

ETHICAL CONSIDERATION FOR ENVIRONMENTAL/NATURAL RESOURCES LAWYERS

I. Acme Company Hypos 1-3

Hypothetical #1

A lawyer represents Acme Company, which owns a parcel of real property. The lawyer learns that employees of the company have been dumping Waste X into a surface impoundment on the property. (The company does not have any permits or other type of regulatory permission for this activity).

- A. What obligations does the lawyer have to report this activity “up the chain” of Acme Company?
- B. Is the lawyer required, or permitted, to disclose information about the illegal disposal to regulators or other third parties?
- C. What is the lawyer knows that Waste X is toxic, that it can leach into groundwater, and that children near the property drink groundwater-supplied water?

Hypothetical #2

Acme Company is considering selling the piece of property. Before the lawyer finds out about the illegal disposal of Waste X, Acme has the lawyer prepare an opinion letter for the potential purchaser based on an environmental audit of the property that the lawyer supervised. The illegal disposal had been occurring at the time the audit was conducted, but it was not discovered during the audit process. The lawyer knows that the purchaser inquired whether hazardous wastes had ever been disposed of on the property, and that Acme representatives responded that no such disposal has occurred.

- A. What are the lawyer’s obligations with respect to the purchase once the lawyer becomes aware of the illegal disposal?
 1. Would the lawyer be required to withdraw from representation of Acme under the circumstances?
 2. Is the lawyer required or permitted to disclose the false representations?
 3. May (or must) the lawyer disaffirm or repudiate the opinion letter in the course of withdrawing representation of Acme in the sale of the property?

Hypothetical #3

Acme Company engaged in illegal disposal of Waste X on property it owned. The company did not use outside counsel at that time. EPA and the state environmental agency start an investigation into the dumping of Waste X on the property. The investigation leads to a criminal prosecution of Acme Company and its management. A lawyer at a local law firm is hired as Acme’s trial counsel. Acme directs the lawyer to hire the appropriate consultants to assist the lawyer in trial preparation and to appear as expert witnesses at the trial.

- A. What are the lawyer's ethical obligations in selecting and working with consultants before and during trial?
- B. What ethical obligations arise in the process of selecting experts?
- C. During trial preparation, may the lawyer work with the expert in preparing the expert's opinion? May the lawyer "suggest" what the opinion should be?

II. Multiple Party Representations

Hypothetical #4

You have been asked to represent Company A, a manufacturing concern, in a multiparty Superfund matter in which 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.

- A. Is there an existing conflict? Do you need to obtain consent?
- B. If both parties, Company A and Company B, request your representation in the Superfund matter, may you take the concurrent representation?

III. Arguing Two Sides of the Same Issue

Hypothetical #5

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.

- A. Is arguing two sides of the same legal issue a conflict of interest?