



# Ethics Committee Newsletter

Vol. 4, No. 1

February 2004

## MESSAGE FROM THE CHAIR

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As we begin a new year we can reflect on the significant changes in legal ethics that likely impact all Section members, either directly or indirectly.

The Sarbanes-Oxley Act and the Final Promulgation of Regulations and Guidance governing Sarbanes-Oxley has had a direct impact on attorneys working for or representing publicly traded companies. This issue is further explored in this newsletter. Moreover, it is predicted that the compliance requirements conceptually contained in Sarbanes-Oxley will become a norm or standard in private and closely held companies as well. For practitioners of environmental, energy or resources law, the preexisting difficulties in assessing the nature and extent of critical issues now become even more complicated. The multidimensional complexities attorneys were previously sorting through based upon legal precedent are now expressly governed by regulatory requirements which require an evaluation of the "material effect" of the "issue" we face for our clients for whom Sarbanes-Oxley applies.

Significantly, in addition to Sarbanes-Oxley, the American Bar Association House of Delegates voted to approve amendments to the Model Rules of Professional Conduct Rules 1.6 and 1.13. As these revised rules are adopted, practitioners will be required to determine whether or not a particular circumstance may cause a "substantial injury" to the organization. So, even if Sarbanes-Oxley does not apply to a particular client, the revised 1.6 and 1.13 may be applicable. I challenge you to review these revised rules which can be viewed at <http://www.abanet.org/cpr> in order to form your own opinion as to the impact of these revisions in your practice and clients.

We are in the midst of significant shifts in the laws and rules governing the practice of law. Certainly, the practice of environmental, energy and resources law has been evolving in its complexity. As always, we must be armed with resources and knowledge; both of which are indispensable to the practice of law.

ABA Section of Environment,  
Energy, and Resources  
33rd Annual Conference on  
Environmental Law  
March 11-14, 2004  
*Save the Date!*

**Ethics Committee Newsletter**  
**Vol. 4, No. 1, February 2004**  
**Mary Ellen Ternes, Editor**

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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.



## Upcoming Events and a Call for Questions

The Ethics Committee has calendared the following events for 2004:

- On March 14, 2004 at the 33rd Annual Conference on Environmental Law in Keystone, Colorado, the Ethics Committee will present a “comparison and contrast” of various professionals involved in environmental matters highlighting how each professional resolves their ethical obligations and duties (further details below).
- On May 7, 2004 the committee will present a session at the program Eastern Water Resources: Law, Policy and Technology which will explore conflicts of interest amongst government attorneys and the issue of “who’s the client?” at a Federal Advisory Committee Act (FACA) proceeding.
- A quick teleconference on June 15, 2004 will discuss the latest developments as to MJP and how these changes will impact the practice of environmental law. Stay tuned for registration information.

*If you have a question or topic you would like to be discussed on this teleconference, please email the question/topic to [tskove@ralaw.com](mailto:tskove@ralaw.com) so that the panel can be presented with your request.*

The committee will close the year with the 12th Section Fall Meeting in San Antonio, the topic to be announced.

## ETHICS AT KEYSTONE

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**Mary Ellen Ternes**  
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Arden Shenker, Vicki Wright and Tom Skove have put together another great ethics panel session for the 33rd Annual Conference on Environmental Law in Keystone, Colorado, guaranteed to roust everyone early after a great Saturday night and keep them off the slopes for the requisite two hours (always the challenge for the Keystone Ethics session, which always begins at 7:45 a.m. on Sunday morning). This year's session is entitled, *Professionalism Intertwined: A Comparative Evaluation*.

Accountants, engineers, environmental consultants and lawyers have different views of their ethical responsibilities. How do they mesh? Where do they conflict? Practitioners, regulators, consultants, professionals interface regularly and increasingly. They may have the same client, whose perspective on receiving or giving advice may or should not be the same, in the interaction with professionals providing advice. This kind of multi-disciplinary analysis should be particularly illuminating for those who must deal with it day by day, without recognizing perhaps that there are different constraints on different advisors. This session will discuss ethical parallels and divergences, from the environmental perspectives of a practitioner, an accountant, an engineer/consultant, a lobbyist and an academic.

Vicki Wright is moderating and the panel will include: Susan Shapiro, American Bar Foundation, Chicago, Illinois; Lee E. Miller, Burns, Figa & Will, P.C., Englewood, Colorado; Jeffrey Teitel, Deloitte & Touche, New York, New York; John Barkett, Shook, Hardy & Bacon, Miami, Florida; and Steve Washburn, Environ.

## BOOK REVIEW: ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW

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Irma S. Russell, a past chair of the Committee has written a book, *Issues of Legal Ethics in the Practice of Environmental Law*. This is the definitive work for the field, comprehensive, authoritative, up to date – and readable, too. It is available from ABA Publishing.

The chapters on Confidentiality and Conflicts (numbers 4-6) are especially timely and rich with variations on the themes. Subsequent revisions of the work no doubt will expand the chapters on working with consultants and the media (numbers 16 and 17), as these issues can always be given further attention. The current chapter on the duty of competence (number 2) reminds us that competence is a “given” for environmental lawyers!

The book is well-indexed, with a helpful table of cases and a glossary followed by an acronym list. A particularly useful section, Appendix B, lists 10 frequently asked questions. They are the stuff of which many a CLE could be made.

### ETHICS COMMITTEE

#### Committee Web Page:

<http://www.abanet.org/enviro/committees/ethics/home.html>

#### Committee Newsletters:

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**CONFLICTS OF INTEREST FOR  
ENVIRONMENTAL LAWYERS:  
THE 2002 AND 2003  
ABA MODEL RULE REVISIONS**

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Lawyers have to struggle – with their egos when they’ve got the work and with their soul when they don’t – to meet budgets. Anything that stands in the way of the next notch in the billable hour stick is looked upon with hostility.

Conflict of interest rules are a bit like meeting the devil: you know you’ll never be the same after that first encounter, and no matter how hard you try, you’ll never get him entirely out of your sight. But the rules exist for a good reason: like Beelzebub, they keep you going right into the ditch as the proverbial stick drives you forward one tenth of an hour at a time. We also know we can be too smart for our own good, and blind to the moral consciousness from which the duty of loyalty is derived.

### **ABA Model Rule Revisions**

In March 2002, the ABA formed a Task Force on Corporate Responsibility in light of the apparent collapse of corporate governance standards based on the Enron and Worldcom debacles.

The Task Force was not concerned with the \$150 fee that that idiot associate accepted and that is keeping you from filling your billable hour quote for all eternity. In fact, just the month before the ABA had adopted the 2002 Revisions that dealt in several small, but noteworthy ways, with conflicts, as discussed in the second half of this article.

In 2003, the ABA ultimately adopted the Task Force’s recommendations to give lawyers

broader latitude to climb the corporate ladder when a corporate employee misbehaves and refuses to get right with the law.

That the ABA did so – essentially reversing its position when a similar amendment was proposed as part of the 2002 Revisions – argues that the profession is re-embracing, and even extending, the almost feudal concept of loyalty. If Oliver Wendell Holmes Jr.’s philosophy that the best test of truth is the power of the thought to get itself accepted in the competition of the market, then loyalty has never been stronger.

To my mind loyalty is loyalty, and whether it is loyalty to one’s client or to compliance with conformity to the law ultimately makes little difference. Protection of loyalty from conflicts shines just as brightly in the constellation of values at the ABA even if the ultimate test is to rat on your client and bite the hand that feeds you. While the 2003 revisions came about several months after the SEC’s own Sarbanes-Oxley “up the ladder” disclosure rule of January 2003, review of the extensive comments to the proposed revisions is evidence that it was not a value easily embraced.

### **Why Read the 2002 Revisions to Conflict Rule?**

Neither the 2002 revision to Rule 1.7 nor the 2003 revisions to Rule 1.6 (Confidentiality of Information) or Rule 1.13 (Organization as Client) have any operative effect until adopted by state judiciaries. However, as Irma Russell says in her recent book, “Issues of Legal Ethics in the Practice of Environmental Law,” “the lawyer should be wary of allowing his conscience to trump rules of professional conduct. The strong preference should be to comply with the rule.” And that means read the latest pronouncements.

John Barkett similarly writes in “A Baker’s Dozen: Reasons Why Florida Lawyers Should Read the 2003 Model Rules of Professional Conduct:” “The American Bar Association’s 2002 Model Rules of Professional Conduct may not represent a major revision in the Rules of Professional Conduct in the minds of some, but changes, indeed, there are, and the wary and watchful will be well served by studying them.”

### **Revised Rule 1.7: Big Petro**

Let’s see how the revisions play out from the point of view of the lawyer who has a chance to represent a dream client. As summarized by Irma Russell, comment [2] to revised Rule 1.7 sets forth a five-step process to follow to resolve (*i.e.*, cure) the conflict:

After noting the existence of a potential conflict (the first step), the lawyer must gather information about the proffered employment (the second step) and determine whether the representation will adversely affect the current client (step three). If the lawyer’s decision in step three is that the representation will not adversely affect the current client, the lawyer must consult (step four) with the current and potential clients, taking care to preserve the confidentiality of each and to adequately inform the clients involved of the potential for adverse consequences from the conflict. Finally, to accept the potential client’s representation and retain the current client, the lawyer must obtain the waiver and consent of each of the clients after the consultation (step five).

Let’s assume that dream client Big Petro and Ma & Pa Gas haven’t sued each other and that the two-year associate hasn’t been given any confidential information that relates to the potential Big Petro-Ma & Pa Gas dispute. Before the 2002 revisions, the subjective test

employed by the lawyer in step three (“does it really matter?”) tended to blend with the objective test of step five (“we agree to waive the conflict”).

The 2002 revisions strengthened the objective test of client consent by introducing the twin concepts of “informed consent” and “confirmed in writing.” “Informed” and “confirmed” – no more guessing seems to be the basic tact, with informed requiring the lawyer to explain the risks and reasonable alternatives to dual representation. “Confirmed” means that the informed consent must be evidenced by a writing. (Model Rule 1.0(b).

Note, however, that you do not have to get Big Petro and Ma & Pa Gas to actually produce or sign a letter. The writing could be in the form of an e-mail that you write yourself and send to the current and prospective clients.

### **Revised Rule 1.7: Ma & Pa Gas**

Let’s reverse the potential and current client roles, and this time assume that Ma & Pa Gas wants to be the new client. What if Big Petro has set aside \$1 million dollars for joint advertising for distributors like Ma & Pa Gas, and Ma & Pa simply want help putting together their claim for their share? Sure, your firm represents both parties, although in unrelated matters, but is their “concurrent conflict of interest,” the new term introduced by Rule 1.7?

Rule 1.7 defines a concurrent conflict, in part, as one that is “directly adverse.” While the assertion of a claim by one client against another is one thing (Rule 1.7(b)(3) and common practice holds that those are real, unwaivable conflicts) there are other situations in which no adversity is apparent. For example, not every permit applicant is directly adverse to the issuing agency, in the same way that loan applicants are not, per se, adverse to their lenders.

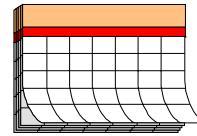
If the automatic default to potential client relationships was to adversity, lawyers would probably need conflict waivers for almost any client. Moreover, can't Big Petro be presumed to know who represents them, and to which of their distributors they are adverse? As to Ma & Pa Gas, you owe them an account of your firm's representation of Big Petro, so that they know and consent in advance to your inability to sue Big Petro should the relation turn sour.

Of course, obvious adversity is not the only consideration. For example, John Barkett notes that new comment [24] states that a conflict of interest will exist "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; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client."

Ethical considerations are inherently fact-driven, so that questions will not likely be clarified for many years to come. For the practicing lawyer, what's important is that the Model Rules put a high premium on loyalty – whether to clients or the lawful action – and that lawyers who rely too heavily on their intuition and ability to talk themselves out of seeing a conflict had better check their thought process by studying these latest templates after they've reviewed their own state ethical rules.

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

### ***Calendar of Section Events***



#### **22nd Annual Water Law Conference**

February 19-20, 2004  
San Diego, California

#### **33rd Annual Conference on Environmental Law**

March 11-14, 2004  
Keystone, Colorado

#### **Sixth Annual Dispute Resolution Conference**

April 15-17, 2004  
New York, New York  
(Co-sponsored with the ABA Section of  
Dispute Resolution, for information call  
202/662-1690)

#### **Eastern Water Resources: Law, Policy and Technology**

May 6-7, 2004  
Hollywood, Florida

#### **ABA Annual Meeting**

August 5-11, 2004  
Atlanta, Georgia

#### **12th Section Fall Meeting**

October 6-10, 2004  
San Antonio, Texas

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

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#### *The Year in Review*

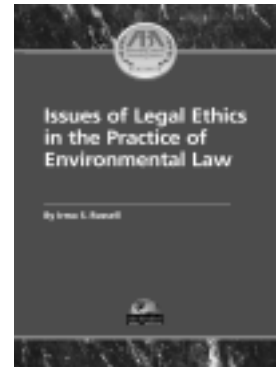
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# From ABA Publishing and The Section of Environment, Energy, and Resources

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## **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
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- The Lawyer's Role in Working with Consultants
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- 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

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