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## Ethical Considerations for Environmental Lawyers

This article highlights some of the more common ethical issues that may arise in the practice of environmental law. A hypothetical is used to illustrate each issue and the American Bar Association's ("ABA") Model Rules of Professional Conduct<sup>1</sup> ("Model Rules") are used to analyze a potential resolution in each case.

**CONFLICTS OF INTEREST** -- One of the most common ethical issues that may arise in the practice of environmental law is the problem of conflicts of interest.

### **Conflicts Arising in Connection with the Representation of Multiple Parties in the Same Matter**

**Hypothetical:** You have been asked to represent Company A, 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:***

- Is there an existing conflict? Do you need to obtain consent?
- 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 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 be 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 another client...a lawyer may represent a client if (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client...."<sup>2</sup>

**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.

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<sup>1</sup> ABA Model Rules of Prof'l Conduct (hereinafter "ABA Model Rule"). Each state has its own rules of professional conduct. Because most states have based their rules on the ABA Model Rules, those rules are cited in this article.

<sup>2</sup> ABA Model Rule 1.7.

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.”<sup>3</sup> However, the ABA acknowledges that the circumstances of a particular representation may give rise to a conflict. 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 “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.”<sup>4</sup>

As to the second part of the hypothetical, multiple representations in Superfund matters are generally permissible.<sup>5</sup> In fact, there has been considerable discussion among legal commentators about the ethical issues arising from such representations.<sup>6</sup> The general opinion among these commentators is that multiple representations are permitted, as long as the lawyer examines each situation for compliance with Model Rule 1.7.<sup>7</sup>

Model Rule 1.7 prohibits a lawyer from undertaking legal representation where direct adversity exists between two clients unless the lawyer reasonably believes there will be no adverse effect on the representation and each client provides informed consent.<sup>8</sup> Even where there is no direct adversity of interest between two clients, this rule prohibits any representation of a client, absent consent, based on a determination as to whether “there is a significant risk that representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”<sup>9</sup>

A group of similar generator PRPs may have sufficient common interest in cooperating with regulatory agencies to permit multiple representation. However, if two parties cannot agree on how liability should be apportioned between them, it would not be permissible to have multiple representation because their positions are “fundamentally antagonistic.”<sup>10</sup>

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

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<sup>3</sup> ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 390 (1995).

<sup>4</sup> *Id.*

<sup>5</sup> 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.”)

<sup>6</sup> See, Andrew Kenefick, et al., *Assessing Conflicts of Interest at Multi-Party Superfund Sites: From the First Involvement to Litigation*, 4 *Env’tl. 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).

<sup>7</sup> *Id.*

<sup>8</sup> ABA Model Rule 1.7 cmt 6.

<sup>9</sup> ABA Model Rule 1.7.

<sup>10</sup> *Id.*, at cmt 28

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.

Lawyers 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.

### **Conflicts Between Current Clients in Different Matters**

Frequently in representing multiple clients, attorneys argue opposing sides of the same legal issue, a conflict occurs when advocacy of a legal issue on behalf of one client could adversely affect a client in the second matter by setting an adverse precedent.

**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:** Is arguing two sides of the same legal issue a conflict of interest?

**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..."<sup>11</sup> Factors relevant in assessing whether the representation of one client will impair the representation of another include where the cases are pending, whether one representation may create legal precedent adverse to another, whether the issue is substantive or procedural, the timing of the respective proceedings, and the expectations of the clients.<sup>12</sup>

The determination is a fact intensive one. 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. Factors relevant in making this determination include where the cases are pending, whether the issue is substantive or procedural, the timing of the respective proceedings, and the expectations of the respective clients. Basically, if there is a significant risk of material limitation, then absent informed consent, the lawyer must refuse one or both matters or withdraw from one or both matters. In Formal Ethics Opinion No. 93-377- Positional Conflicts,<sup>13</sup> the ABA addresses this issue. The opinion provides:

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<sup>11</sup> ABA Model Rule 1.7 cmt 24.

<sup>12</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 377 (1993).

<sup>13</sup> *Id.*

“[I]f the two matters are being litigated in the same jurisdiction, and there is a substantial risk that the law firm’s representation of one client will create legal precedent, even if not binding, which is likely materially to undercut the legal position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or ...withdraw from the first, unless both client’s consent after full disclosure of the potential ramifications of the lawyer continuing to handle both matters.”<sup>14</sup>

Second, the ABA further states that if the matters are being litigated in different jurisdictions:

“[T]he lawyer should nevertheless attempt to determine fairly and objectively whether the effectiveness of her representation of either client will be materially limited by the lawyer’s ...representation of the other...” such that the lawyer must “soft-pedal” or “modify” his/her argument...then the lawyer should not accept dual representations.”<sup>15</sup>

### **Conflicts with Former Clients**

The duties owed to a former client are somewhat limited but remain in effect in perpetuity. Model Rule 1.9 prohibits a lawyer from representing a client (in the absence of consent) whose interests are materially adverse to those of a former client whom the lawyer represented in “the same or a substantially related matter.”<sup>16</sup> Model Rule 1.9, comment 3, provides an environmental example. These types of conflicts typically involve close call situations in which consent should be obtained from the former client.

### **Conflicts Between Current Clients or Former Clients and their Law Firms**

An interesting problem arises when a lawyer joins a new law firm that represents parties adverse to his prior firm’s clients and the lawyers potentially had access to adverse party confidences at that firm. Model Rule 1.10 provides that law firms that hire lateral attorneys from another private law firm have the option of using a screening mechanism to prevent potential conflicts of interest from being imputed to the hiring firm.<sup>17</sup> Model Rule 1.10 allows the firm that is making a lateral hire to retain its clients even if the lateral hire attorney represented adverse parties of the prior firm. The rule requires that the hiring firm give the lateral hire’s firm client written notice of the conflict screening procedures and further requires that the former client must be notified that it can seek judicial review of the screening process. The rule also prevents lawyers with conflicts of interest from directly sharing compensation from matters that they are not allowed to work on because of the conflict. To prevent disqualification of the entire firm, screening or Chinese walls may be erected to guard against inadvertent use of confidential information.

**COMPLIANCE ISSUES** -- Compliance issues are often misunderstood, but analyzing them properly is crucial in environmental practice.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> ABA Model Rule 1.9.

<sup>17</sup> ABA Model Rule 1.10. *See also Southwire Co. v. Ramallo Bros. Printing, Inc.*, 2009 WL 4937726 (D.P.R. Dec. 15, 2009)

**Hypothetical:** Company A has recently redesigned its manufacturing processes. Management has informed you that the modifications are minor and 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.

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."<sup>18</sup> Company A management then asks if it can rely on its knowledge of the old waste product to conclude whether Waste X is hazardous.

**Ethical Issues:** What is required of the lawyer in this situation?

**Model Rule 2.1: 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, which may be relevant to the client's situation."<sup>19</sup>

**Model Rule 1.2: Scope of Representation and Allocation of Authority Between Client and Lawyer:** "... (d) A lawyer shall 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."<sup>20</sup>

**Analysis:** 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 further testing because the results may subject Waste X to stricter regulation.<sup>21</sup> 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."<sup>22</sup> This

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<sup>18</sup> 40 C.F.R. 262.11(c) (2000).

<sup>19</sup> ABA Model Rule 2.1.

<sup>20</sup> *Id.*

<sup>21</sup> See Douglas R. Williams, *Loyalty, Independence and Social Responsibility in the Practice of Environmental Law*, 44 St. Louis L.J. 1061, 1069 (2000).

<sup>22</sup> ABA Model Rule 1.2, cmt 9.

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.

**CONFIDENTIALITY OBLIGATIONS IN TRANSACTIONS** -- Another common ethics issue that arises in the practice of environmental law is issues relating to client confidence and disclosure.

***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's representatives state that no such disposal has occurred.

***Ethical Issues:***

--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?

--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?

--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?

--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?

--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 revised model rules relating to disclosure states:

***Model Rule 1.6: Confidentiality of Information:***

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

(b) A lawyer may reveal information relating to the representation of a client 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....”<sup>23</sup>

***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....”<sup>24</sup>

***Model Rule 2.3: Evaluation for Use by Third Persons:***

“(3) 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;

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<sup>23</sup> ABA Model Rule 1.6 (amended August 2012).

<sup>24</sup> ABA Model Rule 1.16.

(4) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent....<sup>25</sup>

***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.”<sup>26</sup>

***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.”<sup>27</sup>

***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 nondisclosure.”<sup>28</sup> Model Rule 1.2(d) prohibits a lawyer from assisting a client in the commission of a crime. 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. Model Rule 1.16 requires counsel to decline or withdraw if the representation will result in a violation of the rules of professional conduct or other law. How does a lawyer reconcile these rules?<sup>29</sup>

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.

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<sup>25</sup> ABA Model Rule 2.3.

<sup>26</sup> ABA Model Rule 4.1.

<sup>27</sup> National Society of Professional Engineers Code of Ethics for Engineers Rule II (1) (2000).

<sup>28</sup> Williams, supra note 21, at 1073.

<sup>29</sup> 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.

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

Comment 3 to Model 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...”<sup>30</sup>

The comment cross-references Model 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 Model Rule 2.3(a).<sup>31</sup> 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 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 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 Model 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, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.”<sup>32</sup> 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 Model Rule 4.1 (a) ...applies in this

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<sup>30</sup> ABA Model Rule 2.3, cmt. 3.

<sup>31</sup> ABA Model Rule 2.3 (a).

<sup>32</sup> ABA Model Rule 1.6 cmt. 3.

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.”<sup>33</sup> Accordingly, Model Rule 1.6 trumps Model 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).<sup>34</sup> 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.”<sup>35</sup>

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 the comments to 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. 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.”<sup>36</sup> Thus, you may be obligated to inform the appropriate regulatory agencies regarding the disposal of Waste X on the property. 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.<sup>37</sup> 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.<sup>38</sup>

Rule II (1) of the NSPE Code of Ethics for Engineers<sup>39</sup> 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<sup>40</sup> 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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<sup>33</sup> ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 366 (1992).

<sup>34</sup> ABA Model Rule 1.16.

<sup>35</sup> ABA Model Rule 1.16.

<sup>36</sup> ABA Model Rule 1.6(b) (1).

<sup>37</sup> Michael B. Gerrard, ed., *Brownfields Law and Practice*, §11.05[2] (2000).

<sup>38</sup> *Id.*, at fn. 103.1.

<sup>39</sup> NSPE Rule II (1) (2000). *See also*, NSPE Rule I (1) (2000).

<sup>40</sup> NSPE Rule II (1) (c) (2000).

**CONTACT WITH FORMER EMPLOYEES** – This is another issue that arises with some degree of frequency in environmental cases.

**Hypothetical:** Litigation ensues against Company A. The complaint brought against the company alleges that hazardous substances were disposed of at the site 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 person 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.”<sup>41</sup>

Comment 7 to Model Rule 4.2 provides that former employees are not within the scope of the prohibition.<sup>42</sup>

**ETHICS AND EXPERTS** -- Environmental lawyers spend a considerable amount of time working with scientific, technical or engineering experts. There are a host of ethical issues that may arise in connection with this activity.<sup>43</sup>

**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:** What are your ethical obligations in selecting and working with consultants in preparation for and during a trial? May Attorney A work with Expert B in preparing this opinion and may Attorney A suggest what the opinion should state.

**Model Rule 1.1: Competence:** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.”<sup>44</sup>

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<sup>41</sup> ABA Model Rule 4.2.

<sup>42</sup> ABA Model Rule 4.2, cmt 7.

<sup>43</sup> 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 Practitioner’s Guide*, 25 N. Ky. L. Rev. 111 (1997).

<sup>44</sup> ABA Model Rule 1.1 (amended August 2012).

**Analysis:** Because of the highly technical aspects of environmental litigation, environmental trial lawyers need to be able to effectively use and manage experts in accordance with Model Rule 1.1. In the use of these experts, lawyers must consider ethical issues as well, 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. Confidential information should not be disclosed to the potential expert unless there is a clear understanding that the information will be regarded as confidential. During this process, 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, would not be engaged by opposing counsel.

Once an expert is retained, an attorney may share relevant facts and anticipated trial testimony; discuss legal and factual issues raised in documents or other evidence; and prepare the expert for cross-examination. However, an attorney must not "suggest" expert opinions. Because consultants themselves are not subject to rules of professional conduct requiring disclosure of any conflicts, the attorney should consider potential conflicts among the parties, their counsel, and the expert at this stage, and should discuss with the expert any work done on the behalf of the opposing party or its counsel.

With respect to the second part of the hypothetical, Attorney A may share relevant facts and anticipated trial testimony expected from other witnesses. Attorney A may discuss the applicability of the law to the facts in issue and review documents or other physical evidence with Expert B. Attorney A may also discuss the expert's role, demeanor, as well as probable lines of cross-examination. Attorney A may not "suggest" any opinions to Expert B. It is important to remember that the rules with respect to witness preparation vary from state to state. Other countries such as England, Belgium, Italy, France and Switzerland have codes of conduct that prohibit witness preparation.

**Hypothetical:** You get a call from an industrial client that a burst pipe at the client's facility has resulted in a spill of unknown chemicals to the soil. You contact the environmental consulting firm that you frequently work with, and both you and the environmental consultant go the site to investigate. The engineers' investigations confirm the spill does not present a risk of "reasonable certain death or substantial bodily injury," but that it is likely to pose ecological harm and, if it reaches groundwater, and may create some risk of minor human health effects. The client decides that it does not want to report the spill to any regulatory body.

**Ethical Issue:** What are your ethical obligations in terms of reporting?

**Analysis:** Under the Model Rules (Rule 1.6), the attorney would likely be precluded from disclosing the spill without the client's consent. The engineer (assuming membership in the NPSE) would not be so restrained. Further complicating matters, Model Rules 5.3 provides "with respect to a non-lawyer employed by or associated with a lawyer ... [the] lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." Therefore, the lawyer is ethically obligated to try and ensure that the consultant's

actions are consistent with the Model Rules, even if the Model Rules are inconsistent with the consultant's own professional obligations.

Finally, if the spill requires reporting under either state or federal statutes, this adds another layer of complexity. New York State requires reporting of nearly all oil spills, and in *Middleton, Kontokosta Associates, Ltd.*, the NYSDEC Commissioner held that a consultant who learned of a spill was legally obligated to report it. The Commissioner's opinion did not address the ethical implications of its decision, since the consultant at issue was not a licensed engineer ("Middleton is not a professional engineer, and therefore cannot claim that he is under a professional obligation not to disclose under the Code of Ethics for Engineers, assuming that the code was otherwise applicable under the circumstances.")

**OBLIGATIONS TO PROSPECTIVE CLIENTS** -- A common practice in environmental cases is the use of "beauty contests" to select outside counsel. This competitive interviewing process raises several legal issues including whether an attorney client relationship is created.

**Hypothetical:** Assume for purposes of this hypothetical that you have not been previously 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 Issue:** 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 consults with a lawyer about 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 learned information from a prospective client shall not use or reveal that information except...."<sup>45</sup>

**Analysis:** Model Rule 1.18 addresses 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 Model Rule 1.18.

The rule is triggered only when the lawyer learns information that "could be significantly harmful" to the prospective client if used by another client of the firm in connection with the same matter. The rule requires that the lawyer not only decline to

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<sup>45</sup> ABA Model Rule 1.18 (amended August 2012).

represent the prospective client but also stop representing the client in connection with the matter.

**MULTIJURISDICTIONAL PRACTICE ISSUES** -- Multijurisdictional practice issues are very common in an environmental law practice. It is not uncommon for environmental lawyers to be involved in matters that require work in multiple states. There may be government enforcement initiatives that may cover activities in multiple jurisdictions. Another example is where environmental lawyers get involved in large acquisitions that require due diligence in multiple states. Regardless of the type of matter, it is critical for attorneys involved in these matters to consult the multijurisdictional practice rules in each of the involved jurisdictions.

Model Rule 5.5 identifies circumstances in which a lawyer may practice law on a temporary basis in jurisdictions in which they are not admitted, 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.<sup>46</sup>

Note, Model Rule 5.5 does not resolve every ambiguity relating to multijurisdictional practice. Second, not all states have adopted these "safe harbors". Also, Model Rule 5.8 provides that a "temporary" lawyers' host state is given jurisdiction co-equal to the jurisdiction of the state in which the lawyer has his/her license. Under this provision, a lawyer could be subject to disciplinary action by both jurisdictions for the same conduct.<sup>47</sup>

**SOCIAL NETWORKING AND BLOGGING** -- Environmental lawyers, like other lawyers, have become increasingly reliant on the internet for many aspects of their practice. Environmental lawyers rely on the internet not only for research, but also to maintain office-related websites, to communicate with clients and prospective clients, and for marketing purposes. An increasing number of environmental attorneys author blogs and/or belong to social networking sites such as LinkedIn or Facebook. Blogging raises several ethical considerations, including: communications, advertising, solicitation, the unauthorized practice of law, and the creation of an inadvertent attorney-client relationship.

**Hypothetical:** During discovery, you depose R, an adverse witness, and during the course of the deposition, R reveals that she has accounts on Facebook and LinkedIn, two social networking sites that permit "friends" of users to access personal information posted by that user. You also learn that R would "friend" anyone who requests to be her friend. You believe that R has posted information on her pages that may be used to impeach her at trial. You ask your paralegal, T, who is not friends with R, to try to "friend" R. T will use her real name, but will not reveal where she works or the reason she wants to be R's "friend."<sup>48</sup>

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<sup>46</sup> ABA Model Rule 5.5 (amended February 2013).

<sup>47</sup> ABA Model Rule 5.8 (amended February 2013).

<sup>48</sup> For an in depth discussion of the issue see Philadelphia Bar Association, Professional Guidance

***Ethical Issues and Applicable Rules:***

- Is the lawyer responsible for the third party’s conduct?
- Has the lawyer engaged in professional misconduct?
- Did the lawyer make a false statement of material fact to a witness?

***Model Rule 1.6: Confidentiality Rule:*** The confidentiality rules discussed above are applicable. Lawyers may not discuss confidential client information in blogs, on Facebook pages, or LinkedIn pages.

***Model Rule 5.3: Responsibilities Regarding Nonlawyer Assistants:*** “With respect to a nonlawyer employed or retained by or associated with a lawyer. . . a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . . .”<sup>49</sup>

***Analysis:*** Although you did not order T to “friend” R, because you are T’s employer and in a position of authority, T may believe that she is obligated to “friend” R. Further, you are procuring the conduct, and if T becomes R’s “friend”, you would be ratifying it with full knowledge of the propriety or lack thereof. Therefore, even though you did not engage in the actual conduct, you are responsible for T’s actions, and are thus responsible for violating this Rule.

***Model Rule 8.4: Misconduct:***

“It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .

”<sup>50</sup>

You know that R most likely will not allow you access to her sites, but would most likely allow someone else who is not associated with you. Because of this, you asked your paralegal to try to “friend” R to obtain information from a witness’s social networking sites that may be used during pending litigation to impeach her. T would not have become friends with R otherwise. By omitting the highly material fact that T only wants to become R’s “friend” to obtain this information and share it with you, T is purposefully concealing information in order to induce R to become her “friend” knowing that R would likely not become her “friend” if R knew for whom T worked. By using your paralegal to access R’s personal

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Committee, Opinion 2009-02 (March 2009); see also Mara E. Zazzali-Hogan and Jennifer Marino Thibodaux, *Friend or Foe: Ethical Issues for Lawyers to Consider when ‘Friending’ Witnesses Online*, N.J.L.J. (Aug. 31, 2009).

<sup>49</sup> ABA Model Rule 5.3 (amended August 2012).

<sup>50</sup> ABA Model Rule 8.4.

information on her networking sites, you engaged in dishonest and deceitful conduct “through the acts of another.”

**Model Rule 4.1: Truthfulness in Statements to Others:** “In the course of representing a client a lawyer shall not knowingly: make a false statement of material fact or law to a third person . . . .”<sup>51</sup>

In attempting to “friend” R, your paralegal intentionally omitted the fact that she works for you and is “friending” R to access R’s personal and private information for the purposes of the ongoing litigation. This omission of relevant information would be considered “a false statement of material fact” and, therefore, in violation of the Model Rules. In addition, there are several other potentially applicable rules, discussed below.

**Model Rule 7.1: Communications Concerning a Lawyer’s Services:** “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”<sup>52</sup>

Because potential clients have access to lawyers’ blogs unless such access is restricted, lawyers must be very careful about what they post and ensure that it is truthful.

**Model Rule 7.3(a): Solicitation of Clients:** The Model Rule states, in part:

“A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted:

- (1) is a lawyer; or
- (2) has a family, close personal, or prior professional relationship with the lawyer.”<sup>53</sup>

Emails, like written communication, are not prohibited outright. Blog posts are similar to email; they are not posted in real time. However, if the blog encourages interaction between potential clients and the lawyer-author, or the author immediately responds to comments made in response to the posts, then the blogs could be construed as real-time electronic contact.

**Model Rule 7.2(a): Advertising:** The Model Rule states, in part: “Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”<sup>54</sup>

A firm’s or lawyer’s web page is widely considered a form of advertising. A blog,

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<sup>51</sup> ABA Model Rule 4.1

<sup>52</sup> ABA Model Rule 7.1 (amended August 2012).

<sup>53</sup> ABA Model Rule 7.3 (amended August 2012).

<sup>54</sup> ABA Model Rule 7.2 (amended August 2012).

generally a part of the firm’s website, would likely constitute advertising and be covered by the Model Rules.

**Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law:** “...a lawyer, who is not admitted to practice in a specific jurisdiction, from: “establish[ing] an office or other systematic and continuous presence in this jurisdiction for the practice of law; or hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in this jurisdiction.”<sup>55</sup>

Lawyers authorized to practice law in one state cannot perform legal services in another state unless they are licensed in that state, admitted *pro hac vice*, participating in arbitration, mediation, or alternative dispute resolution, engaged in services “reasonably related to [their] practice” where they are admitted to provide legal services, or authorized by federal law.<sup>56</sup>

The Internet has created a multi-jurisdictional environment for legal services. If a law firm’s website does not comply with the state’s ethics rules on advertising or implies that lawyers in the firm are “authorized to practice in such states, the state could seek to sanction such out-of-state lawyers” or determine they “are practicing law without a license.”<sup>57</sup> A law firm that operates a highly interactive blog, website, or social networking site and avails itself of a specific jurisdiction will likely be subject to the ethical rules applicable in that jurisdiction.<sup>58</sup> The law in this realm is still evolving and is not clear. Therefore, law firms that maintain an active internet presence should keep abreast of the ethical rules.

Another potential ethical issue that law firm blogs raise is potential that the information received constitutes the formation of an attorney-client relationship. An attorney-client relationship is formed when a client reasonably relies on the advice of the lawyer. Law firm websites should include a disclaimer clearly stating that all information contained on the website, including any blog posts, is for informational purposes only, does not provide legal advice, and does not form an attorney-client relationship.

The following disclaimer illustrates the above:

*The information contained on the Law Firm X Web site (the "Law Firm X Site") is intended to supply general information to the public, is provided for informational purposes only and may not reflect the latest legal developments. It is not intended to constitute, and should not be considered, legal advice on any subject matter. Law Firm X does not warrant that the information contained on the Law Firm X Site is accurate or complete. Users of the Law Firm X Site should not assume that the information on the Law Firm X Site applies to their specific situation and should not act or refrain from acting on the basis of any information included in the Law Firm X Site without obtaining appropriate legal advice from competent, independent legal counsel in the relevant jurisdiction. The transmission of the Law Firm X Site, in part or in whole, and/or communication with Law Firm X via Internet e-mail through the Law Firm X Site does not constitute or create an attorney-client relationship between Law Firm X and any recipients.*

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<sup>55</sup> ABA Model Rule 5.5 (b) (amended February 2013).

<sup>56</sup> *Id.*, ABA Model Rule 5.5 (c), (d) (amended February 2013).

<sup>57</sup> J.T. Westermeyer, *Ethics and the Internet*, 17 Geo. J. Legal Ethics 267, 285 (2004).

<sup>58</sup> *See id.* at 288; *see also* Cydney Tune and Marley Degner, *Blogging and Social Networking*, 962 PLI/Pat 113, 134 (Mar. 2009).

Other rules that are potentially applicable to social networking include:

--Rule 3.5 (b) which prohibits *ex parte* contact with judges, jurors or officials. Friending, tweeting judges in social media has been held to violate this rule; and

--Rule 4.2 prohibits an attorney from “communicating about the subject of a representation with a person the lawyer knows to be represented by another lawyer in the matter.” Even on Facebook, Twitter or other social media, lawyers must avoid intentional and unintentional contact with individuals represented by counsel.

**METADATA** -- Environmental lawyers frequently use electronic mail to transmit documents including pretrial discovery, drafts of settlement agreements, sampling plans, etc. These documents are prepared using Microsoft Word or other similar software. Metadata is embedded information that is generated during the course of creating a document, during the course of editing a document or during the process of transmitting the document.

**Hypothetical:** You work in a small law firm that concentrates in environmental litigation matters. In one of the cases you are handling, you have drafted a letter to opposing counsel in which you explain your client's position with regard to ongoing settlement negotiations. Before you send the letter, you e-mail a copy to your partner and ask for comments. The partner e-mails the letter back to you with comments typed into the letter, offering suggestions based on client confidences and strategies that would compromise the client's position if they were revealed to the other side. You review the suggested modifications, delete the confidential information, and make the appropriate changes to the document. You are now ready to e-mail it to your opposing counsel. Are there any precautions you should take before you press the “send” button?

**Ethical Issue and Applicable Rules:** What are the responsibilities with respect to metadata related to those sending the information and what are the obligations of the recipient of such information?

**Model Rule 1.6, cmt. 18** provides: “A lawyer must act “competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision...”<sup>59</sup>

**Model Rule 4.4 (b)** states: “[a] lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”<sup>60</sup>

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<sup>59</sup> ABA Model Rule 1.6, cmt. 18 (amended August 2012).

<sup>60</sup> ABA Model Rule 4.4 (amended August 2012).

**Model Rule 8.4** provides: “it is professional misconduct for a lawyer [to...] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation...”<sup>61</sup>

**ABA Formal Op. No. 06-442, Review and Use of Metadata:** This formal opinion concluded that a lawyer “is free to inspect metadata, even if it contains confidential information, without contacting the opposing lawyer. The opinion suggests that lawyers should employ “scrubbing” programs or other methods to prevent disclosure to an opponent.”<sup>62</sup>

**Analysis:** The lawyer in the above scenario should be concerned about “metadata,” the data embedded in an electronic document that is not readily visible or available to the reader. Using appropriate software, a recipient of the e-mailed document can recover this data, which may include confidential client information—information the sending lawyer thought had been deleted.

Metadata may reveal who created or worked on the document, information about prior versions of the document, and notes or comments inserted in the document during drafting or editing. The hidden text may reflect strategy, legal issues raised by lawyers, or legal advice provided by the lawyer. A lawyer who has circulated internally a document and wishes to avoid sharing related metadata with opposing counsel should “scrub” the metadata from the electronic documents using software designed for this purpose, send the document in a portable document format (PDF) or send a hard copy of the document.

The second part of the hypothetical concerns what happens when the lawyer inadvertently receives confidential information via metadata. Most, but not all, jurisdictions call on lawyers who discover potentially sensitive metadata to promptly notify the sender. A number also note that the discovery of information may be as inadvertent as the transmission. A minority of states that have issued metadata guidance for the sender do not address the receiver’s responsibilities.<sup>63</sup>

The NYS Bar, in a 2001 opinion, said that any effort to “get behind” what was readily seen in an electronically transmitted document sent from opposing counsel constitutes “an impermissible intrusion on the attorney client relationship.”<sup>64</sup>

In a 2009 opinion, Vermont characterized a prohibition as a limitation on a lawyer’s ability to “diligently and thoroughly” analyze information received from opposing counsel. A 2009 Washington State opinion gave recipient lawyers consent to view opposing counsel’s metadata but said the use of special software to dig out further information “would violate the legal rights of [third persons.]”

Model Rule 4.4 states that once a lawyer receives a document or electronically stored information, he has an obligation only to notify the sender that he has received it. State bar rules and ethics opinions vary in their conclusions on this issue. Comment 19, to Model Rule 1.6, may also be applicable:

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<sup>61</sup> ABA Model Rule 8.4.

<sup>62</sup> ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-4-42 (2011).

<sup>63</sup> Maine and Mississippi.

<sup>64</sup> NYSBA Opin. 749 (Dec. 2001).

“When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule....”<sup>65</sup>

A number of states have taken the position that “mining” for metadata in communications from opposing counsel is an unjustified intrusion into client lawyer relations.<sup>66</sup> A few jurisdictions have concluded that lawyers have an obligation to use reasonable care when transmitting documents by email to prevent the disclosure of metadata containing client confidences. Additionally, most jurisdictions require the recipient to notify the sender if the recipient reasonably concludes confidential or privileged information has been discovered. The transmittal page of an email should contain a disclaimer that provides that the communication is intended to be confidential to the person to whom it is addressed and should not be read by anyone else.

**CYBERSECURITY** -- There are increasing concerns for environmental lawyers associated with the use of cloud computing technologies such as smart phones, Web-based email and cloud based document and data storage. Law firms are increasingly the subject of cyberattacks and clients of environmental law firms are also at risk. According to the FBI's Cyber Division, law firms are becoming a common target for hackers due primarily to their role as a “man-in-the-middle” privy to large amounts of non-public information that can be used in a number of ways.

Pursuant to the August 2012 amendments to the Model Rules, lawyers now have a duty to safeguard against such attacks. Florida has recently gone a step further than the ABA and any other state by adopting a continuing legal education requirement as well. Florida Bar members now have to complete three CLE hours in an approved technology program over a three-year period.

**Model Rule 1.1 Competency:** Model Rule 1.1 Competence, requires attorneys to know what technology is necessary and how to use it. This “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>67</sup> It includes competence in selecting and using technology and requires attorneys who lack technical competence for security to consult with qualified people who do. This Rule requires

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<sup>65</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-4-42 (2011).

<sup>66</sup> New York, Alabama, Arizona and Florida have taken this position.

<sup>67</sup> ABA Model Rule 1.1 (amended August 2012).

attorneys using technology (including mobile devices, networks, technology outsourcing, and cloud computing) to take competent and reasonable measures to safeguard client data.<sup>68</sup>

**Model Rule 1.6 Confidentiality:** Model Rule 1.6 is also generally applicable: “(c) A lawyer shall make reasonable efforts to prevent the unintended disclosure of, or unauthorized access to, information relating to the representation of a client.”<sup>69</sup> Rule 1.6, comment 18, requires reasonable precautions to safeguard and preserve confidential information. The comment further provides:

“The unauthorized access to, or the inadvertent or unauthorized disclosure of confidential information does not constitute a violation of paragraph (c) above, if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining reasonableness include:

- The sensitivity of the information
- The likelihood of disclosure if additional safeguards
- The difficulty of implementing the safeguards...”

A client may require the lawyer to implement special security measures. Also, a client may give informed consent to forgo security measures that would otherwise be required.”

**Rule 1.6, Comment [19]** provides that “Special circumstances, however, may warrant special precautions.”<sup>70</sup>

**Model Rule 5.3 (Duty to Supervise Non lawyer Assistants)** was also amended to expanded and requires attorneys to employ “reasonable safeguards...to insure that non-lawyers inside and outside a law firm provide services in compliance with attorneys’ duty of confidentiality.”<sup>71</sup>

**CONCLUSION** -- Ethical considerations for the environmental lawyer are critical. Environmental lawyers should keep abreast of revisions to the Model Rules that are promulgated in any jurisdiction in which they practice. When confronted with an ethical dilemma, lawyers must use their best judgment to evaluate their particular situation in light of the relevant ethical rules, bar association opinions, and case law.

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<sup>68</sup> See David Ries, *Safeguarding Confidential Information*, ABA SEER, March 20, 2014.

<sup>69</sup> ABA Model Rule 1.6 (c) (amended August 2013).

<sup>70</sup> ABA Model Rule 1.6, comment 19 (amended August 2013).

<sup>71</sup> ABA Model Rule 5.3 (amended August 2012).