

An Ethics Overview (And Update) For The Environmental Lawyer

Carol E. Dinkins

In ethical matters, environmental practitioners are not in an ivory tower.

ENVIRONMENTAL ATTORNEYS ARE a distinguished lot, and one of the things that distinguish them is their low rate of professional liability claims. There could be any number of good explanations for this, but it is certainly not because environmental attorneys are spared the same ethical dilemmas and quandaries that

other lawyers face. To the contrary, environmental practice is fraught with the potential for ethical problems. Some arise from substantive issues conflicts. Others arise from the conflicts in multi-party CERCLA cases. And many are just inherent in a practice that involves multiple jurisdictions.

Carol E. Dinkins is a member of the firm of Vinson & Elkins, L.L.P., in Houston.

Recent years have seen significant changes in the legal ethics landscape. The Sarbanes-Oxley Act and the American Law Institute's adoption of the *Restatement (Third) of the Law Governing Lawyers* ("Restatement"), and recent changes to the Model Rules of Professional Conduct ("Model Rules") are three developments that are of major importance to all lawyers, and we will examine them—and how they can affect environmental practitioners—in this article. But first, we will address some of the more familiar ethical issues that lawyers face, including client relationships, the crime-fraud exception to confidentiality, issues facing environmental lawyers in government, multi-jurisdictional practice, and ethical guidelines for settlement negotiations. Fortunately for environmental practitioners, the ethical rules have not stagnated. And they have even evolved in ways that account for changes in the nature of environmental practice.

CLIENT RELATIONSHIPS • These can arise in numerous ways, as they can for any practitioner. You have to be aware of the ethical dimension even "before the beginning." Today, many prospective clients conduct "beauty contests" to select counsel, and these opportunities have ethical implications, especially when the lawyer ultimately is not engaged. There are issues of confidentiality and prospects of creating conflicts that could cause very serious problems. These issues are addressed in section 15 of the Restatement. Another useful source to consult is Dorothy Glancy's article, *Prospective Client Interviews*, ABA, Section of Natural Resources, Energy, and Environmental Law, 27th Annual Conference on Environmental Law at Keystone, Colorado, March 1998. This article thoughtfully analyzes the ethical issues inherent in beauty contests, and the author's treatment of these issues can set you on a well-marked path to avoid ethical pitfalls.

Multiple Representations

This situation commonly occurs in CERCLA matters. Usually counsel represents clients in the same type of circumstances: transporter, small- or large-quantity generator disposer, or de minimis generator. This is a situation in which multiple informed consent must be sought, and most clients are quite sophisticated about these types of representations. The State Bar of Michigan Opinion No. R-16 (1993), remains one of the best treatments of this issue. *See also*, Patrick Donovan, comment, *Serving Multiple Masters: Confronting the Conflicting Interests that Arise in Superfund Disputes*, 17 B.C. Env'tl. Aff. L. Rev. 371 (Winter 1990); and David Littell, *Consent and Disclosure in Superfund Negotiations: Identifying and Avoiding Conflicts of Interests Arising from Multiple Client Representation*, ABA/SONREEL 23rd Annual Conference on Environmental Law (Keystone Conference, March 10-13, 1994).

Criminal Investigations

There are, of course, ethical considerations in environmental criminal investigations, especially in the multiple-defendant scenario. Generally, prosecutors are leery of defense counsel who represent multiple clients in an investigation. *See* Stanley Arkin, *Ethical Issues Raised During Criminal Defense Representation: Environmental Cases* (409 PLI/Lit 279, West 1996). This is a situation that calls for careful judgment, given the prospect that multiple representation, joint defense agreements, and common interest arrangements can pose difficulties for counsel once the decision has been made on behalf of a represented defendant to cooperate with government investigators. Once such an arrangement exists, waivers of confidentiality are necessary for counsel to share any information with the government, even if exculpatory for the organization.

Grand Jury Investigations

In the course of a grand jury investigation, a number of individuals may need advice of counsel either because they are targets, subjects, or witnesses, or their files are seized or subpoenaed. Given the complexity and sheer expense of defending a company and individuals in the course of a grand jury investigation, it usually is preferable for a single lawyer to represent multiple clients. It is exceedingly difficult to develop the facts and then to develop and pursue a coherent defense strategy if a single investigation involves a large number of defense attorneys. Additionally, given the scope and length of a grand jury investigation, it soon becomes quite expensive for a company to pay the fees and expenses of multiple lawyers. A corporation, under the law in most states, can pay attorneys' fees for its employees and officers. The attorney will then evaluate whether the corporation's interests conflict with those of the company employee or official and, if that may be the case, whether the client can waive the conflict. *See* Code of Professional Responsibility, EC 5-22, 5-23.

Other issues arise in this context, such as:

- Government grants of immunity;
- The potential for the in-house law department to be implicated in the investigation; and
- The duty of the court and counsel to advise the client of the consequences of potential conflicts of interest.

For an excellent discussion of these issues, *see* Ira Mickenberg, *Grand Jury Investigations: Multiple Representation and Conflicts of Interest in Corporate Criminality Cases*, 17 *Crim. Law Bull.* 5 (Jan-Feb. 1981). *See also* Thompson, *Multiple Representation: An Unneeded Sideshow in Complex Prosecutions*, *Nat'l Envtl. Enforcement J.* 3 (Oct. 1990).

The "Corporate Miranda"

Usually counsel to an organization must interview various employees, managers, and executives to determine what happened, to provide information to evaluate the strengths and weaknesses of the case, and to assure the basis on which to render advice about whether to seek a disposition short of trial. This calls for a corporate Miranda to avoid later facing assertions that the interviewee thought corporate counsel also served as individual counsel.

The Privilege Is With The Company, Not The Individual

The attorney-client privilege lies with the corporation in this instance and does not protect what corporate officials and employees say to counsel representing the corporation if the corporation elects to waive the privilege and disclose what was learned from the corporation's employees. Counsel for the corporation generally will explain this at the outset of interviews with employees if they are thought to possess knowledge that puts their personal conduct or omission at risk. Additionally, counsel generally will advise the employees that their discussions are voluntary and they are not compelled to cooperate, and that they may engage their own counsel to advise them. *See* Kathleen Gallagher, *Legal and Professional Responsibility of Corporate Counsel to Employees During an Internal Investigation for Corporate Misconduct*, 6 *Corp. L. Rev.* 3 (1983).

CRIME-FRAUD EXCEPTION TO CONFIDENTIALITY • Many environmental laws impose criminal liability. As a result of this, and hence the sort of information can come to the lawyer's attention in the course of representation, this issue is of particular ethical concern.