

Inadvertent Disclosure Hypothetical

You are negotiating with the State Department of Environmental Protection to resolve violations of the wastewater discharge permit for your client's manufacturing facility. As part of the negotiations, the agency has proposed to revise the permit to add new discharge limits, ostensibly to protect fish in the receiving waterbody. Your client strongly objects to the proposed new discharge limits and believes that they are both unnecessary and unduly burdensome. You have filed a FOIL request with the agency seeking documents related to the new objectionable limits. An inspector for the agency who periodically inspects your client's plant tells your client at the next inspection that the new limits have been requested by the State Fish and Wildlife Division and that they are unreasonable and not needed to protect the fishery. The inspector also gives your client a flash drive with documents relating to the new limits. When your client later reviews the documents, he realizes that they in fact clearly show that the new limits cannot be justified. Your client passes the flash drive along to you to use in the negotiations.

What do you do?

Do you have an obligation to your client to look at and/or use the documents?

Do you have an obligation to let the State agency know you received the documents?

Do you have an obligation to tell the state agency how you got the documents? Do you have an obligation to return the documents to the State agency?

If you have no obligation to take any of these actions, may you?

Can the fact that you regularly practice before the State agency affect your decision-making?

Does it make a difference that you don't know for certain whether the documents were inappropriately provided to your client?

Engineering Consultant Hypothetical

Bluth Inc., a publicly traded holding company, owns a sprawling mixed-use ranch. In addition to housing, part of the development is currently used for commercial activities, including a dry cleaning operation. The development has encountered some financial difficulties and the Board of Directors has authorized the CEO, George Sr., to try to sell off the commercial property, including the piece on which the dry cleaning facility is situated. Bluth Inc.'s competitor, Sitwell Inc., has eyed this valuable tract of land.

After some protracted negotiations between Bluth Inc. and Sitwell Inc., a tentative understanding for the sale of the property is reached. George Sr. negotiates for himself a bonus if the deal closes. Sitwell Inc. has had the opportunity to conduct its due diligence, and is aware of the historical use of the property, including the dry cleaning operations.

George Sr. hires his local attorney, Barry Zuccercorn, to draft up a formal Agreement of Purchase and Sale for the transaction. The parties execute the agreement. The closing is set for one month from the date of execution.

Immediately after the parties execute the agreement of sale, Bluth's landscaper, Tobias discovers a previously unknown collection of buried drums on the property behind the dry cleaning operations on the site. While the cache of drums generally appears intact, Tobias does observe that one of the drums is deteriorated and some of the contents of the drum have leaked out into the soil.

Tobias immediately calls George Sr. who in turn calls

- his attorney, Barry, and
- his environmental engineering consultant, Steve Holt.

George Sr. asks Steve Holt to undertake some testing to determine the nature and extent of the apparent release and to advise George Sr. and his attorney, Barry, of the results of his testing.

George Sr. advises Steve Holt that he may share his conclusions with the purchaser Sitwell Inc. He also advises Steve Holt that if, after rendering his conclusions, the transaction proceeds to close, Steve Holt will receive a bonus of \$250K. George Sr. notes that this bonus will not be paid if the transaction does not close.

After exhaustive testing and analysis, Steve Holt advises George Sr. and Barry of his findings:

- (1) there was an apparent minor release of perchloroethylene in a small soil area comprised of dense clay, and does not present a risk of reasonable certain death or substantial bodily injury for the nearby residents of the Ranch;
- (2) However, if the release is not addressed, it may impair the ecological functions of a nearby marsh, and there exists a remote possibility that drinking water may be affected.

Steve Holt suggests that this should be reported to local authorities and to Sitwell Inc.

George Sr., desperate to save his floundering company and to obtain his incentive bonus, simply wishes to repair the damaged drum and do nothing else.

Questions:

Does lawyer Barry have a duty to report the contamination to the regulators even if George Sr. does not want him report?

Does lawyer Barry have a responsibility to report the findings to Sitwell, Inc.?

What if the consultants' responsibilities require that a report be made to the local authorities and the client does not want to report?

Is it appropriate to offer this kind of incentive bonus to a consultant?

Conflicts of Interest Hypothetical

You are an environmental attorney in good standing working for a large, national law firm. You have been retained by TefloStars, a major national manufacturer who utilizes perfluorooctanic acid (PFOA) in connection with the production of Teflon-coated products. PFOA, though not listed as a hazardous substance under EPA regulations, is a persistent organic pollutant with established toxic and carcinogenic properties. On April 25, 2016, the New York State Department of Environmental Conservation (DEC) listed PFOA as a hazardous substance after PFOA contamination was discovered in the groundwater of numerous upstate municipalities. TefloStars was named as a potentially responsible party (PRP) under the State Superfund law by the DEC in a cost recovery action related to cleanup at PFOA contaminated site.

1. Recently, the general counsel of XYZ, Inc., another PRP identified by DEC, contacted you in hopes that you would represent them in the cost recovery action.

- Could you represent XYZ?
- Could another attorney at your firm represent XYZ?

2. In addition to TefloStars, you represent Fuego, a sportswear manufacturer that sells performance clothing. A number of their products utilize Teflon coating for waterproofing. Fuego has sought your advice on the negotiation and drafting of a commercial agreement between TefloStars and Fuego, under which TefloStars would sell Teflon-coated fabric to Fuego.

- Could you represent Fuego?
- Could another attorney at your firm represent Fuego? How?

3. A subsidiary of TefloStars maintains a facility in Parkersburg, West Virginia. As a result, the subsidiary was named as a PRP in a separate cost recovery action, for which they have retained separate counsel. ABC, Inc.—a small-scale Teflon manufacturer with one facility that was also named as a PRP—contacted you in hopes that you would represent them in the litigation. A legal argument that is key to their case would, if applied to the New York action, adversely affect your client.

- Could you represent ABC?
- Could another attorney at your firm represent ABC? How?

4. In addition to the CERCLA Action, TefloStars is currently suing Arkana Oil under the New York Navigation Law to clean up a petroleum spill that migrated onto TefloStars property. Over a decade ago and while working for another firm, represented Arkana in a similar matter, but neither you nor your current firm has done any work for them in the years since.

- Can you or your firm represent TefloStars in this matter?
- What steps can you take to avoid this conflict?

Multijurisdictional Practice Hypothetical

You are an environmental lawyer in good standing admitted to the Bar in New York. Your client, ABC Corp., is a national company based in New York, with manufacturing facilities throughout the country. You have represented ABC Corp. for over ten years on environmental issues related to its facilities. On a Thursday afternoon, the general counsel for ABC Corp. calls you with an urgent matter related to one of its New Jersey facilities. ABC Corp. received a Notice of Violation from the NJDEP and the general counsel wants you to appear at an informal hearing to negotiate the resolution of the violation scheduled for the following afternoon.

Can you appear at the informal hearing in NJ without engaging in the unauthorized practice of law? What if the hearing were scheduled for a month later?

What if you had appeared previously in similar hearings for the client in New Jersey such that you expected to travel to New Jersey to handle these matters at least every quarter?

What if your client asked you to appear in front of the Connecticut Department of Energy and Environmental Protection?

What if you are a New Jersey lawyer with a New Jersey client who asked you to appear in front of the New York State Department of Environmental Conservation?

Legal Holds Hypothetical

You are an environmental attorney working as in-house counsel for a corporation with operations in multiple jurisdictions.

One of the facility managers sent you an email this morning with a pdf copy of a letter dated two months ago from a local NGO alleging non-compliance with an air permit, threatening that the NGO will “take all appropriate measures” to “force the company into compliance.” The facility manager then called to ask your advice: “What do I do now?”

Questions to consider:

1. Is this letter a “triggering event” that requires you take action to preserve relevant information at the facility? At corporate HQ? Elsewhere within the company?
2. Who would you send a “legal hold” notice to?
 - Where all of the hard copy and electronic records are located?
 - Where is the company’s off-site hard copy storage?
 - Where are the servers?
3. Does the company have automatic archive, backup and deletion?
4. Does the company have a written policy regarding use of personal devices for company communications?

5. Who has authority (within the company) to:
 - Instruct IT to freeze emails in the background without the knowledge of an employee?
 - Review employee emails without their knowledge?
6. What should you do if you find out that an employee with knowledge of the NGO letter has been “scrubbing” their emails and files?