

SHARING COUNSEL AT MULTI-PARTY WASTE SITES:

Reducing Transaction Costs and Conflict of Interest Considerations

David B. Graham
Kaye, Scholer, Fierman, Hays & Handler
and

William S. Hood, Jr.
Senior Attorney
Ashland Chemical Company
Columbus, Ohio
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AT A TYPICAL WASTE/CLEANUP SITE, SCORES — AND SOMETIMES hundreds — of potentially responsible parties (“PRPs”) may be identified. As the cost of cleaning up waste sites escalates, both the government and the parties initially identified as having potential liability for cleanup costs under “Superfund”¹ (or the equivalent state law) have a strong financial motive to identify as many additional PRPs as possible to share the liability for cleanup costs.

Given this dilemma, all parties involved recognize that it is necessary to find a more cost-effective and predictable approach to assessing and quantifying the financial liabilities of multiple PRPs at individual waste site cleanups; counsel representing the PRPs are especially interested in incorporating mechanisms for reducing or eliminating excessive transaction costs associated with representing the PRP client into this approach. At the same time, whatever approach is adopted must nonetheless conform to applicable ethical standards. (In applying standards of ethical conduct, state bar associations and state courts will look to the standards which have been either adopted or promulgated within the state, while federal courts may apply standards which differ from the standards of the state in which the action lies.²) This article addresses several approaches that can be employed to help PRPs minimize their transaction costs at multi-party waste sites; further, the authors will address the ethical standards and considerations which may arise in the process.

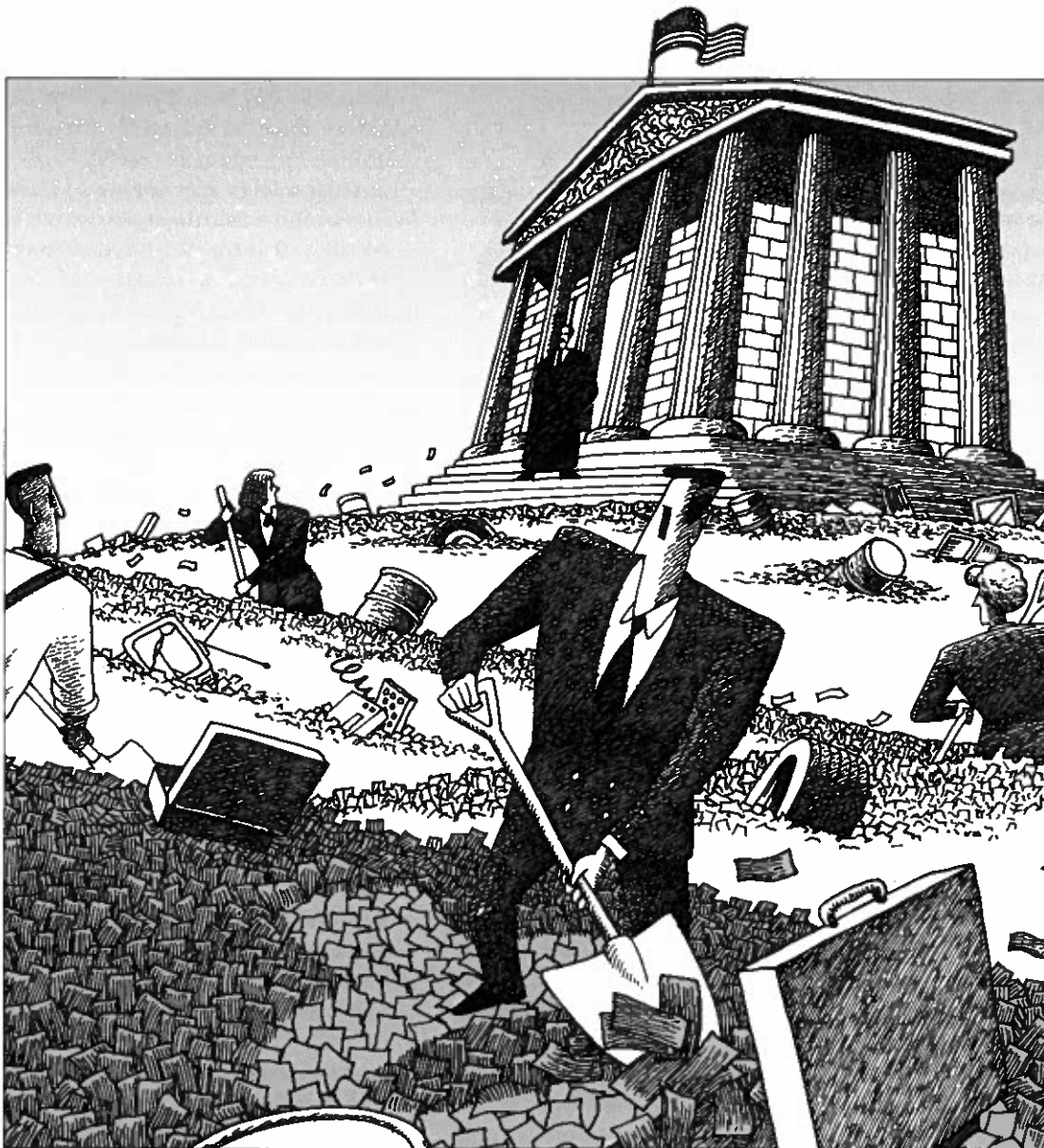
“Transaction” Costs

A complaint heard more and more frequently at CERCLA sites is that too much money is spent on non-cleanup or “transaction” costs: i.e., government administrative and enforcement costs, and PRPs’ legal and technical/consultant costs — both in-house and outside the company or municipality.³ The following analysis of options for reducing these costs is intended to give the reader an overview of the alternatives.

Consultant Transaction Costs

Consultant transaction costs break down into two basic categories: first, consultants who specialize in the study of the contaminated area are hired to determine the appropriate cleanup strategy; and second, consulting firms which are engaged to search for more PRPs, and to collect data on waste quantities and toxicity for allocation purposes. Occasionally, consultants serve as arbiters, or perhaps as mediators, as the PRPs attempt to resolve liability and allocation questions among themselves.

Generally, it does not appear that transaction costs are out of proportion to the benefits the PRPs receive from the second category of consultants. In the first category, however, the United States



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number of environmental law problems to justify hiring an in-house attorney specialist who can devote a significant amount of time to waste-site work.

Environmental Protection Agency (EPA) has recently recognized that monies are being spent unnecessarily on a "full blown" Remedial Investigation/Feasibility Study (RI/FS) for waste sites where essentially identical remedies are required because the contamination problems are so similar: for example, municipal landfills, either with or without any industrial hazardous waste.⁴

Perhaps one of the most effective methods for reducing consultant costs is for the EPA (and its counterparts in the states) to insure that the government uses different consultants to perform the RI/FS at a site and the site cleanup work (in the event the PRPs do not agree to undertake the work). By removing

this potential conflict of interest, consultants will have no incentive to recommend a "gold-plated" cleanup plan.

Greater use of fixed price bids (particularly for the expensive cleanup work), versus bids based upon time and materials may also help to reduce consultant costs.

Reducing Legal Transaction Costs

To reduce legal costs at multi-party Superfund sites, the reader should consider several options. Many companies cut costs by using their in-house counsel wherever possible, avoiding outside counsel expenses. This situation is most feasible for companies with a sufficiently large

Alternatively, a group of PRPs can engage "common counsel," which lessens each party's expenses by distributing the cost of representation over the group on a mutually agreed basis, such as per capita or in proportion to waste volume. A variation on common counsel is "liaison" or "lead counsel," or some combination of the two, if the matter is in litigation. Finally, an increasing number of PRPs are using "shared counsel." Shared counsel is employed in situations in which two or more PRPs at a multi-party waste site hire the same attorney and share the costs involved on a mutually agreeable basis. Shared counsel can also be used in a situation in which a group of PRPs

elect to use counsel already representing an individual PRP from the group; usually this decision is premised on a commonality of interests sufficiently similar among group members to justify sharing the costs of that counsel on a mutually agreeable basis.

Each of the methods for reducing legal costs noted above (except the use of a company's in-house counsel) warrants consideration of the rules stemming from applicable codes of professional conduct due the existence of actual or potential conflicts of interest among the parties. In the remainder of this article, the authors will discuss a.) the savings that can result from the use of common counsel, liaison or lead counsel, and shared counsel, and b.), how to handle the potential for conflict of interest implications arising from these relationships.

Common Counsel

a. General Concerns

"Common counsel" is usually a single counsel who represents all of the defendants sued by the EPA or the state, or all of the plaintiffs (or defendants) in a related cost recovery or contribution case against third-party defendants. Common counsel is not retained to advance the interest of any individual party or group of parties, but rather is obligated to represent the group where they have shared or common interests. Common counsel takes no position on allocation among the individual parties he or she represents, but can serve as a facilitator in an effort to help the parties reach agreement on the sharing of any potential liability.

While the use of common counsel clearly reduces legal costs at a multi-party waste site by reducing the need for individual PRP's counsel to concentrate on site problems, there are some disadvantages associated with using common counsel. The primary disadvantage is that individual PRPs often reduce their role to such an extent that common counsel can find it difficult to generate interest in



or obtain assistance from individual PRP counsel. Attendance at meetings of the group and participation in conference calls may prove sparse, making it more difficult to obtain the guidance and feedback necessary to represent the group most effectively.

b. Conflict of Interest Questions

To minimize the potential for conflict of interest problems, many multi-party waste site agreements contain a provision intended to insulate common counsel from allegations that a conflict previously existed, or has subsequently arisen, which compromises common counsel's ability to represent the group or his/her clients on other matters. One such provision the authors have seen used in a number of PRP agreements is as follows:

Waiver of Conflict of Interest: In the event that the Steering Committee retains common counsel, each Member agrees that: (1) it will not claim or assert that, based solely on said counsel's past or present representation of a Member, said counsel has a conflict of interest in performing legal services authorized by the Steering Committee and arising out of the Site, unless the Member notifies the Steering Committee of the claimed conflict within twenty (20) days of receiving notice of intent to hire said

counsel; (2) it will not claim or assert that, based solely on said counsel's representation of the Group under the terms of this Agreement, said counsel has a conflict of interest in connection with any representation of any other person or entity in a matter pending as of the date of receiving notice of intent to hire said counsel, unless the Member notifies the Steering Committee of the claimed conflict within twenty (20) days of receiving said notice; (3) it will not claim or assert that, based solely on said counsel's representation of the Group under the terms of this Agreement, said counsel has a conflict of interest in any future representation of any person or entity unless the subject matter relating to said future representation arises out of or is connected to the site and involves or could involve any facts or information obtained from the Member during the term of this agreement; (4) in the event that any conflict develops in the performance of work authorized by the Steering Committee by said counsel and the legal services authorized by any Member that has retained that counsel, the Member consents to that counsel's continued performance of the work authorized by the Steering Committee; and (5) if a Member withdraws or is removed from this Agreement or its representation by said counsel is in any way terminated, it will raise no objection to the continued representation by said counsel of all or any of the other Members in connection with legal services arising out of the site.⁵

One issue raised by the inclusion of such a provision, however, is whether the above language sufficiently addresses the conflict issues raised by the ABA Model Rules of Professional Conduct (the ethical rules adopted by three-fourths of the states). Model Rule 1.7 is the general

rule on conflict of interest. Since common counsel is hired to represent parties with similar interests, such as co-defendants or co-plaintiffs, paragraph (b) of Rule 1.7 should be reviewed:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.⁶

Thus, so long as the attorney reasonably believes that he or she can represent each client without adversely affecting the representation of another client, and each client consents after consultation, the attorney may represent multiple clients.⁷

The waiver of conflict of interest provision in the PRP agreement above appears to be sufficiently comprehensive so as to meet the various conflict questions that could arise from multi-party representation by an attorney. Certainty, however, is sometimes a difficult objective to achieve in the area of conflicts. Furthermore, to the authors' knowledge, not all matters addressed in the provision have been tested in the courts. Subparagraph (3), in particular, has proved troublesome; it is yet unclear whether a broad-based waiver of future conflicts is effective if a client of a firm proves not inclined to honor it.

The authors are unaware of any statistical information detailing how frequently common counsel are used. Readers who want more infor-

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mation on the pros and cons of common counsel arrangements may wish to contact the parties involved in cleanup sites using common counsel, including: the Operating Industries, Inc. landfill in California, the SCP Carlstadt site in New Jersey, the Buckeye Reclamation Landfill in Ohio, the French Limited site in Texas, and the GEMS Landfill in New Jersey, just to name a few.

Liaison/Lead Counsel

a. General Concerns

The roles and responsibilities of liaison and lead counsel are set forth in the *Manual for Complex Litigation*.⁸ Counsel are usually appointed by a court to such a role in order to assist the court in the administration of large multi-party cases. Magistrates have found the concept particularly useful in large Superfund cases involving scores to several hundred parties.

Liaison counsel is a particularly useful concept at waste sites involving PRPs with different interests, and perhaps different defenses. For example, the generator PRPs at a waste site normally have many interests in common (assuming they are all either direct defendants in a complaint filed by EPA or the State, or third-party defendants in a contribution or cost recovery action). Transporters usually share many of the same interests with other trans-

porters, as do owner/operators. Finally, municipalities, whether as generators or transporters, usually are deemed to share more in common with other municipalities than with private companies in either the generator or transporter category. Consequently, it is not uncommon to find the court appointing a number of liaison counsel, e.g., for the government plaintiffs, the direct defendants, the third-party plaintiffs (if different counsel is used for the two roles), the municipalities, the owner/operators (whether as direct defendants or third-party defendants), and the transporter and generator third-party defendants.

The role of liaison counsel varies by court and the manner in which the particular judge or magistrate prefers to use counsel designated for the task. Liaison counsel are expected to perform a variety of functions, including distributing pleadings and other documents to all parties in their group, maintaining a service list, managing common funds, calling meetings, and resolving scheduling conflicts.

In contrast to these administrative functions, many courts expect liaison counsel to serve also in a substantive capacity. For example, counsel are often expected to attend meetings called by the court and to speak on behalf of the members of their respective groups. This function requires liaison/lead counsel to prepare for and report on the results of such meetings to all members of their group. In order to perform this role properly, the attorney will need to engage in consensus building among the members of the group and communicate the positions of the attorneys representing those parties to the court.

b. Conflict of Interest Questions

Liaison/lead counsel at multi-party waste sites serving in the substantive role described above are sometimes paid for their services rendered from court-ordered funding contributions from all the parties in



their group. This situation is in contrast to that normally found in other types of litigation where liaison/lead counsel responsibilities are undertaken by one party's counsel whose fees continue to be paid solely by its client. This more extensive role for liaison/lead counsel in multi-party waste site cases does not, however, require liaison counsel to become an advocate and represent the similarly situated parties. Therefore, no additional waivers of conflict of interest should be required over and above those an attorney would ordinarily obtain if he were asked to represent one party in the case and, in order to do so, would need to obtain waivers from other clients of his firm involved in the same case but represented by other counsel.

Unlike common counsel (who is customarily selected by the parties in a group of plaintiffs or defendants from a firm not currently representing any of the parties in the case), liaison/lead counsel compensated from court-ordered funding by all similarly situated parties continues to represent the party(ies) who initially engaged him or her, so long as steps are taken to insure that the members of the group know when liaison/lead counsel is acting on behalf of an individual client rather than performing activities for the group. Separate billing accounts must be established and maintained in a careful manner to ensure that liaison/lead counsel's client is properly billed for any work done on the client's behalf, separate and apart from works done for all members of the group.

Shared Counsel

a. General Concerns

Shared counsel is generally defined as one counsel representing two or more parties at a multi-party waste site. The authors believe that this concept will see ever-increasing use as companies and municipalities seek ways to reduce the costs of representation in large multi-party sites both in the negotiation/settlement phase prior to litigation and after liti-



gation is initiated, assuming settlement could not be achieved.

While the use of shared counsel is cost-effective, it clearly has its limitations, i.e., shared counsel cannot take any role at the time allocation of cleanup costs between the parties occurs. Generators and transporters often decide they need individual counsel to represent their particular interests at this point, since the kind, amount and toxicity of materials will vary greatly from one party to another.⁹ Additionally, the interests of the larger users of the site are likely to be diametrically opposed to those of the so-called *de minimis* users of the site when it comes to paying for the cleanup. In-house counsel often handle the allocation effort for the client when such situations arise. The use of shared counsel is clearly less complicated and more effective when the liability of the clients is approximately the same. Conflicts are less likely to arise under these circumstances, as well.

Sometimes it is also possible to carve out a specific piece of the litigation on an ad hoc basis and use shared counsel solely on that particular point. For example, in *U.S. v. Laskin*,¹⁰ a number of companies maintained they were not liable because of the "petroleum exclusion" contained in §101(14) of CERCLA. Thus, for the limited purpose of presenting this joint defense, a large

group of companies pooled their resources on this issue, and one counsel represented all of them during that phase of the case.

At the Lone Pine Landfill, the shared counsel concept was used by PRPs preparing for and conducting negotiations with the EPA over the issue of a *de minimis* settlement by the companies whose wastes were allegedly transshipped without their knowledge from Scientific Chemical Processing's facilities to the Lone Pine Landfill. Later, these same companies shared the costs of preparing comments on EPA's Record of Decision (by one of the co-authors, who represented one of the twenty companies), and subsequently, shared the costs of challenging the proposed consent decree between the government and the settling parties (by an attorney representing another company in the group of twenty companies).

The advantages of shared counsel are numerous. First, counsel's fees and expenses are divided among several parties, more experienced counsel with specialized expertise to be retained on a more economical basis. Second, counsel can focus in greater detail on all elements of the case, which may not be the situation for an individual PRP's counsel whose resources and time is more limited.

The primary disadvantage to shared counsel is that the counsel cannot devote full time to the sole interests of one client. Further, in the allocation process, if the interests of the client group are not virtually the same, shared counsel will need to allow in-house or another outside counsel to argue individual clients' allocation interests vis-a-vis each other in order to avoid a conflict of interest.

In addition to the Picillo, Laskin, and Lone Pine sites, shared counsel have been used at such sites as the Helen Kramer Landfill in New Jersey, the Kellogg-Derring Well Field in Connecticut, the Fisher-Calo site in

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Illinois, and the Midwest Solvents Recovery site in Indiana.

b. Conflict of Interest Questions

The ABA Model Rules of Professional Conduct applicable to common counsel are equally applicable to shared counsel. The PRP agreement language designed to protect common counsel from conflict of interest situations is also useful for attorneys acting in a shared counsel role when the counsel who assumes responsibility for a particular group activity represents one of its members and other members are represented by their own counsel. If two to three parties are simply sharing the use of one counsel, a mutual understanding of the counsel's responsibilities and waivers of conflicts among and between the parties should be obtained by the counsel either through the use of individual letters or a memorandum to the parties which should be countersigned.

Conclusion

As PRPs make even greater efforts to reduce transaction costs at multi-party Superfund sites, they will likely use the mechanisms of common and shared counsel. Such arrangements can save PRPs money by reducing the use of individual outside counsel while, at the same time, enabling them to hire the best legal talent at a fraction of customary costs. Fortunately, such arrangements are consistent with the ethical guidelines for attorneys' conduct contained in the ABA Model Rules of Professional Conduct. □

Footnotes

1. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675.

2. As of March 1, 1991, 36 states have adopted versions of the ABA's Model Rules of Professional Conduct, (the "Model Rules") while other states rely on versions of the ABA's Model Code of Professional Responsibility, (the "Model Code"). Federal Courts have exercised latitude in the ethical standards which they have implemented; thus, one may wish to research beforehand which rules have been applied in the jurisdiction of the action.

3. See, Testimony of John C. Butler, 111

before the U.S. House Committee on Banking, Finance, and Urban Affairs, Subcommittee on Policy Research and Insurance, September 27, 1990; Lyons, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 Stan. Envtl. L.J. 271, 312-18 (1986-87).

4. EPA, *Streamlining the RI/FS for CERCLA Municipal Landfill Sites*, Sept. 1990, available from NITS, Doc. #PB90-274424.

5. This clause appears in PRP agreements used at several New Jersey sites.

6. The Model Rules of Professional Conduct were adopted by the House of Delegates of the American Bar Association on August 2, 1983.

7. Comment 7 to Rule 1.7 states that, "An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in position in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question . . . (C)ommon representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met." Paragraph (b) is discussed in the text.

Model Rule 1.7(a) addresses situations in which representation of one client is directly adverse to another client; e.g., an attorney cannot represent both a plaintiff and a defendant in the same action because the conflict cannot be waived. Representation of one client also would be directly adverse to another client if an attorney were representing co-defendants and one elected to file a cross-claim against the other. A waiver could not be granted by the clients in this situation unless the attorney disassociated himself from any representation concerning the cross claim.

8. Moore's Federal Practice, Vol. 1, Part 2, *Manual for Complex Litigation*, 20.22 (2d Ed. 1986).

9. In 1980, litigation was instituted by the State of Rhode Island regarding the Picillo site. To reduce costs, four of the large generators engaged shared counsel to represent them. In early 1987, when the allocation process started, one of the four companies engaged one of the co-authors as separate counsel. That company and three other defendants eventually negotiated an agreement with the state and the EPA to cleanup the site while the other three companies took the

case to judgment. See, *O'Neil v. Picillo*, 682 F.Supp. 706 (D.R.I. 1988); *aff'd*, 883 F.2d 176 (1st Cir. 1989); *cert. denied*, 110 S.Ct. 1115 (1990).

10. *U.S. v. Laskin*, Case No. C84-2035Y, (N.D. Ohio, February 27, 1989); LEXIS, Genfed Library, Dist. file.

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