



MODRALL SPERLING

L A W Y E R S

Top Ten (More or Less) Ethical Issues in the NEPA Process

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I. Introduction.

This paper addresses a range of ethical and related issues that may arise in the context of National Environmental Policy Act (“NEPA”) compliance efforts. As you will see, some of the subjects addressed have broader application, while other parts of the paper focus on agency-project proponent-public relationships, and still others are more narrowly focused on NEPA-specific issues.

Please note that this paper refers to the ABA Model Rules of Professional Conduct. As the name suggests, these are “model” rules. While most States have adopted the lion’s share of the Model Rules, each State has the opportunity to modify or re-write the ethics rules they ultimately adopt. Lawyers and others are advised to consult with the specific rules applicable in any given State or in the District of Columbia.¹

II. “In-House” Communications: Preserving the Attorney-Client Privilege.

When lawyers are actively engaged in NEPA compliance proceedings or other counseling, administrative or judicial proceedings, those lawyers must be ever vigilant to protect the confidences and secrets of their clients. While discovery is limited in NEPA judicial review litigation,² discovery is permitted in some circumstances.³ Consequently, lawyers should give consideration to the privileged nature of certain attorney-client communications. Moreover, government agency counsel may find

¹ See, e.g., Colorado Rules of Professional Conduct (2008), <http://www.cobar.org/index.cfm/ID/384/CETH/Colorado-Rules-of-Professional-Conduct/>; Utah Rules of Professional Conduct, http://www.utahbar.org/rules_ops_pols/; Wyoming Rules of Professional Conduct, http://courts.state.wy.us/CourtRules_Entities.aspx?RulesPage=AttorneysConduct.xml.

² See *Custer County Action Assn. v. Garvey*, 256 F.3d 1024, 1028, n.1 (10th Cir. 2001) (describing five limited circumstances in which courts will consider extra-record material).

³ See generally Mandelker, Daniel R., *NEPA Law and Litigation*, §§ 4.35, 4.36, 4.44 (Second Ed. 2006).

their clients on the receiving end of Freedom of Information Act (“FOIA”) requests related to NEPA compliance, and must review agency documents within the scope of such requests that potentially would include attorney-client privileged communications.

Another reason to understand the attorney-client privilege and its scope relates to Federal Rule of Evidence 502, adopted in 2007, which provides among other things for the recovery of privileged communications inadvertently disclosed in “a Federal proceeding or to a Federal office or agency.” In the event an entity or lawyer inadvertently discloses a privileged communication to a federal agency, this rule addresses whether the inadvertent disclosure actually waives the privilege and whether any inadvertently disclosed material can be recovered.

For these and other reasons, lawyers should be mindful to continue to identify and protect privileged communications during the NEPA compliance process.

A. The Lawyer’s Obligation to Protect Client Confidences.

The importance of protecting the attorney-client privilege stems, in large measure, from a lawyer’s obligation to protect the confidentiality of information obtained from clients. This obligation is embodied in ABA Model Rule of Professional Conduct Rule 1.6, titled “Confidentiality of Information,” which provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (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 and in furtherance of which the client has used or is using the lawyer’s services;
 - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

Executives, management, general counsel and other in-house lawyers working in organizations (including corporations, non-government organizations (“NGOs”), and government agencies) should be constantly vigilant concerning whether in-house communications with in-house counsel or with executives who are also lawyers would be protected from disclosure obligations in the event of litigation involving the organization. There is an ever-developing body of judicial decisions that reflect closer scrutiny of claims of attorney-client privilege, even where a communication's participants include lawyers. This part of the paper reviews some of these decisions, and provides information that corporate (and other types of organizations) counsel and senior executives and management should understand in managing their in-house communications. This may be particularly relevant to electronic communications given their common use today. In certain circumstances, the lessons arising from these decisions may also be relevant to communications with outside counsel.

B. Attorney-Client Privilege: A Primer.

Generally, while most communications are subject to disclosure or discovery in litigation, the attorney-client privileged communication is an exception to that general rule. The privilege protects **certain** communications by a client to the lawyer as well as responsive communications from the lawyer to the client. Since 1950, many courts across the country have defined the attorney-client privilege by reference to a federal district court decision from Massachusetts:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on the law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of

committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.⁴

This succinct definition is packed with important language, without much wasted verbiage. Other courts have adopted similar definitions. While the focus initially is on the original communication by the client to the lawyer in which the client seeks legal advice, the privilege also is ordinarily applied to the responsive communication:

The responsive communication from the attorney to the client is protected only to the extent that the response reveals the content of the client's prior confidential communication. Many judges, however, tend to interpret this restriction as giving protection to the attorney's advice (either regardless of what it reveals from prior communications from the client, or on the assumption that it will always disclose such confidences) and enforcing the derivative rule [giving protection to the responsive communication] only for factual communications⁵

As with *United Shoe*, this *Vioxx* opinion is a federal district court opinion. As a technical matter, like *United Shoe*, it is not binding on state or federal courts in other jurisdictions. However, if other courts find its reasoning persuasive, this opinion could be influential well beyond the State of Louisiana. This opinion is discussed in further detail in this article because it provides an analysis of many of the issues courts grapple with in considering attorney-client communications and claims of privilege.

The attorney-client privilege applies to protect corporations as clients, of course.⁶ In the corporate setting, the privilege “protects communications between those employees and corporate legal counsel on matters within the scope of their corporate responsibilities, as well as communications between corporate employees in which prior advice received is being transmitted to those who have a need to know in the scope of their corporate responsibilities.”⁷ The discussion here should be equally applicable to an NGO or governmental agency.

⁴ *United States v. United Shoe Machinery Corp.*, 89 F.Supp. 357, 358-59 (D. Mass. 1950).

⁵ *In re Vioxx Products Liability Litigation*, 501 F.Supp.2d 789, 795 (E.D. La. 2007) (“*Vioxx*”). What this means is that there is some risks that a court may limit the privilege that protects a lawyer's legal advice just to those portions of the legal analysis that discusses confidential information that the client provided to the lawyer. Practically, in many circumstances, such a narrow application of the privilege would result in a heavily redacted document that may not make much sense to the reader.

⁶ *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677 (1981).

⁷ *Vioxx*, 501 F.Supp.2d at 796.

C. Is the Communication's Primary Purpose for Legal Advice? Is the Communication Privileged if Legal and Business Advice are Combined?

As noted in the 1950 *United Shoe* decision, for the privilege to apply, the **primary purpose** of the communication must be for the purpose of securing or giving legal advice or assistance. This sounds simple enough, but challenges arise:

It is often difficult to apply the attorney-client privilege in the corporate context to communications between in-house corporate counsel and those who personify the corporate entity because modern corporate counsel have become involved in all facets of the enterprises for which they work. As a consequence, in-house legal counsel participates in and renders decisions about business, technical, scientific, public relations, and advertising issues, as well as purely legal issues.⁸

“Many courts fear that businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions and funneling documents through counsel As a result, courts require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege’s protection.”⁹

Consequently, business advice provided by a lawyer that is unrelated to legal advice may not be found to be subject to the attorney-client privilege.¹⁰ Therefore, senior officials, executives and management should be cognizant that if the organization utilizes the non-legal expertise of counsel, communications relating to such communications likely will not be privileged and protected from disclosure unless the primary purpose of the communication is to obtain legal advice. In addition, in the event of litigation, where lawyers are involved in more than just providing legal advice, there may be additional work required in separating privileged from non-privileged communications as part of the discovery process or defending claims of privilege.

In the event a client requests advice or where counsel determines it necessary to include “business” (non-legal) advice in communications providing legal advice, the entire communication may be still subject to the attorney-client privilege if the court determines that the business advice is inextricably linked with the legal advice. So, according to the federal district court in Louisiana, “correct[ing] grammatical mistakes and propos[ing] alternative language that will best serve the client’s interests” is permissible and protected under the privilege in the context of principally providing legal advice. Again, “[t]he test for the application of the

⁸ *Vioxx*, 501 F.Supp.2d at 797.

⁹ Rice, 1 Attorney-Client Privilege in the United States, § 7:2, pp. 24-25 (Thomson West 2d ed. 1999), *quoted in Vioxx*, 501 F.Supp.2d at 797.

¹⁰ *See In re CFS-Related Securities*, 223 F.R.D. 631 (N.D. Okla. 2004).

attorney-client privilege to communications with legal counsel in which a mixture of services are sought is whether counsel was participating in the communications primarily for the purpose of rendering legal advice or assistance. * * * The lawyer's role as a lawyer must be primary to her participation."¹¹

These circumstances cause the courts to be vigilant in determining the primary or authentic purpose of communications with counsel. It is important to remember that the burden of establishing the existence of the privilege lies with the organization claiming the privilege. In this context, the organization must be prepared to demonstrate that the primary purpose of communications sought to be protected was for the purpose of securing or receiving legal advice or legal services.

D. Does being a Heavily Regulated Entity Change the Privilege Analysis?

Many companies operate in areas or industries that are subject to pervasive governmental regulation. Thus, the question arises whether the existence of such pervasive regulation broadens the appropriate role of the lawyer and changes the scope of the attorney-client privilege. According to United States District Judge Fallon in his opinion in *Vioxx*:

Without question, the pervasive nature of governmental regulation is a factor that must be taken into account when assessing whether the work of the in-house attorneys in the drug industry constitutes legal advice, but those drug companies cannot reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department, or in which the legal department is involved, will automatically be protected by the attorney-client privilege. * * *

The fact that the industry is so pervasively regulated does not justify dispensing with each company's burden of persuasion on the elements of the attorney-client privilege. Indeed, many of the documents that we examined appeared to reflect far more technical, scientific, promotional, marketing, and general editorial input from lawyers than would be expected of a legal department primarily concerned about legal advice and assistance. . . . it was Merck's burden to successfully establish [the privilege] on a document-by-document basis.¹²

As the Court noted, one of the key elements of the burden of persuasion is to demonstrate the "primacy of services being rendered was . . . legal in nature." *Id.* at 801. In many cases, Merck ultimately was able to support its position.

¹¹ *Vioxx*, 501 F.Supp.2d at 798.

¹² 501 F.Supp.2d at 800-801.

E. What's an Organization To Do?: Practical Pointers.

Generalities are dangerous in this context, and there may be no clear, safe harbor until there is further judicial discussion of the matters addressed here. But, here are a few points to consider:

- The client and lawyer each can help support a subsequent claim of privilege by using clear language in their communications that the communications relate to requests for delivery of legal services or advice.
 - For example, the client might say: “I would like your legal advice concerning . . .” or, “Please provide a legal opinion on”
 - And, for the lawyer: “In response to your request for legal advice”
 - These phrases are not required to support a privilege claim, but their use may assist the court in determining whether the primary purpose of the communication was for legal advice.
- Labeling communications as privileged and confidential, when judiciously applied, can help demonstrate that the client has an expectation of confidentiality and intends the communication to be privileged. Two caveats should be considered, however: First, if one labels every communication that includes a lawyer as a recipient or copyee among a series of recipients, the privilege designation may undermine the benefit of the label on communications that really are privileged. Second, if one sends a communication that really is privileged, but forgets to label it as such, the absence of the label could be argued to reflect an intent that the communication was not intended to be confidential and privileged.
- Memoranda or e-mails addressed only to a lawyer requesting legal advice concerning an identifiable legal question should be privileged.
 - Attachments to such communications, where the author is seeking legal advice following the lawyer’s review of the attachment, should also be privileged.
 - If the attachment, however, is a technical paper (e.g., a report from a hydrologist), promotional or public relations material, or similar material not perceived by the court as being related to traditional legal services, a court may require the privilege claimant some specific information to meet the burden of establishing that the communication is primarily for legal advice.

- The lawyer's response to a request for legal advice - and which provides legal advice - should be privileged. This is true even if the lawyer also includes editorial and grammatical revisions, together with her legal advice. The greater the extent of non-legal advice that is included, the greater the risk that a court would determine the communication not to be subject to the attorney-client privilege.
- A lawyer's comments on legal instruments, such as contracts and patent applications, are more likely to be considered privileged than a lawyer's comments on technical or scientific reports or studies.
- The preparation of a response to a governmental agency's warning or allegation of a regulatory violation may be more likely to be considered like the preparation of a pleading, and therefore more prone to a finding of privilege. The point here is that courts may be more likely to recognize that the purpose of communications relating to the preparation of responses to notices of violation are more likely to be considered within the realm of legal advice.
 - Communications by a lawyer with organizational employees to gather information to respond to government notices of violation and similar activities should be considered privileged.
 - Similar communications by a lawyer with organizational employees concerning documents that are not considered of a legal nature may not be privileged.
- The attorney-client privilege may not apply to communications from the attorney simply passing along information that the lawyer acquired from third parties.
- The attorney-client privilege analysis will be made with respect to each element of a communication. In other words, if an e-mail includes attachments, a court likely will consider whether the e-mail is privileged independently from whether the attachments (or each of them) are privileged.
- When dealing with an e-mail string, with a series of communications, each e-mail communication requires separate justification of the claimed privilege.
- E-mail messages addressed to lawyers and non-lawyers for review, comment and approval may or may not pass the test that the communication was for the primary purpose of obtaining legal advice. However, it is possible that the company would be able to establish that the non-lawyers were included in the communication simply to notify them about the nature of the legal advice being sought. Bottom line: Simply including a lawyer on a communication will

not automatically protect the communication under the attorney-client privilege.

- Communications forwarding legal advice to other employees should be privileged if the communication serves to advise others of the legal advice, and those recipients had reason or need to know.
- Be sure to check and double-check the list of people to whom you are sending a communication, particularly when communicating electronically, to be sure not to send something to the wrong person inadvertently. While steps can be taken to help preserve privilege for inadvertent disclosures, the best practice is to avoid inadvertent disclosure. Bottom line: Be careful about your use of “reply to all” and “auto-fill” functions in your e-mail software.
- When the time comes to send a document that has been the subject of privileged communications to third parties, such as a person with whom the company is negotiating, be sure to send a version that has all metadata scrubbed from it to avoid any inadvertent disclosure of deliberative, in-house discussions.
 - In some circumstances, this can be handled by sending Adobe Acrobat “pdf” documents in lieu of Word documents (for those using the Microsoft product). Scrubbing software is also available to cleanse documents of metadata.
 - If you are negotiating an agreement or exchanging drafts of a document, however, one may need to use Word documents. In that case, it is best to employ software that will enable you to send a “redline” of the relevant document, but which will otherwise scrub the metadata prior to sending the document to other parties.
- Claims of privilege require specific support on a document by document basis. The burden of proof is on the organization to establish the elements of the privilege. This proof usually is provided by individuals with personal knowledge of the nature and purpose of the communications.

Conceivably, this part of the paper raises as many questions as it answers. A reason for that is that every court and every circumstance and fact pattern may yield a different result. It is my hope, however, that this discussion provides useful guidance and identifies areas for discussion between in-house counsel and executives and management to assist organizations in managing communications intended to be privileged.

III. Common Interest or Joint Defense Privilege.

The “common interest” or joint defense privilege is recognized in some jurisdictions to protect certain communications between lawyers for separate organizations that have interests or goals in common. Where this privilege is recognized, counsel for multiple, but interrelated project proponents may be able to protect from disclosure certain communications between them, so long as the communications relate to matters of common interest. For example, communications between lawyers for a solar generation project proponent and lawyers for the entity that will develop associated transmission facilities may be privileged, enabling counsel to coordinate NEPA compliance matters efficiently without risk of disclosure.

Communications between two entities with common interests may remain privileged (if otherwise meeting the requirements of a privileged communication) where sharing communications otherwise privileged would allow those entities to utilize legal resources more efficiently. In New Mexico, for example, the applicable Rule of Evidence provides in pertinent part:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, ... (3) by the client or the client’s lawyer to a lawyer representing another in a matter of common interest. . . .¹³

The common interest privilege applies when two or more clients or entities, represented by their own attorneys, agree to exchange information concerning a matter of common interest to the parties. Such communications are privileged as against third persons. The privilege arises under the attorney-client privilege and is also known as the joint defense or common interest privilege.¹⁴ Not every jurisdiction recognizes the common interest privilege, and each jurisdiction may define the manner in which the privilege is to be maintained differently. Lawyers are encouraged to review applicable statutes rules within your jurisdiction.

This privilege should be found to apply to administrative proceedings, but there is a paucity of authority on this point. The lack of authority, of course, translates into risk that a court will not interpret and enforce the privilege or common interest agreement as the parties may have intended.

¹³ New Mexico Rule of Evidence 11-503.B (emphasis added). Other states may have comparable rules or statutes governing such matters.

¹⁴ For a general discussion of the privilege, see 1 PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES § 4.35 (2nd ed. 1999); 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 76 (2000); 3 WEINSTEIN’S FEDERAL EVIDENCE § 503.21[2] (2nd ed. 2001); 24 CHARLES ALLEN WRIGHT AND KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493 (1986).

There are risks also that arise from entering into a common interest agreement: In the event two entities share confidential information via a common interest agreement, should a dispute arise in the future concerning the subject matter of the agreement, one entity may seek to disqualify the second entity's counsel from continuing to represent the second entity in that dispute. If there is a substantial relationship between the confidential information shared and the subsequent dispute, the effort to disqualify may succeed.¹⁵

While parties to a common interest agreement could seek to prevent such disqualification through provisions in any common interest privilege agreement, it is not clear that such a provision would be enforceable:

Each party is represented by separate and independent counsel. Neither the execution of this agreement, nor its performance, nor the exchange of confidential information pursuant to the agreement shall create an attorney-client relationship between any counsel and any other party identified in this agreement. Execution of this agreement, performance of the agreement, and obtaining confidential information from any party pursuant to the agreement by any counsel shall not in any way: (a) preclude that counsel from representing any interest that is adverse to the interest of any other party or of any other party's counsel; or (b) be used as a basis to seek disqualification of counsel in any proceeding between the parties. The parties and counsel agree that the parties and counsel are prohibited from utilizing any confidential material exchanged pursuant to this agreement in any future proceeding that may arise between the parties to this agreement.

Again, whether such a provision would be enforced or recognized in a subsequent disqualification effort may depend on specific facts. If the agreement is between two or more sophisticated parties, however, the greater the likelihood a court would recognize the agreement.

IV. Attorney-Work Product Privilege.

The work product privilege attaches to the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party prepared in anticipation of or in the context of litigation or dispute. Documents subject to this privilege are ordinarily not subject to disclosure to third parties. Agency lawyers should take care in their advice to agency officials who may be preparing an administrative record to ensure that documents subject to the work product privilege

¹⁵ See *Wilson P. Abraham Construction Corp. v. Armco Steel Corp.*, 559 F.2d 250 (5th Cir. 1977); *GTE North, Inc. v Apache Products Co.*, 914 F.Supp. 1575 (N.D. Ill. 1996) (firm that had represented a member of an environmental cost recovery committee was disqualified from representing a defendant in a related matter brought by another member of the committee because confidential information had been shared by members of the committee and their respective counsel).

are not inadvertently included in the administrative record. Similarly, project proponent's counsel and counsel for other interested parties should take care that neither they nor their clients inadvertently submit attorney work product material to federal officials. Such material could make its way into the administrative record, and may provide fodder for opposing parties.

V. Conflicts of Interest in NEPA Compliance.¹⁶

NEPA itself does not address conflicts of interest matters expressly.¹⁷ The Council on Environmental Quality ("CEQ") regulations that implement NEPA provide guidance concerning conflicts of interest, with the goal of "ensuring the objectivity and integrity of the NEPA process and NEPA documents."¹⁸

NEPA is a law which imposes obligations on Federal agencies. [40 C.F.R. § 1506.5] is designed to ensure that those agencies meet those obligations and to minimize the conflict of interest inherent in the situation of those outside the government coming to the government for money, leases or permits while attempting impartially to analyze the environmental consequences of their getting it. * * * The purpose of this provision is to ensure the objectivity of the environmental review process.¹⁹

40 C.F.R. § 1506.5, titled "Agency responsibility," provides some key guidance to agency officials and project proponents alike concerning the manner in which NEPA compliance work should be performed. The regulation requires full disclosure concerning the sources of information that appears in any NEPA compliance documentation, and directs that the agency official cannot abdicate her or his responsibility under the statute and regulations:

(a) Information. If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency

¹⁶ There are, of course, several conflict of interest rules governing the conduct of lawyers that are described in Rules of Professional Conduct. *See, e.g.*, ABA Model Rules of Professional Conduct, Rules 1.7 and 1.8. I do not discuss those conflict of interest rules in this paper, but they are important, nonetheless.

¹⁷ For an excellent treatment of NEPA conflict of interest issues, *see* Malmquist, Michael, "NEPA Conflict of Interest - Who Gets to Do What?", Energy Development, Access, Siting, Permitting, and Delivery on Public Lands, Paper No. 9 (Rocky Mt. Min. L. Fdn. 2009) ("Malmquist"). *See also* Williams, Ezekial J., "The Role of the Project Proponent in the NEPA Process," NEPA and Federal Land Development, Paper No. 5, Section III.C. (Rocky Mt. Min. L. Fdn. 2006), This part of the paper provides only an overview of this subject.

¹⁸ *Id.* at 9-3.

¹⁹ Preamble to Final CEQ NEPA Regulations, 43 Fed. Reg. 55978, 55987 (November 29, 1979).

should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

- (b) Environmental assessments. If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.
- (c) Environmental impact statements. Except as provided in 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

As indicated, project proponents can provide information to a federal agency for its use in preparation of an environmental impact statement (“EIS”) so long as the agency “independently confirmed the reasonableness [of the information].”²⁰ A project proponent’s role in preparation of an environmental assessment (“EA”) is even more permissive under the CEQ regulations.

Often, agencies and project proponents will negotiate and execute agreements to guide the parties and define the appropriate role of the project proponent in NEPA

²⁰ *National Wildlife Federation v. FERC*, 912 F.2d 1471, 1485 (D.C. Cir. 1990).

compliance work. Agency guidance can provide support for the development of such agreements or memorandum of understanding.²¹

These agreements often define the relationships between, and roles of, agency personnel, the NEPA contractor, project proponents, and possibly others. As discussed in Craig Galli's paper at this Special Institute, third party contractors are often engaged to prepare NEPA documents, such as EAs and EISs. While the third party contractor is ordinarily paid by the project proponent, the work of that contractor should be controlled by the federal agency. Communication between the project proponent and third-party contractor is permissible, but should be defined carefully (and then followed) to avoid risks associated with claims of improper bias or influence by the project proponent over the contractor.

U.S. District Judge Kane considered claims of improper influence and third-party contractor bias in *Colorado Wild, Inc. v. U.S. Forest Service*,²² a case involving NEPA compliance associated with a proposed special use authorization for a real estate development near Wolf Creek Ski Area in southern Colorado. In granting the plaintiffs' motion to continue a preliminary injunction, Judge Kane examined communications between the contractor and project proponent which had been characterized by plaintiffs as "communication regarding the substance, scope and timing of the FEIS."²³ According to Judge Kane, [s]uch direct communications and influence were prohibited by the Memorandum of Understanding . . . regarding preparation of the EIS by a third-party contractor."²⁴ The court concluded that the communications between contractor and proponent raised "serious, difficult, and doubtful questions that are ripe for litigation and deserving of deliberative investigation. The ultimate question to be decided is whether any improper influence by [the project proponent] and resulting contractor bias 'compromised the objectivity and integrity of the NEPA process.'"²⁵

As suggested in Judge Kane's opinion, violation of conflict of interest rules and regulations can give rise to serious consequences. In *Davis v. Mineta*,²⁶ for example, the U.S. Court of Appeals for the Tenth Circuit invalidated an EA because the consultant who prepared the document was under contract to deliver an EA that would ensure a "Finding of No Significant Impact" ("FONSI") by the agency. This

²¹ See, e.g., Bureau of Land Management National Environmental Policy Handbook H-1790-1.

²² 523 F.Supp. 2d 1213, 1229-30 (10th Cir. 2007).

²³ *Id.* at 1229.

²⁴ *Id.*

²⁵ *Id.* at 1230, quoting *Ass'ns Working for Aurora's Residential Env't. V. Colorado Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998).

²⁶ 303 F.3d 1104 (10th Cir. 2002).

prejudgment of the outcome of the NEPA process, together with what the court viewed as insufficient agency oversight and searching review of the EA caused the court to invalidate the EA and require the agency to re-initiate the NEPA process.²⁷ While courts in other cases have upheld NEPA compliance work where there were some procedural irregularities,²⁸ practitioners are advised to avoid such irregularities in their own conduct, and cooperate with agency officials and contractors to ensure a NEPA compliance process that is squeaky clean.

In addition, many federal agencies have their own regulations and guidance concerning management of conflicts of interest.²⁹ Practitioners are well advised to review any applicable agency regulations and guidance carefully to ensure that their clients will conduct themselves in a fashion consistent with those norms and requirements.

It is critical that agency officials and project proponents alike toe the line in administering these regulatory obligations. People with NEPA experience in run-of-the-mill, non-controversial projects should be particularly careful not to get into bad habits or take short cuts in the NEPA compliance process. First, bad habits are just that - bad. Second, should one find themselves involved in a project that is more controversial and subject to greater scrutiny, the best practices approach taken elsewhere will serve you well when you are in the spotlight of that greater scrutiny.

VI. Confidential and Proprietary Information Provided to Agencies.

Communications with federal agencies, including the BIA and BLM will not be privileged, generally. One should assume that the substance of any communication with federal agency personnel will be recorded in some fashion by the agency official and be included in the administrative record. In some circumstances, non-government counsel might be able to communicate with federal agency lawyers in a fashion that might be “off-the-record.” Any such communications, however, would not be considered privileged, even though there are reasons why the agency and non-governmental entity would have a common interest in ensuring that the administrative record and agency documents, including an EA or EIS, the record of decision, and similar materials are defensible in the event of a challenge to the NEPA, the National Historic Preservation Act (“NHPA”), or other compliance processes.

Further, as noted above, for confidential and proprietary materials that need to be disclosed to agency officials, a company may be able to negotiate a

²⁷ 303 F.3d at 1112-13.

²⁸ Malmquist at 9-9, n. 23 (collecting cases).

²⁹ See, e.g., U.S. Department of the Interior, 43 C.F.R. § 46.105 (2009); BLM NEPA Handbook H-1790-1, § 13.5 (2008); U.S. Forest Service, FSH 1909.5, Environmental Policy and Procedures Handbook, Ch. 10, § 12.24 (2008).

confidentiality agreement or obtain the protection of any applicable agency regulations governing the protection of confidential or proprietary information.³⁰

If there are confidential or other materials that a project proponent determines should be shared, the proponent may want to consider whether such materials are subject to the FOIA. Consideration of FOIA is beyond the scope of this paper, however.

VII. Ethics and Conduct Codes for Federal Employees.

Federal employees are held to specific ethical standards of behavior. Agency officials and those working with the federal government should have a basic working knowledge of them.

These federal ethics standards are described in Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (October 17, 1990). Section 101, titled “Principles of Ethical Conduct,” of the modified Executive Order provides:

To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each Federal employee shall respect and adhere to the fundamental principles of ethical service as implemented in regulations promulgated under sections 201 and 301 of this order:

- (a) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.
- (b) Employees shall not hold financial interests that conflict with the conscientious performance of duty.
- (c) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
- (d) An employee shall not, except pursuant to such reasonable exceptions as are provided by regulation, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

³⁰ This may include some proprietary company information such as trade secrets, certain information about sensitive resources such as archeological sites or other historic properties, and the like.

- (e) Employees shall put forth honest effort in the performance of their duties.
- (f) Employees shall make no unauthorized commitments or promises of any kind purporting to bind the Government.
- (g) Employees shall not use public office for private gain.
- (h) Employees shall act impartially and not give preferential treatment to any private organization or individual.
- (i) Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
- (j) Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
- (k) Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
- (l) Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those -- such as Federal, State, or local taxes -- that are imposed by law.
- (m) Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.
- (n) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards promulgated pursuant to this order.³¹

Under Section 201 of the Executive Order, the federal Office of Government Ethics has promulgated regulations to implement Executive Order 12674. Those regulations can be found at 5 C.F.R. Part 2635 (2009). In addition, Section 301 of the Executive Order provides that Agency Heads are directed to supplement the Office of Government Ethics' regulations as necessary depending on the particular functions and activities of each agency. Most of the Department of the Interior-specific regulations impose prohibitions on Department or agency employees from obtaining

³¹ Executive Order 12674 (April 12, 1989), as modified by Executive Order 12731 (October 17, 1990), § 101.

interests in federal lands, permits or leases and on holding financial interests in companies that hold leases or property rights on federal lands.³²

While the risks of agency personnel violating these restrictions may be low, particularly given the high degree of professionalism exhibited by most federal employees, it is important that agency personnel, agency counsel, and counsel for entities dealing with the government know and understand the restrictions described lest one encounters agency officials who are acting outside the bounds of these restrictions. Should one encounter such conduct, it will be important to consider carefully how to address it. Among others, an important consideration in that regard relates to whether the conduct could adversely impact the validity of the NEPA compliance effort and related permitting processes.

VIII. Contact with Agency Officials by Counsel for Project Proponents, NGOs, and Others, including Matters under Administrative Appeal or Judicial Review.

Opinions among lawyers vary concerning the propriety of making contact with agency officials concerning a matter in which the agency is represented by counsel. Some lawyers are of the view that, in their capacity representing a project proponent or NGO, they may contact agency officials concerning a matter in litigation or in an administrative appeal process, while others believe that such contact should only occur after receiving permission from government counsel.³³

ABA Model Rule 4.2, titled “Communication with Person Represented by Counsel,” provides:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so. Except for persons having a managerial responsibility on behalf of the organization, an attorney is not prohibited from communicating directly with employees of a corporation, partnership or other entity about the subject matter of the representation even though the corporation, partnership or entity itself is represented by counsel. (Emphasis added.)

³² See, e.g., 43 C.F.R. § 20.401, 5 C.F.R. § 3501.105 (BLM employees); 5 C.F.R. § 3501.103(b) (MMS employees); 5 C.F.R. § 3501.104 (OSM employees); 5 C.F.R. § 3501.103(C) (All DOI employees).

³³ Even more lawyers likely are of the view that contact with agency officials without government counsel consent is permissible when one is not involved in an administrative appeal or in litigation. While that may be true, a better practice (if not an ethical requirement) may be to seek consent of agency counsel or at least advise that you plan to be in contact with agency representatives prior to making contact. In my experience, government counsel will provide consent, barring extraordinary circumstances.

From the ABA Model Rule, one may conclude that communication with agency personnel about a matter in which the agency is represented by counsel (presumably either counsel at the U.S. Department of Justice or a lawyer within the agency) is prohibited - “shall not communicate” - from contacting agency officials about that matter unless the lawyer first receives consent from government counsel. That, however, is not the end of the proverbial story:

The Comment to ABA Model Rule 4.2 states:

This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with non-lawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. **Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.** (Emphasis added.)

Further, Comment No. 5 to Rule 4.2 of the Colorado Rules of Professional Conduct, for example, provides in part:

Communications authorized by law may include communications by a lawyer on behalf of a client who is **exercising a constitutional or other legal right to communicate with the government.** Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.

The right “to petition the Government for a redress of grievances,” of course, is etched in the First Amendment to the U.S. Constitution. Depending on how each State might interpret the scope of that right to petition, there may be avenues to communicate with agency officials about the substance of a dispute or a related policy question without consent of government counsel. Practitioners are urged to investigate the Rules, ethics opinions, and other resources available that are applicable in those States in which you are licensed.

Finally, the District of Columbia Bar has a different Rule 4.2, including subsection (d), which states:

(d) This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer’s client, whether or not those grievances or the lawyer’s

communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.³⁴

D.C. Bar Opinion No. 340 (2007) has interpreted D.C. Rule 4.2(d) to permit communications with government officials even concerning the subject matter of a litigated matter or a matter subject to an administrative appeal without first obtaining the consent of government counsel.³⁵ Counsel cannot, however, discuss procedural matters, such as “ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of resolution of disputes.”³⁶

Again, lawyers are advised to consult the Rules of Professional Conduct in the State(s) in which they are licensed for specific guidance.

IX. Candor to A Tribunal: Courts and Administrative Law Judges.

This topic relates, of course, to one’s conduct before administrative appeal bodies such as the Interior Board of Land Appeals or before BLM State Directors in State Director Review proceedings, among other tribunals. Codes of Professional Conduct address duties of candor to “tribunals”. “Tribunals” should be interpreted to be any decision making body, including administrative law judges. ABA Model Rule 3.3, “Candor Toward the Tribunal” provides:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

³⁴ D.C. Rule 4.2(b) states: “During the course of representing a client, a lawyer may communicate about the subject of the representation with a nonparty employee of an organization without obtaining the consent of that organization’s lawyer. If the organization is an adverse party, however, prior to communicating with any such nonparty employee, a lawyer must disclose to such employee both the lawyer’s identity and the fact that the lawyer represents a party that is adverse to the employee’s employer.”

³⁵ http://www.dcbbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion340.cfm.

³⁶ D.C. Bar Opinion No, 340, quoting Comment 11 of *Analysis of Comments Submitted to the District of Columbia Court of Appeals in Response to the Court’s Order of September 1, 1988*.

- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
- (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- (c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
- (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Ethical obligations to tribunals do not end there. ABA Model Rule 3.5, titled "Impartiality and Decorum of the Tribunal," provides:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court order;
- (c) communicate with a juror or prospective juror after discharge of the jury if:
 - (1) the communication is prohibited by law or court order;
 - (2) the juror has made known to the lawyer a desire not to communicate; or
 - (3) the communication involves misrepresentation, coercion, duress or harassment; or
- (d) engage in conduct intended to disrupt a tribunal.

X. Professionalism: Ethical Boundaries Should Not Always Define the Outer Limit of the Manner in Which Lawyers Conduct Their Client’s Affairs.

At the risk of getting preachy and departing from strict discussion of ethical issues, this section of the paper suggests that lawyers engaged in administrative proceedings and permitting matters should not simply determine what is strictly permitted or prohibited by the rules of professional responsibility or other legal ethics standards. Narrowly skirting ethical violations is not necessarily a way to “win friends and influence people” or otherwise conduct oneself in a professional manner. As the “Scope” to the ABA Model Rules of Professional Conduct states: “[t]he rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules.”³⁷ For example, as discussed above, while an ethics rule may not require obtaining consent of a government lawyer in order to speak with an agency official, there may be both short and long term benefits from seeking consent or at least giving the agency counsel a heads up that you will be making the contact. Such an effort may lead to a greater trust between lawyers or a more productive conversation with the agency official.

What follows here are a range of thoughts for consideration as you continue to pursue your professional career:³⁸

1. Will the fight you are about to pick really advance your client’s interests and goals? Grapple with this question and discuss it with your client - ahead of time. In those client discussions, be sure to provide the client with the benefit of your personal experiences you may have with the agency or agency personnel involved. ABA Model Rule 2.1, concerning the lawyer’s role as “advisor” provides: “In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”
2. How do you handle a situation where you disagree with a position that a client may want you to assert? Do you simply withdraw? Perhaps there are situations where such a result is appropriate, but the first step ought to be to talk with the client. In that conversation, counsel should be aware of the potential tension between a duty of loyalty to the client and the obligation to zealously represent your clients’ interests within the bounds of the law on the one hand, and - potentially, the duty of candor you have to the tribunal - whether court

³⁷ ABA Rules of Professional Conduct, Scope.

³⁸ Attached to this paper as Appendix A is the New Mexico Creed of Professionalism for your consideration also. Some of the points outlined in the text here are drawn from the New Mexico Creed.

or agency. More often than not, counsel will be able to resolve such matters productively with the client.

3. Even if a particular dispute you may have could be resolved in your client's favor, consider whether any victory achieved may have an impact on future proceedings. In other words, if you squander some political capital (either your own or your client's) in achieving a victory of some sort, will that serve to limit your ability to achieve more important goals later.
4. For those of you who are litigators, you know that most (all?) judges hate discovery disputes. Does the same thing apply to disputes over the content of an administrative record?
5. Civility is not a weakness. This is something that some clients may not understand. Some may view common courtesies as things that should not be visited on one's adversaries. I respectfully disagree. For one thing, today's adversary may be tomorrow's partner. Moreover, civility does not mean you lose your effectiveness before the decision maker. In fact, I would venture that most judges and decision makers are more influenced by collegiality than overly aggressive conduct or language directed at one's adversary. One can certainly be an effective advocate for a client's position by presenting facts and law persuasively without engaging in the ad hominem attack. Finally, civility may also serve to keep the door open to potential avenues of amicable resolution.
6. When working on documents with other parties, use readily available redlining tools to show changes you make to such documents. This is a simple and courteous approach, and serves to streamline efforts to complete negotiations or documentation of agreements. On the other side of this coin, if your counterpart insists on not providing redlines, consider utilizing document comparison software in order to ferret out changes that opposing counsel may have made but chose not to identify.
7. Undoubtedly, there are other principles that each of us live by in our daily lives. Feel free to fill in others so that you act in a fashion true to yourself. As Dr. Suess said: "Be who you are and say what you feel, because those who mind don't matter, and those who matter don't mind." Or, for the more historically minded: "Do what you feel in your heart to be right, for you'll be criticized anyway. You'll be damned if you do and damned if you don't." Eleanor Roosevelt

Thanks for your attention.

APPENDIX A

New Mexico Creed of Professionalism

As a lawyer, I will strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, I will comply with the letter and spirit of the disciplinary standards applicable to all lawyers, and I will also conduct myself in accordance with the following Creed of Professionalism when dealing with my client, opposing parties, their counsel, the courts, and any other person involved in the legal system, including the general public.

A. In all matters: “My Word is My Bond.”

B. With respect to my clients:

- I will be loyal and committed to my client’s cause, and I will provide my client with objective and independent advice;
- I will work to achieve lawful objectives in all other matters, as expeditiously and economically as possible;
- In appropriate cases, I will counsel my client regarding options for mediation, arbitration and other alternative methods of resolving disputes;
- I will advise my client against pursuing matters that have no merit;
- I will advise my client against tactics that will delay resolution or which harass or drain the financial resources of the opposing party;
- I will advise my client that civility and courtesy are not weaknesses;
- I will counsel my client that initiating or engaging in settlement discussions is consistent with zealous and effective representation;
- I will keep my client informed about the progress of the work for which I have been engaged or retained, including the costs and fees;
- I will charge only a reasonable attorney’s fee for services rendered;
- I will be courteous to and considerate of my client at all times.

C. With respect to opposing parties and their counsel:

- I will be courteous and civil, both in oral and in written communications;
- I will not make improper statements of fact or of law;
- I will agree to reasonable requests for extensions of time or waivers of formalities when legitimate interests of my client will not be adversely affected;
- I will consult with opposing counsel before scheduling depositions and meetings or before rescheduling hearings;

- I will cooperate with opposing counsel's requests for scheduling changes;
- I will not use litigation, delay tactics, or other courses of conduct to harass the opposing party or their counsel;
- I will refrain from excessive and abusive discovery, and I will comply with reasonable discovery requests;
- In depositions, negotiations and other proceedings, I will conduct myself with dignity, avoiding groundless objections and other actions that are disrupting and disrespectful;
- I will not serve motions and pleadings that will unfairly limit the other party's opportunity to respond;
- In the preparation of documents and in negotiations, I will concentrate on substance and content;
- I will clearly identify, for other counsel or parties, all changes that I have made in all documents.

D. With respect to the courts and other tribunals:

- I will be a vigorous and zealous advocate on behalf of my client, but I will remember that excessive zeal may be detrimental to my client's interests or the proper functioning of our justice system;
- I will communicate with opposing counsel in an effort to avoid litigation or to resolve litigation;
- I will voluntarily withdraw claims or defenses when they are superfluous or do not have merit;
- I will refrain from filing frivolous motions;
- I will voluntarily exchange information and work on a plan for discovery as early as possible;
- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;
- When hearings or depositions are cancelled, I will notify opposing counsel, necessary parties, and the court (or other tribunal) as early as possible;
- Before dates for hearings or trials are set, or immediately after dates have been set, I will verify the availability of participants and witnesses, and I will also notify the court (or other tribunal) and opposing counsel of any problems;
- In civil matters, I will stipulate to facts when there is no genuine dispute;
- I will be punctual for court hearings, conferences and depositions;
- I will be respectful toward and candid with the court;
- I will avoid the appearance of impropriety at all times.

E. With respect to the public and to other persons involved in the legal system:

- I will be mindful of my commitment to the public good;
- I will keep current in my practice areas, and, when necessary, will associate with or refer my client to other more knowledgeable or experienced counsel;
- I will willingly participate in the disciplinary process;
- I will strive to set a high standard of professional conduct for others to follow;
- I will respect and protect the image of the legal profession, and will be respectful of the content of my advertisements or other public communications;
- I will commit to the goals of the legal profession, and to my responsibilities to public service, improvement of administration of justice, civic influence, and my contribution of voluntary and uncompensated time for those persons who cannot afford adequate legal assistance.