



Ethics Committee Newsletter

Vol. 3, No. 1

April 2003

MESSAGE FROM THE CHAIR

Susan Ponce
Halliburton
Susan.ponce@Halliburton.com

Spring has sprung and another ABA year is well underway. If you just got back from 32nd Annual Conference on Environmental Law in Keystone, Colorado (March 13-16, 2003), you are probably still talking about the snow (or lack thereof!), the food, the friends and, last but not least, another great ethics program. Sunday morning, Tom Skove led a distinguished panel of experts as they explored the out-of-this-world ethics issues that can surround a complex transaction among publicly held companies. See Tom's article at page 3, highlighting the ethics rules and issues featured in the program.

If you missed Keystone, mark your calendar to head east in October for the 11th Section Fall Meeting in Washington, D.C., Oct. 8-12, 2003. The Ethics Committee is working closely with the Environmental Transactions, Audits and Brownfields Committee, the In-House Counsel Committee and the Rapid Response Committee to develop a program entitled "My Big Fat Conflict of Interest." Program planning is well underway, with panelists, to be named later, clamoring to "break some china" as they tackle the hard questions surrounding

materiality and disclosure issues in light of changing ethics rules and the newly enacted Sarbanes-Oxley Act. Washington is a wonderful meeting location. During the Fall Meeting, the Ethics Committee plans to host a dinner for all First-Timers. If this will be your first Section Fall Meeting (and even if it's not!), please plan to join us one evening for a get-acquainted dinner. Details will be available as the meeting date nears.

In the meantime, the Ethics Committee has been busy developing its latest Newsletter, and tracking developments related to Sarbanes-Oxley, Ethics 2000 changes to the Model Rules and multi-jurisdictional practice. For recent ethics program materials, see the link Tom provides in his article. Also, please don't hesitate to contact me, or one of the listed committee leaders if you are interested in a more active role on the Committee. We are always looking for good ideas and helping hands. Cheers for now.

**ABA Section of Environment,
Energy, and resources**

**11th Section Fall Meeting
Washington, D.C.
October 8-12, 2003**

Save the Date!

Ethics Committee Newsletter
Vol. 3, No. 1, April 2003
Mary Ellen Ternes, Editor

In this issue:

Message from the Chair 1

Membership Outreach 2

Conflicts of Interest in Environmental Practice and the Sarbanes-Oxley Act of 2002 3

Section Calendar of Events 4

New from ABA Publishing –
Environmental Dispute Resolution: An Anthology of Practical Solutions .. 6

Ethics Committee 2002-03
Leadership 7

Ethics Committee News You Can
Use 7

New from ABA Publishing –
Issues of Legal Ethics in the Practice of Environmental Law..... 8

© 2003. American Bar Association. All rights reserved. The views expressed herein have not been approved by the ABA House of Delegates or the Board of Governors and, accordingly should not be construed as representing the policy of the ABA.

This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 750 N. Lake Shore Drive, Chicago, IL 60611.



MEMBERSHIP OUTREACH

Vicki Wright
Membership Vice-Chair
Harrison & Moberly
vwright@h-mlaw.com

By now, you should have received a letter from me, as Membership vice-chair, welcoming you to another year.

During the day-to-day course of practicing law, our ethical duties and responsibilities are an ever-present backdrop to the substantive issues we deal with on behalf of our clients. Often, those instances where we must address an “ethical” question are quickly resolved by ourselves or through mechanisms within our local networks. However, there are times when we each face substantive ethical issues that are much more complex and thought provoking.

Additionally, as the practice of law for the environmental practitioner evolves, all of us must find appropriate approaches and resolutions within the context of our professional duties that are consistent not only with our practice areas, but also with the ongoing changes in our ethical obligations.

It is the goal of the ethics committee to provide section members a resource to address the ever-changing challenges of practicing law. Should you have an issue, question or topic you would like to see addressed, please contact me, or any of the Ethics Committee vice-chairs. Certainly, feel free to contact me at any time with suggestions.

**CONFLICTS OF INTEREST IN
ENVIRONMENTAL PRACTICE AND THE
SARBANES-OXLEY ACT OF 2002**

Thomas M. Skove
Public Service Vice-Chair
Roetzel & Andress, Cleveland, Ohio
tskove@ralaw.com

**Ethics Session at the 32nd Annual
Conference on Environmental Law
Keystone, Colorado – March 13-16, 2003**

On March 16, 2003, the Section's Ethics Committee presented a hypothetical titled "On the Far Side of the Moon" at the 32nd Annual Conference on Environmental Law in Keystone, Colorado. The hypo concerned the adventures of Adrienne Fitch, in-house counsel at the Empire Strikes Mining Co., Larry Able, the company's outside environmental counsel, and Frank Numero, the company's auditor.

The panel consisted of former in-house counsel Fern Fleischer Daves of Sedgwick Detert Moran & Arnold (Newark, New Jersey); David Bell, senior counsel at BP (Chicago, Illinois); Kristina Woods, senior counsel at Ashland Inc. (Dublin, Ohio); Gary Prascher of PricewaterhouseCoopers (Houston, Texas); Alan Gates of Mitchell, Williams, Selig, Gates & Woodyard (Little Rock, Arkansas); and Peter Nadel of Gorsuch Kirgis (Denver, Colorado).

The writer, who also is a former in-house counsel, began with a presentation on the Sarbanes-Oxley Act of 2002 (Pub L. No. 107-204). Under Sections 302, 404 and 906, CEOs and CFOs of publicly-traded companies must set up internal disclosure systems in order to ensure that the company's financial and management, discussion and analysis (MD&A) reports to shareholders comply with Securities and Exchange Commission (SEC) law. In the year-end annual report, the

company's auditors have to "attest" to the system, a higher burden than an audit opinion.

Accounting firms are setting up Sec. 302 internal reporting systems so that the CEO/CFO has backup when they sign the quarterly 10 Q with the attached Sec. 906 statement. That includes a system to capture any event that might be material, such as environmental issues. There have been two quarters submitted so far (the SEC rule was final at the end of August 2002). The accountants are meeting with company "inside" counsel to identify the liability side to the reporting system (environmental, EEOC, antitrust) and outside counsel to resolve newly discovered issues.

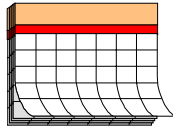
Accounting firms are also counseling companies on Sec. 404 internal control structures, usually modeled after the "Committee of Organizational Standards" or "COSO," standard, so that the companies can receive an unqualified attestation from the auditors at year-end. The first year-end Sec. 404 reports from the CEO and CFO, with the attestation attached, will be due at the end of 2003. Lawyers with experience in corporate compliance systems, such as the U.S. Sentencing Commission's guidance, and internal corporate investigations will have work in this area.

Since Sarbanes-Oxley requires that the auditors now report to the audit committee of the board, and not the CFO, the auditors themselves are working with both the company's corporate counsel, in-house counsel, and, in some cases, counsel with no previous relation to the client on issues in which regular counsel may have a conflict of interest based on prior representation. .

The general counsel – or a Qualified Legal Compliance Committee formed by the company – must respond to "evidence of material violations" presented by in-house or

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT,
ENERGY, AND RESOURCES**

Calendar of Section Events



**Roundtable on Biotechnology –
Biopharming and the Biosafety
Protocol**

May 21, 2003
St. Louis, Missouri

Wetlands Law and Regulation

May 28-30, 2003
Washington, D.C.
(Co-sponsored with ALI-ABA, for
information call 800/253-6397)

ABA Annual Meeting

August 7-13, 2003
San Francisco, California

**Conference on Federal Lands and
Natural Resources Law**

September 17-19, 2003
Seattle, Washington
(Co-sponsored with ALI-ABA, for
information call 800/253-6397)

11th Section Fall Meeting

October 8-12, 2003
Washington, D.C.

***For more information, see the Section
Web site at <http://www.abanet.org/enviro>
or contact the Section at 312/988-5724.***



outside counsel. In August 2003, all lawyers who represent public companies are required to make such reports, and the company has a legal obligation to provide an appropriate response, which may include directing an outside attorney to make a “colorable defense” in response to the violation. Sarbanes-Oxley includes federal protection for whistleblowers, which may include in-house attorneys who have lost their job as a result of their material violation report.

The panel then discussed the “up-the-ladder” problem that in-house counsel Adrienne had when she learned from Larry that Empire Strike’s “Far Side Mining” subsidiary had been violating hazardous materials transportation or “HazMat” requirements by shipping hazardous moldy product back to Earth without an adequate manifest. In the context of the brave new world of “upstream certifications” to the CEO and CFO required by Sec. 302 and Sec. 404 of Sarbanes-Oxley, we focused on Larry’s disclosure to Frank without complying with the ABA’s Statement of Policy Regarding Lawyers’ Responses to Auditors’ Requests for Information.

As for direct conflicts of interest, we identified Larry’s representation of the Far Sides’ former parent before the company was sold to Empire. The sale agreement provided for an indemnity. The panel agreed that, in general, once Larry learned of facts that could trigger the indemnity, he needed to withdraw from representation of either party. Alan Gates advised that the ABA Model Rules required that Larry provide full disclosure of the subject of his past representation for Far Side’s old parent and obtain informed consent from Far Side’s new parent Empire Strikes, but that in the event of an actual conflict, he needed to withdraw.

The panel and the audience discussed whether Adrienne Fitch not only has to advise her client as to what the environmental issues

are, but also whether she had to help them wrestle with whether HazMat violations were “material.” One question of particular interest was whether she or Larry needed to follow-up to see what the company did if either one reported the problem as a material violation under the SEC’s “up the ladder” reporting obligation under its new attorney ethics rules, mandated by Sec. 307 of Sarbanes-Oxley, and promulgated on Jan. 29, 2003 at 17 CFR 205.

Assuming the mold issue is a violation of law, and further that it could result in material fines, penalties and costs, the panel also discussed whether a “material violation” under an environmental statute would be a “material violation” subject to Rule 205 reporting. If we assumed that potential fines, penalties and costs are unknown, but the violation is as yet not detected or reported to EPA, and the agency has never imposed substantial fines – despite their authority to do so – is it still material, or does the SEC’s definition of materiality necessarily include only those violations with likely adverse financial consequences?

For example, can an improperly certified Title V compliance report by an officer, for which the “lunar” EPA has never imposed a fine – although it could – be a breach of a fiduciary duty, and therefore Adrienne must make a disclosure to Empire Strikes’ general counsel? If non-compliance with the Clean Air Act is similar to violation of a securities law, doesn’t she have to evaluate the general counsel’s response, and if not satisfied, bring the issue up with the audit committee of the Board?

We also discussed whether Empire Strikes would or should recognize the inherent conflicts of interest in Adrienne’s position and should put a more “system” and less “staff oriented” corporate reporting structure in place. Gary Prascher reported that he believes that Sec. 302 and Sec. 906

certifications will fundamentally change corporate internal reporting structures and procedures.

We talked about problems Adrienne will face if she chooses to both escalate the issue and counsel the affected employees. The in-house counsel on our panel discussed the need to preserve the goodwill and relations of the company’s employees in any internal investigation, but emphasized that the employees potentially involved in the violation need to be told that in-house counsel represented the entity, and not its constituents.

Environmental lawyers often learn of potential liabilities beyond the strict scope of our representation. Those potential liabilities may become apparent from our own application of environmental law to the facts as well as another professional’s judgment of the impact of those facts – such as an accountant in regard to potential accounting treatment, or an environmental scientist’s assessment of potential harm or remedial options.

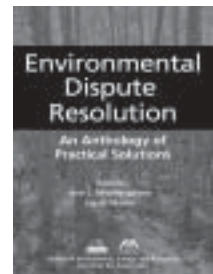
Finally, the panel discussed to what extent Larry had to apply his legal knowledge of the import of facts he overheard from Far Sides’ employees. While we did not resolve the issue, we generally concluded that Larry would have a difficult time claiming he “knew nothing” under Rule 205.

For additional material that bears on these issues, go to the Ethics Committee of the ABA’s Section of Environment, Energy, and Resource’s Web site, at <http://www.abanet.org/enviro/committees/ethics/home.html>, and follow the links under the Section’s Fall Meeting Ethics Panel Materials Online.

New from ABA Publishing and The Section of Environment, Energy, and Resources

Environmental Dispute Resolution: An Anthology of Practical Solutions **Ann L. MacNaughton and Jay G. Martin, editors**

Environmental Dispute Resolution: An Anthology of Practical Solutions provides comprehensive and thoughtful treatment of the topic for the serious student and also highly practical guidance in specific substantive contexts to those who may wish to focus on one or a few of its chapters. This useful handbook provides a toolkit of diagnostics, systems, strategies, and methodologies proven effective in diverse substantive contexts. It can be read in order, or in any order, or chapters can stand alone for the reader with a particular substantive or procedural focus. The information in this book will be invaluable to anyone involved with environmental risk management, environmental management systems, environmental dispute resolution, or sustainable development system design and implementation.



Summary of Contents

- Environmental Conflict Management and Dispute Resolution: A Framework for Analysis
- Moving Beyond the Familiar Rules: The Challenges of Alternative Dispute Resolution
- Advantages of Using Mediation and Arbitration to Settle Environmental Disputes
- Mediating with an Environmental Enforcement Agency
- Effective Settlement Strategies in Public Disputes
- Public Access to EDR Processes: US and UK Trends Toward a Common Approach
- Effective Settlement Advocacy in Mass Tort Disputes
- Resolving Superfund Cost Recovery Disputes Outside the Courtroom
- Effective Settlement Advocacy in Environmental Insurance Coverage Disputes
- Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?
- Ethical Issues in Environmental Alternative Dispute Resolution Processes
- Managing Environmental Conflict and Disputes for Improved EDR Results

2002, 6 x 9 , paper , 250 pages, Product Code: 5350090, Price:\$89.95 Section of Environment, Energy, and Resources Member; \$99.95 Regular

**TO ORDER ABA BOOKS, CALL 1-800-285-2221 OR
VISIT THE ABA PUBLISHING WEB SITE AT
WWW.ABABOOKS.ORG/ENVIROLAW.HTML/.
QUESTIONS? E-MAIL: SERVICE@ABANET.ORG**

**ETHICS COMMITTEE
2002-03 LEADERSHIP**

You are invited to contact any of the leaders of the Ethics Committee to discuss Committee activities or to become more active in the Committee.

Chair – Susan Ponce, Halliburton,
susanponce@halliburton.com

Vice-Chair, The Year in Review
Van Kirk McCombs, Burge & Wettermark,
vkmccombs@bwjax.com

Vice-Chair, Newsletter
Mary Ellen Ternes, McAfee & Taft,
Maryellen.ternes@mcafeetaft.com

Vice-Chair, Membership
Vicki J. Wright, Harrison & Moberly,
vwright@h-mlaw.com

Vice-Chair, Programs
Arden E. Shenker, Shenker & Bonaparte,
ashenker@ashenkeresq.com

Vice-Chair, Public Service
Thomas M. Skove, Roetzel & Andress,
tskove@ralaw.com
Peter Sly, Peter_Sly@msn.com

Vice-Chair, Technology
Thomas M. Skove, Roetzel & Andress,
tskove@ralaw.com

Additional Vice-Chairs
Bonnie Allyn Barnett, Drinker, Biddle &
Reath, bonnie.barnett@dbr.com

Anthony John Cotter, Orange County
Attorney's Office, anthony.cotter@ocfl.net

Cathy Powell, Larson King,
cpowell@larsonking.com

ETHICS COMMITTEE

NEWS YOU CAN USE

Committee Web Page:

[http://www.abanet.org/enviro/
committees/ethics/home.html](http://www.abanet.org/enviro/committees/ethics/home.html)

Committee Newsletters:

[http://www.abanet.org/enviro/
committees/ethics/newsletter/home.html](http://www.abanet.org/enviro/committees/ethics/newsletter/home.html)

Committee List Serve:

environ-ethics@mail.abanet.org

**ETHICS COMMITTEE
NEWSLETTER OPPORTUNITIES**

Like to Write? Like to Edit?

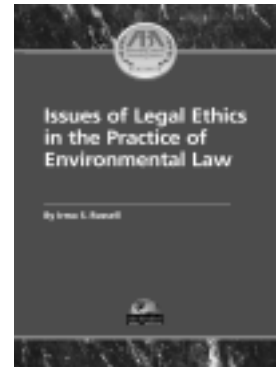
The Ethics Committee welcomes the participation of members who are interested in preparing this Newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact Mary Ellen Ternes at:

Mary Ellen Ternes
McAfee & Taft
Two Leadership Square, 10th Floor
211 North Robinson
Oklahoma City, OK 73102-7103
Phone: 405/552-2303
Fax: 405/228-7303
maryellen.ternes@mcafeetaft.com

New from ABA Publishing and The Section of Environment, Energy, and Resources

Issues of Legal Ethics in the Practice of Environmental Law by Irma S. Russell

This new book is an essential guide for every environmental lawyer on representing industrial clients, government agencies, individuals, and public interest groups. It focuses primarily on the rules of ethics that raise significant concerns for the environmental practitioner. A proactive approach to ethics helps lawyers avoid problems by making reasoned decisions before ethical problems arise in urgent or complicated context. This book helps you anticipate and analyze these difficult ethics issues. This book also examines the American Bar Association's Model Rules of Professional Conduct (Model Rules), judicial decisions, formal and informal ABA Opinions, and opinions of state boards of professional responsibility. Contents Include:



- Regulation of Lawyers
- The Duty of Competence and the Lawyer's Duty of Diligence
- The Lawyer-Client Relationship
- Confidentiality
- Conflicts Concerns in Environmental Law
- Imputed Conflicts
- Duty of Candor
- The Lawyer's Duties to Non-Clients
- Alternative Dispute Resolution
- The Anti-Contact Rule
- Multi-Disciplinary Practice
- Multijurisdictional Practice
- Pro Bono Representations
- Lawyer Advertising
- Lawyer's Fees
- The Lawyer's Role in Working with Consultants
- The Lawyer Role in Working in Use of the Media
- Termination and Withdrawal from Representation

2003, 6 X 9, 480 pages

Product Code: 5350097

Price: Section of Environment, Energy, and Resources member \$64.95; Regular \$79.95

**TO ORDER ABA BOOKS, CALL 1-800-285-221 OR VISIT THE ABA PUBLISHING
WEB SITE AT WWW.ABABOOKS.ORG/ENVIROLAW.HTML/.
QUESTIONS? E-MAIL: SERVICE@ABANET.ORG**