



Ethics: Going Beyond the Model Rules

2010 NACWA Developments in Clean Water Law Seminar

Speakers

Allan Gates

Mitchell, Williams, Selig, Gates & Woodyard
Little Rock, AR

Charles K. Purcell

Rodey, Dickason, Sloan, Akin & Robb
Albuquerque, NM

Moderator

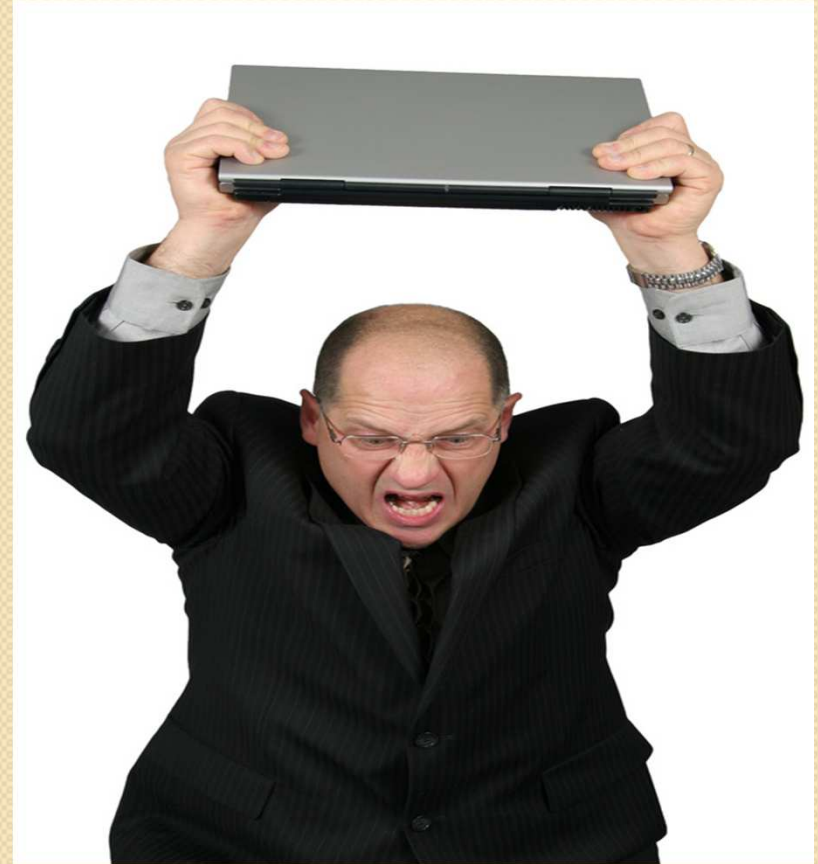
Hilary Meltzer

New York City Law Department
New York, NY

Scenario One

“No good deed goes
unpunished.”

-- Claire Boothe
Luce





Scenario One

- Metro Water Utility (MWU) sued by former employee
- MWU General Counsel (Mary) retains attorney & close friend (Hannah) to defend utility
- Plaintiff subpoenas MWU manager (Norman) to give deposition
- MWU will be represented at deposition by Hannah – Norman asks who will be representing him
- Mary offers to serve as Norman's attorney during deposition – Norman agrees



Scenario One (contd.)

- Prior to trial, plaintiffs add Norman as a defendant
- Mary and Hannah don't want postponement of trial date – agree to pay for counsel of Norman's choosing to represent him during trial
- Norman's new attorney (Sam) meets with Mary and Hannah – agrees to support MWU in keeping original trial date if utility indemnifies Norman
- If not, Sam will seek continuance and move to disqualify Mary and Hannah from case



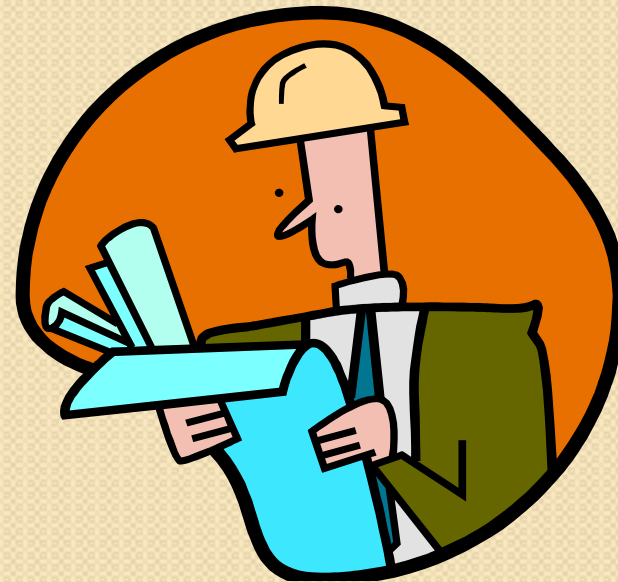
Scenario One Questions

- What should Mary and Hannah do?
- If MWU refuses to indemnify Norman, should the disqualification motion be granted?

Scenario Two

“Trust me, we’ll be
done next week.”

-- Anonymous
contractor





Scenario Two

- MWU has dispute with contractor over adequacy of work on expansion of treatment plant
- Work must be completed within 9 months to meet compliance schedule in consent decree
- MWU engages outside law firm (Locke & Lode) to sue contractor
- Contractor makes settlement offer, agrees to perform repair work if MWU 1) pays Contractor \$1.5 million, and 2) gives Contractor release if repairs are successful before compliance schedule deadline

Scenario Two (contd.)

- Locke & Lode recommends to MWU in-house counsel (Peter) that utility accept offer but also notes that SOL on claim will expire in 6 months – suggests tolling agreement
- L&L offers to prepare tolling agreement but Peter declines and uses his own form
- MWU accepts Contractor's settlement and Contractor executes tolling agreement prepared by Peter
- Contractor's repairs are unsuccessful

Scenario Two (contd.)

- L&L sends demand letter to Contractor, demanding payment of \$5 million and indemnification for MWU against penalties for not meeting consent decree compliance deadline
- Contractor sends counter-offer to L&L proposing \$500,000 payment to MWU and no indemnity
- Counter-offer also notes that time limit on suit is statute of repose, not SOL, and could not be extended with tolling agreement



Scenario Two Questions

- Does Locke & Lode now face a conflict of interest?
- Did Peter commit malpractice?

Scenario Three

“Honesty is never seen
sitting astride the fence.”

-- Lemuel K. Washburn





Scenario Three

- MWU's Environmental Director (Steve) tells MWU's outside counsel (Mary) that someone is falsifying utility's DMRs to conceal permit violations for arsenic
- Steve is concerned because he is the "responsible official" that signs DMRs
- Steve provides Mary with handwritten note from treatment plant manager to MWU's lab director



Scenario Three (contd.)

“Joe:

You need to ‘recalculate’ the arsenic and copper analytical results for the Dec. 13 and Dec. 20 samples ASAP so we do not have to report any permit violations. If you don’t get those sample results ‘right’ it may cost me my job!

If I go down, I will make sure you go down with me. Don’t forget that I still have the documents on your ‘very interesting’ travel expense reimbursement requests from WEFTEC in New Orleans!”



Scenario Three (contd.)

- Steve asks Mary if he has any personal liability exposure
- Mary tells Steve she is MWU's lawyer, not his, and advises him to retain his own counsel
- Steve agrees and asks Mary to "hang on to the note for safekeeping because it is the original and there are no copies"
- One week later Steve calls Mary, says everything is fine, and asks her to destroy the note so there is no "misleading garbage like that kicking around"



Scenario Three (contd.)

- Mary calls MWU in-house counsel (Harry) about the situation
- Harry says he is aware and directs Mary to destroy note – Mary says she is not comfortable with that
- Harry directs Mary to send the note to him and says “Don’t make any copies of the note, and don’t forget that all conversations with Steve and me regarding this are privileged. Don’t talk to anyone about this.”



Scenario Three Question

- What should Mary do?

Scenario Four

“Information is moving
through the Internets.”
-- President George W.
Bush





Scenario Four

- MWU is defendant in a tort action involving significant injury and property damage claims
- MWU General Counsel (Mary) has her paralegal (Larry) search the Internet for information on plaintiffs
- Larry discovers several plaintiffs have Facebook pages
- Mary directs Larry to “friend” the plaintiffs and all of their Facebook “friends” and gather information
- Larry is to use his real name, MWU email address, and only truthful information in the “friending” process



Scenario Four (contd.)

- Larry discovers information on two plaintiffs via Facebook that is damaging to their case
- Mary gives information to MWU litigation counsel (Willy) and explains how it was obtained
- Willy questions if he should use information in upcoming depositions
- Mary then directs MWU's IT department to search all metadata in pre-trial disclosure provided by plaintiffs



Scenario Four (contd.)

- The metadata suggests that much of the incriminating evidence found by Larry was included in early drafts of plaintiffs' pre-trial disclosures but removed from final version submitted to MWU
- Mary provides metadata to Willy, says it indicates a deliberate cover-up, and directs him to use everything in the depositions



Scenario Four Questions

- Should Willy use the Facebook information? How about the metadata?
- If Willy refuses to use the information and Mary continues to insist that it be used, must Willy withdraw from the case?

Questions?

