resolve these conflicting demands. Unfortunately, even these guidelines contain conflicting provisions and their implementation and enforcement varies widely from state to state. Presently, the Model Rules have been adopted, in some form, by 42 states and 8 states have established their own regimes governing professional conduct.[5]

In February 2002, the ABA Commission on Evaluation of the Rules of Professional Conduct, also known as the "Ethics 2000 Commission"

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[2] See Marla B. Rubin, ed., Ethics and Environmental Law: Case Studies, at 1 (NYSBA) see also, David Sive, Ethical Problems in Environmental Litigation, 2 The Practical Real Estate Lawyer 27-28 (1986).
[3] See William Futrell, Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility, 27 Loy. L.A. L.Rev. 825, 837-38 (1994).
[4] Model Rules of Professional Conduct (1995).
[5] ABA Ethics 2000 Commission, November 2000 Report.

issued various comprehensive amendments to the Model Rules.[6] Shortly after this revision, in August 2003, the ABA again amended the Model Rules 1.6 and 1.13, in response to the Sarbanes-Oxley Act.

Although the spectrum of ethical problems in environmental law is quite large, this Article focuses on the following: (1) conflicts of interest arising from multiple party representations, such as Superfund matters; (2) conflicts in arguing two sides of the same issue; (3) ethical considerations in compliance matters (4) confidentiality obligations in transactions; and (5) ethical considerations in hiring experts for trial. A hypothetical is used to illustrate each problem and the Model Rules are used to analyze a potential resolution. This article concludes with a brief discussion of multijurisdictional practice issues and the impact of the Sarbanes-Oxley Act on environmental disclosures.

This Article is intended as a guideline to resolving some of the ethical problems that may arise in the practice of environmental law. It does not address all possible ethical problems. Lawyers must evaluate each specific fact situation and balance all of the pertinent factors.[7] Lawyers must also use their best judgment, as well as the applicable rules and policies, to solve the ethical dilemmas posed by each fact situation.

B. Multiple Party Representation

Hypothetical: You have been asked to represent Company A, a manufacturing concern, in a multi-party Superfund matter where Company A's interest may be adverse to Company B. A conflicts check reveals that your firm has never represented Company B, but represented Company C, which is the parent of Company B, in a merger transaction. The language of Company C's retainer agreement in the merger transaction states that your firm was hired to represent Company C and all associated companies.

Ethical Issues:

(1) Is there an existing conflict? Do you need to obtain consent?

[6] Presently, only 13 states have adopted amendments pursuant to the ABA revisions. Many other states are currently reviewing their rules.

(2) If both parties, Company A and Company B, request your representation in the Superfund matter, may you take the concurrent representation?

Model Rule 1.7: Conflict of Interest: Current Clients

(a) …a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
(1) the representation of one client will directly adverse to another client; or
(2) there is a significant risk that the representation…will be materially limited by the lawyer's responsibilities to the other client …
(b) …a lawyer may represent a client if :
(1) a lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client...[8]

Analysis:

In the first hypothetical, although your firm does not directly represent Company B, the language in the retainer agreement gives Company C the reasonable expectation that your firm also represents any of its subsidiaries. Therefore, you should obtain Company C's consent before undertaking the representation of Company A.

In Formal Opinion 95-390- Conflicts of Interest in the Corporate Family Context,, the ABA concludes that "the Model Rules of Professional Conduct do not prohibit a lawyer from representing a party adverse to a particular corporation merely because the lawyer (or another lawyer in the same firm) represents, in an unrelated matter, another corporation that owns the potentially adverse corporation, or is owned by it, or is, together with the adverse corporation, owned by a third entity."[9] However, the ABA acknowledges that the circumstances of a particular representation may give rise to a conflict.

[8] Model Rules of Professional Conduct Rule 1.7 (1995), as revised in February 2002.
[9] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 390 (1995).

For example, where a corporate client has a reasonable expectation, based on the retainer agreement or prior discussions with the lawyer, that the corporation's affiliates will be treated as clients and the lawyer is aware of this expectation, undertaking a representation adverse to the corporation's affiliate would give rise to a conflict. As a matter of precaution, the ABA suggests that "as a general matter, in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate."[10]

As to the second part of the hypothetical, multiple representations in Superfund matters are generally permissible.[11] In fact, there has been considerable discussion among legal commentators about the ethical issues arising from such representations.[12] The general opinion among these commentators is that multiple representations are permissible, as long as the lawyer examines each situation for compliance with Model Rule 1.7.

Model Rule 1.7 prohibits a lawyer from undertaking the representation of one client where direct adversity exists between two clients unless the lawyer reasonably believes there will be no adverse affect on the representation and each client provides informed consent.[13] The standard used to determine whether it is reasonable to undertake a specific representation is whether a there is a significant risk that a lawyer's ability will be materially limited as a result of the lawyer's other responsibilities or interests."[14] If this standard is not met, even client consent cannot waive the conflict.

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[10] Id.

[11] See, Michigan State Bar Comm. on Professional and Judicial Ethics, Formal Op. R-16 (1993) (concluding that "[p]ermitting some multiple representation of PRPs whose interests are only potentially adverse, or by limiting the scope of the representation to common goals and interests, permits clients access to and representation by the firm of their choosing...." and that multiple representation, under these circumstances, is "an appropriate balance between the need to maintain high ethical standards in the profession, while being able to render competent legal representation at a reasonable cost.")

[12] See, Andrew Kenefick, et al., Assessing Conflicts of Interest at Multi-Party Superfund Sites: From the First Involvement to Litigation, 4 Envtl. Law. 723 (1998); Sara Beth Watson, Ethical Issues in Environmental Law Practice, ALI-ABA Course of Study Materials: Environmental Law (February 2000); Sara Beth Watson, Conflicts of Interest in Superfund Representation, ALI-ABA Course of Study Materials: Environmental Law (February 1999); Marla B. Rubin, The Problems Get Tougher, The Recorder, Sept. 1992, at 16.

[13] Model Rules of Professional Conduct Rule 1.7 cmt 6 (1985), as revised in February 2002.

[14] Model Rules of Professional Conduct Rule 1.7 cmt. 8 (1995), as revised in February 2002.

As the attorney, you must examine the circumstances to determine if direct adversity exists. A group of similar generator PRPs may have sufficient common interest in cooperating with regulatory agencies to permit a multiple representation. However, if two parties cannot agree on how liability should be apportioned between them, it would not be permissible to have a multiple representation because their positions are "fundamentally antagonistic."[15]

Model Rule 1.7 also prohibits a representation if that representation would be materially limited by the lawyer's responsibilities to other clients or by the lawyer's personal interest unless there is no adverse effect on the client's representation or the client consents. Again, you must make a case-specific inquiry to assess the effects of the multiple representation. As mentioned, the standard is whether a disinterested lawyer would undertake the representation.

You must also take measures to reassess the representations and the potential for conflicts throughout the multiple representations. Although most lawyers check for conflicts at the onset of a representation, conflicts can arise during the course of the multiple representations. As a result, if a conflict develops, the lawyer may be required to withdraw from one or both of the representations in order to comply with Model Rule 1.7. Because Superfund matters can last many years, and positions may change with the introduction of new information, reassessing conflicts throughout the representation is especially important in these matters.

C. Arguing Two Sides of the Same Legal Issue

Hypothetical: The position on substantive legal issues you will be arguing in Company A's defense is directly contrary to the position you are advocating on behalf of another client in a different and unrelated pending matter.

Ethical Issues:

(1) Is arguing two sides of the same legal issue a conflict of interest?

[15] Id., at cmt. 28.

Analysis:

The Model Rules do not expressly prohibit the representation of clients having opposing positions on legal issues occurring in different matters. Comment 24 to Model Rule 1.7 states that: "A conflict of interest exists however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case…"[16]

The determination is, of course, in every case a fact intensive one. What can be stated as a general principle is that in a comparatively new and evolving field of law, there is a greater likelihood than that which exists in the older bodies of law that a court determination is likely to prejudice a contrary determination even though factual distinctions can be drawn.

Thus, like other evaluations of conflicts of interest, you should make case-specific inquiries into each representation to assess whether your representation of one client will impair or limit the representation of the other. If so, ethical considerations may require you to withdraw from one representation or not accept the representation of a client, in the absence of full disclosure.

D. Compliance Issues

Hypothetical: Company A has recently redesigned its manufacturing processes and management has informed you that the modifications are so minor that may not be noticeable, even to an informed observer such as a regulatory agency. The design changes have resulted in the generation of a new waste product, Waste X. Management tells you that Waste X is almost identical to the waste product generated by Company A's old processes and that the new processes should not make Waste X any more harmful than the old waste product.

The old waste product was not listed as a hazardous waste under EPA's regulations promulgated pursuant to RCRA Subtitle C and did not display any hazardous characteristics when subjected to extensive testing by Company A. Thus, the old waste was not regulated under RCRA Subtitle C.

[16] Model Rules of Professional Conduct Rule 1.7 cmt 24 (2002).

The new waste product is not listed as hazardous under the EPA regulations. When management asks you if it is required to treat Waste X differently than the old waste, you reply that it is Company A's responsibility to determine whether the waste is subject to RCRA Subtitle C. One method of making that determination is to allow Company A to rely on its "knowledge of the hazard characteristic of the waste in light of the materials or the processes used."[17] Company A management then asks if it can rely on its knowledge of the old waste product to conclude whether Waste X is hazardous.

<u>Ethical Issues</u>:

(1) What is required of the lawyer in this situation?

<u>Model Rule 2.1</u>: Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer...to...considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.[18]

<u>Model Rule 1.2</u>: Scope of Representation and Allocation of Authority Between Client and Lawyer

…(d) A lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct...and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[19]

<u>Analysis</u>:

This hypothetical dramatically demonstrates the conflicting demands upon the lawyer. On the one hand, a lawyer playing the role of "zealous advocate" may advise Company A that (provided the lawyer believes Company A can make a plausible claim) if its knowledge regarding the old waste would support use of the knowledge test, it may not want to pursue

[17] 40 C.F.R. 262.11(c) (2000).
[18] Model Rules of Professional Conduct Rule 2.1 (1995), as revised in February 2002.
[19] Model Rules of Professional Conduct Rule 1.2 (1995), as revised in February 2002.

further testing because the results may subject Waste X to stricter regulation.[20] Model Rule 1.2 suggests that a lawyer may discuss the possible legal consequences if Waste X was later determined to be hazardous. Although a lawyer may never advise a client to undertake an illegal action and may never assist a client in taking the illegal action, competent representation encompasses "an honest opinion about the actual consequences that appear likely to result from the client's contemplated conduct."[21] This assessment should include the lawyer's informed opinion of whether a particular law will be enforced or not. Therefore, the more efficient and economical solution for Company A may be to rely on the knowledge test, without further testing, and legal advice recommending this solution may not constitute a breach of the Model Rules.

On the other hand, a lawyer playing the role of "protector of the public interest" may suggest to Company A that a good faith approach to the problem is conducting the testing required to determine whether Waste X is truly hazardous, instead of relying on the knowledge test. This advice would not only protect the public interest, but would support the objectives of environmental law, particularly RCRA policies. Thus, the best resolution to this problem is uncertain, because each alternative may comply with the Model Rules.

E. Confidentiality Obligations in Transactions

Hypothetical: Under Company A management direction, Company A employees have been dumping Waste X in a surface impoundment located on Company A property. After continuous dumping for two years, management decides to sell this parcel of the property. To disguise the dumping, it covers the impoundment with clean soil and sod before offering it for sale. During sale negotiations, a prospective buyer specifically asks Company A representatives if any hazardous wastes have ever been disposed of on the parcel. Company A representatives state that no such disposal has occurred.

Ethical Issues:

[20] See Douglas R. Williams, Loyalty, Independence and Social Responsibility in the Practice of Environmental Law, 44 St. Louis L.J. 1061, 1069 (2000).
[21] Model Rules of Professional Conduct Rule 1.2, cmt 9 (1995), as revised in February 2002.

(1) As the lawyer representing the seller in the transaction, are you obligated, or even permitted, to disclose the continuous dumping of Waste X on the parcel, assuming you don't know if Waste X is hazardous?

(2) You are asked by the buyer's lenders to issue an opinion letter based on an environmental audit of the property that was supervised and signed by you. What are your obligations in regards to rendering the opinion?

(3) Suppose you decide that due diligence requires that you have an independent environmental consultant analyze the material, but you do not inform Company A of your decision. The analysis demonstrates that Waste X is indeed hazardous but does not pose any risk of imminent death or substantial bodily harm to persons exposed to it. As a result, you are concerned about the validity of the property's environmental audit and your opinion letter, which were previously given to the buyer. When you confront Company A management, it insists on remaining "uninformed" and wants to continue with the transaction without disclosure. What are your obligations in this case?

(4) The analysis of Waste X results in particularly dire results: direct exposure to Waste X will cause death within hours. What are your obligations in this case?

(5) You hired an environmental engineer to assist you with the environmental audit. You show the results of the analysis to the engineer. What are the engineer's obligations in this case?

The Model Rules describe the duty of confidentiality in regards to protecting client information learned during the course of the representation and protecting third-parties and the public interest. The revise model rules relating to disclosure state:

Model Rule 1.6: Confidentiality of Information

(a) A Lawyer shall not reveal information relating to representation of a client unless the client gives informed consent....

(b) A lawyer may reveal information relating to the representation to the extent the lawyer reasonably believes necessary:

 (1) to prevent reasonably certain death or substantial bodily harm...

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another….[22]

Model Rule 1.16: Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law…

(b) …a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent…[23]

Model Rule 2.3 : Evaluation For Use By Third Persons

(c) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client;

(d) When the lawyer knows or reasonably should know that the evaluation is likely to affect the clients interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.[24]

[22] Model Rules of Professional Conduct Rule 1.6 (1995), as revised in August 2002.
[23] Model Rules of Professional Conduct Rule 1.16(1995), as revised in February 2002.
[24] Model Rules of Professional Conduct Rule 2.3 (1995), as revised in February 2002.

Model Rule 4.1: Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[25]

Rule II(1)of the National Society of Professional Engineers Code of Ethics for Engineers:

Engineers shall hold paramount the safety, health and welfare of the public.

(e) If engineers' judgment is overruled under circumstances that endanger life or property, they shall notify their employer or client and such other authority as may be appropriate.

(f) Engineer shall not reveal facts, data or information without prior consent of the client or employer except as authorized or required by this Code.[26]

Analysis:

This hypothetical highlights the often incongruous duties imposed upon the lawyer by the Model Rules of Professional Conduct. Model Rule 1.6 places an extreme limitation on a lawyer's ability to disclose information relating to the representation of a client "regardless of the social consequences of non disclosure."[27] However, Model Rule 4.1 creates a duty of the lawyer to shield third parties, or the "public interest", from fraud or criminal acts by disclosing the very information protected by Model Rule 1.6. How does a lawyer reconcile these two rules?[28]

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[25] Model Rules of Professional Conduct Rule 4.1 (1995), as revised in February 2002.

[26] National Society of Professional Engineers Code of Ethics for Engineers Rule II(1) (2000).

[27] Williams, supra note 14, at 1073.

[28] See Responsibilities of Lawyers and Engineers to Report Environmental Hazards and Maintain Client Confidences: Duties in Conflict, D. Richman & D. Bauer Env. Report. 4/17/91 p. 1458.

In the first part of the hypothetical, you don't know whether Waste X is hazardous and whether the dumping will cause imminent death or substantial bodily harm. Therefore, you don't know whether Company A's statement is materially misleading, even though Company A did not disclose facts that the buyer has expressed an interest in knowing. Thus, Model Rule 1.6 clearly prohibits disclosure in this situation.

As to the second part of the hypothetical, every lawyer issuing opinion letters should be familiar with the comments following Rule 2.3 which are intended to aid lawyers in adhering to Rule.

Comment 4 to Rule 2.3 provides:

"When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule. However, since such an evaluation involves a departure from the normal client lawyer relationship, careful analysis of the situation is required. The lawyer must be satisfied as a matter of professional judgment that making the evaluation is compatible with other functions undertaken on behalf of the client…"[29]

The comment cross-references Rule 1.6 on confidentiality. The initial inquiry for the lawyer undertaking to render an opinion letter is to determine whether the giving of the required opinion would be compatible with his relationship with this particular client as required by Rule 2.3(a).[30] In this case, the environmental audit and the opinion letter are necessary to facilitate the sale of the property, and thus compatible with the representation of Company A.

Similarly, the lawyer undertaking the evaluation should consider all material aspects of the lawyer's relationship with this particular client which might impair the independence of his judgment. If in the lawyer's judgment he is unable to render an objective opinion, the lawyer should decline to supervise and sign the evaluation.

Any confidential matters to be disclosed in the opinion should be expressly pointed out to the client while obtaining the client's consent. It

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[29] Model Rules of Professional Conduct Rule 2.3, cmt. 4 (1995), as revised in February 2002.
[30] Model Rules of Professional Conduct Rule 2.3 (a) (1995), as revised in February 2002.

would appear that the Model Rules contemplate giving the client the opportunity to impose limitations on the lawyer's authority, if the client so desires. Moreover, the proposed opinion letter and environmental audit must be reviewed in light of the requirements of Rule 4.1 of the Model Rules, the first requirement of which is that the opinion and evaluation cannot contain any false statement of material fact or law.

Notwithstanding the issues raised upon the determination that Waste X is hazardous, your options are severely restricted by Model Rule 1.6. Unlike the attorney-client privilege, information protected by Model Rule 1.6 is not limited to client communications or information learned in the course of representation. Information "relating to the representation," such as the determination that Waste X is hazardous, is protected by Model Rule 1.6. Comment 3 to Model Rule 1.6 supports this conclusion: "....the confidentiality rule applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."[31] Thus, disclosure that Waste X is hazardous in the hypothetical transaction, despite your confirmed knowledge and the buyer's expressed interest, would be improper according to Model Rule 1.6.

In fact, the ABA has issued a formal opinion that specifically concludes that a lawyer may not reveal a client's fraud, even if that fraud is furthered by the client's presentation of an attorney opinion letter that the attorney and the client later learn to be false. This opinion states that "any argument that Rule 4.1 (a) ....applies in this situation fails in the face of the fact that the lawyer did not know at the time she [rendered the opinion] that [it was] false."[32] Accordingly, Rule 1.6 trumps Rule 4.1 in this situation.

However, if the completion of the sale on the presented terms distresses you, an alternative exists that allows for "disclosure" of the nature of Waste X. This is the withdrawal option under Model Rule 1.16 (a).[33] This rule requires an attorney to withdraw from the representation if it "will result in violation of the rules of professional conduct or other law." [34]

The ABA also concluded that, in regards to circumstances similar to the hypothetical, a lawyer is required to withdraw because a continued representation would violate Model Rule 1.2(d). Relying on Comment 16 to

[31] Model Rules of Professional Conduct Rule 1.6 cmt. 3 (1995), as revised in August 2003.
[32] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 366 (1992).
[33] Model Rules of Professional Conduct Rule 1.16 (a) (1995), as revised in February 2002.
[34] Model Rules of Professional Conduct Rule 1.16(a) (1995), as revised in February 2002.

Model Rule 1.6, the opinion further states that a lawyer "may disaffirm documents prepared in the course of the representation that are being, or will be, used in furtherance of the fraud, even though such a "noisy' withdrawal may have the collateral effect of inferentially revealing client confidences."[35] Nonetheless, it is questionable whether the "noisy withdrawal" option should be greatly relied upon, because it is only mentioned in a footnote to the rules and the ABA's opinion and the Rules do not make it mandatory.

In regards to part three of the hypothetical, Model Rule 1.6 requires a lawyer to reveal enough information to prevent Waste X from causing "reasonably certain death or substantial bodily harm."[36] Thus, you may be obligated to inform the appropriate regulatory agencies regarding the disposal of Waste X on the property. However, some states have adopted rules of professional conduct that permit disclosure of client confidences for a broader range of reasons, such as to prevent substantial injury to the financial interests or property of another or to prevent actions that will have serious adverse health consequences to third parties.[37] Thus, environmental lawyers must recognize and understand their specific ethical obligations under the rules of the state in which they practice.

Like environmental lawyers, environmental engineers often face ethical dilemmas regarding whether to disclose confidential information learned in the course of their professional services to a client or to an attorney representing a client in an environmental matter. Codes of professional responsibility do exist for engineers, but do not have the force of law in most states and, therefore, may only serve as guidance.[38]

Rule II (1) of the NSPE Code of Ethics for Engineers[39] places the highest importance on the protection of public safety, health and welfare. However, when an engineer is hired to assist a lawyer in rendering advice, such as in the hypothetical, the engineer may also be subject to the Rule II(1)(c) of the NSPE Code of Ethics[40] in regards to preserving client confidences. A lawyer retaining an environmental engineer, should attempt to anticipate such conflicts and provide in a written agreement how such conflict may be resolved.

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[35] Id. Refers to the new comment 14, as revised in February 2002.
[36] Model Rules of Professional Conduct Rule 1.6(b)(1) (1995), as revised in August 2003.
[37] Michael B. Gerrard, ed., Brownfields Law and Practice, §11.05[2] (2000).
[38] Id., at fn. 103.1.
[39] NSPE Rule II (1)(2000). See also NSPE Rule I (1) (2000)
[40] NSPE Rule II (1)(c)(2000).

Contacts with Former Employees

Hypothetical

Litigation ensues against the Company A. The complaint brought against the company alleges that the hazardous substances were disposed of at the sit during a specific period. You have identified several former employees of company A, who worked at the site during this period. You believe these employees may be able to provide helpful information.

Ethical Issues : Are there any ethical restraints that limit your right to contact these former employees?

Model Rule 4.2 :Communication With Person Represented By Counsel

In representing a client, lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.[41]

F. Ethics and Experts[42]

Hypothetical: While Company A, Inc. still possesses the property, EPA and the state environmental agency commence an investigation into the dumping of Waste X on the property. The investigation culminates in a criminal prosecution of Company A and its management. You are hired as Company A's trial counsel and are directed by Company A to hire the consultants to assist you in preparation for the trial and to appear as expert witnesses at the trial.

Ethical Issues:

(1) What are your ethical obligations in selecting and working with consultants in preparation for and during a trial

[41] Model Rules of Professional Conduct Rule 4.2 (1995), as revised in February 2002.

[42] For a detailed guide on how to use an expert in environmental litigation, see Kim K. Burke, The Use of Experts in Environmental Litigation: A Practicioner's Guide, 25 N. Ky. L.Rev. 111 (1997).

Model Rule1.1 : Competence

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.[43]

Model Rule 1.3: Diligence

> A lawyer shall act with reasonable diligence and promptness in representing a client.[44]

Analysis:

Because of the highly technical aspects of environmental litigation, environmental trial lawyers need to be able to effectively use and manage experts. In the use of these experts, lawyers must consider ethical issues as well, such as zealous advocacy, protecting client confidences and conflicts of interest.

Ethical considerations such as confidentiality begin with the search for the appropriate expert. In order to select the best expert for your client's case, you necessarily will have to interview several candidates. During these so-called "beauty contests," you may have to reveal confidential information about your client and your client's case; therefore, you must take precautions such as having the expert execute a written confidentiality agreement to assure that this information will not be disclosed to the opposing counsel or the public. Furthermore, in order to maintain confidentiality, the agreement should also ensure that the expert, if not retained by you, will not be engaged by opposing counsel.

Conflicts of interest among the parties, their counsel and the expert must be considered. Consultants are not subject to the Code of Professional Responsibility or the Rules of Professional Conduct, and therefore may not voluntarily disclose any conflicts. Consequently, during the interview, you must discuss with the expert any work done on the behalf of the opposing party or its counsel or your client.

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[43] Model Rules of Professional Conduct Rule 1.1 (1995), as revised in February 2002.
[44] Model Rules of Professional Conduct Rule 1.3 (1995), as revised in February 2002.

2. Obligations to Prospective Clients

Assume for purposes of this hypothetical that you have not previously been retained by Company A. You are called by them and asked to interview for the position as counsel. You are told that several firms will be interviewed. This so called "beauty contest" is common in environmental matters. Naturally, you want to learn as much as you can about the client before the interview.

Ethical Issues:

If you as a lawyer participated in a beauty contest, do you have a duty of confidentiality to the prospective client?

Model Rule 1.18 : Duties to Prospective Clients

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation…[45]

The ABA added Rule 1.18 in February 2002, to address the protection of confidential information acquired before formation of the attorney client relationship. Courts that have considered this issue, have consistently found that these lawyers are bound to maintain the confidentiality of any confidential information conveyed by the prospective client. Are you disqualified from representing any other parties in the matter? It depends. In certain circumstances waivers may be obtainable and permissible. Each case must be evaluated in accordance with the new Rule 1.18.

G. Multijurisdictional Practice Issues

In August 2002, the ABA Commission on Multijurisdictional Practice issued its final recommendations.[46] The predicate for the study was the

[45] Model Rules of Professional Conduct Rule 1.18 (2002).

"unauthorized practice of law" provisions that prohibit lawyers from engaging in the practice of law except in states in which they are licensed. The ABA's concern was that if the unauthorized practice of law restrictions were applied literally, lawyers who perform any legal work outside the jurisdiction in which they are admitted, could be sanctioned. This would impede the lawyers ability to meet their clients multistate and interstate legal needs.

This concern was sparked by the 1998 California Supreme Court decision in Birbower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County, 949 P.2d 1 (Ca.1998), which held that New York lawyers, not licensed to practice law in California violated California's unauthorized practice of law provision when they assisted a California corporate client in connection with an impending California arbitration. The New York lawyers were sanctioned and barred from recovering fees in this case. The ABA's recommendations include amendments to Model Rule 5.5.[47] The amendments identify circumstances in which a lawyer may practice law on a temporary basis in another jurisdiction, such as:

- Working on a temporary basis with a lawyer admitted in the jurisdiction who actively participates in the representation;
- Performing services ancillary to pending or prospective litigation in a state where the lawyer is admitted or expects to be admitted *pro hac vice*;
- Representing the client in an ADR setting;
- Performing non-litigation work that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which he is admitted.

They also address standards relating to a lawyer who is an employee of the client, discipline and admissions *pro hac vice* and on motion. There are corresponding amendments to Model Rule 8.5[48], conferring jurisdiction on states to discipline lawyers not admitted in the jurisdiction. It will be

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[46] Am. Bar Ass'n, Report of the Commission on Multijurisdictional Practice (2002). For a synopsis of the changes see S. Gillers, Lessons From The Multijurisdictional Practice Commission: The Art of Making Change, 44 Ariz. L. Rev. 685).
[47] Model Rules of Professional Conduct, Rule 5.5(1995), as revised in August 2002.
[48] Model Rules of Professional Conduct, Rule 8.5(1995), as revised in August 2002.

interesting to see how many states enact and enforce the ABA's recommended changes.[49]

H. Sarbanes-Oxley and Environmental Disclosures

The Sarbanes-Oxley Act was enacted in July 2002 and the regulations promulgated pursuant to the statute have prompted increased public attention to financial disclosures and corporate governance. This has resulted in greater scrutiny of the methods for quantifying and disclosing potential environmental liabilities.[50]

The Securities and Exchange Commission (SEC) has imposed rules for governing disclosure of environmental costs and liabilities since 1982. The SEC requires all publicly held companies to disclose environmental liabilities. Item 101 of SEC Regulation S-K, requires disclosure of material [51] effects that compliance with environmental laws, may have on "capital expenditures, earnings, or the competitive position" of the company. Item 103 of SEC Regulation S-K[52]requires that SEC registrants disclose in annual 10-K quarterly filings "any material pending legal proceedings" to which they are a party, that arise under federal, state, or local law that have the primary purpose of protecting the environment. Item 303 of Regulation S-K, contains a general requirement to disclose "any known trends, demands, commitments, events or uncertainties" that are reasonably likely to have a material effect on a company's bottom line. Whether a company must disclose these liabilities turns on whether they are deemed "material". Generally, an item is "material" if there is a substantial likelihood that its disclosure would be viewed by a "reasonable investor" as having significantly altered the "total mix" of information.[53] The SEC is authorized to investigate any person or entity suspected if of violating federal securities laws or SEC rules. The SEC may seek monetary penalties in federal district court from persons who have violated the securities laws.

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[49] For an interesting discussion of the trends in this area of the law, see Ann L. MacNaughton, Multidiscilinary Trends in an Evolving Marketplace: Practicing With Other Professions, ABA (2001)

[50] See Gracer, J. and Beck A., Disclosing Contingent Environmental Liabilities: Navigating In A New Environment, The Metropolitan Corporate Counsel, April 2004, p.28.

[51] 17 C.F.R. 229.101

[52] 17 C.F.R. 229.103

[53] The SEC has also provided some guidance on applying the materiality standard in SEC Staff Accounting Bulletin No. 99- Materiality, 17 C. F. R. Part 211 Aug. 1999).

I. Conclusion

Ethical considerations for the environmental lawyer are a critical. The applicable rules are in the process of being revised by the various jurisdictions. Environmental lawyers should keep abreast of any revisions that occur to the rules in any jurisdiction in which they practice.

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