

33rd Annual Business & Industry's Sustainability and Environmental Health & Safety Symposium

Ethics & Professionalism for Environmental Lawyers
and EHS Professionals



Benchmark
Safety, Health & Environmental Services

March 20, 2024

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Speakers



Skipp Kropp

Attorney
Steptoe & Johnson PLLC



John J. Keeling PE

Director
Benchmark Safety, Health &
Environmental Services

Agenda

- Introduction
- Ethics for Attorneys
- Ethics for Engineers
- Ethics for Environmental Scientists and Other Environmental Positions
- Case Studies
- Questions



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Introduction - Environmental Matter Ethical Considerations

Historically Significant Events

- Cuyahoga River Fire in the 1970s
- Love Canal
- Superfund Sites

Current Considerations

- Brownfield Sites
- Transportation Related Matters
- Environmental Justice

Ethics For Attorneys

This presentation will involve conversations regarding some of the more common ethical issues that may arise in the practice of environmental law. A hypothetical is used to illustrate each issue and the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules") are used to analyze a potential resolution in each case

Ethics For Attorneys

Rule 1.7: Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

Ethics For Attorneys

Rule 1.6: Confidentiality of Information

(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;...

Ethics For Attorneys

Rule 1.16: Declining or Terminating Representation

a) A lawyer shall inquire into and assess the facts and circumstances of each representation to determine whether the lawyer may accept or continue the representation. Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;...

Ethics For Attorneys

Rule 2.3: Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

Ethics For Attorneys

Rule 4.1: Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Ethics For Attorneys

Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or...

Engineering Ethics Preamble

Engineering is an important and learned profession. As members of this profession, engineers are expected to exhibit the highest standards of honesty and integrity. Engineering has a direct and vital impact on the quality of life for all people. Accordingly, the services provided by engineers require honesty, impartiality, fairness, and equity, and must be dedicated to the protection of the public health, safety, and welfare. Engineers must perform under a standard of professional behavior that requires adherence to the highest principles of ethical conduct.

Pillars of Engineering Ethics

- Honesty & Integrity (avoid deceptive acts and honorable conduct)
- Respect for Life, Law, Environment, & Public Good
- Accuracy and Rigor
- Act for Each Employer or Client as a Faithful Agent or Trustee
- Perform Services only in Areas of Competence
- Conduct is Honorable, Responsible, Ethical, and Lawful so as to Enhance the Honor, Reputation, and Usefulness of the Profession

From the National Society of Professional Engineers

Registered Professional Engineer Ethical Commitment

- a. If Engineer's judgement is overruled under circumstances that endanger life or property, the Engineer shall notify their Employer or Client and such other Authority as may be appropriate.
- b. Engineers shall approve only those engineering documents that are in conformity with applicable standards.
- c. Engineers shall not reveal facts, data, or other information without the prior consent of the employer or client except as authorized or required by law or this code
- d. Engineers shall not aid or abet the unlawful practice of Engineering by a person or firm.
- e. Engineers shall not permit the use of their name or business with persons or firms believed to be engaged in fraudulent or dishonest enterprise.

Other Professions Associated With Environmental Projects

- Geologists
- Surveyors
- Scientists

- Responsible Environmental Professional as defined by the All Appropriate Inquiry (AAI) Regulation.

Case Study 1 – Conflicts of Interest

Hypothetical: You have been asked to represent Company A, in a multi-party Superfund matter where Company A's interest may be adverse to Company B. A conflicts check reveals that your firm has never represented Company B, but represented Company C, which is the parent of Company B, in a merger transaction. The language of Company C's retainer agreement in the merger transaction states that your firm was hired to represent Company C and all associated companies.

Ethical Issues: -- Is there an existing conflict? Do you need to obtain consent? -- If both parties, Company A and Company B, request your representation in the Superfund matter, may you take the concurrent representation?

Case Study 2 – Confidentiality in Transactions

Hypothetical: Under Company A management direction, Company A employees have been dumping Waste X in a surface impoundment located on Company A property. After continuous dumping for two years, management decides to sell this parcel of the property. To disguise the dumping, it covers the impoundment with clean soil and sod before offering it for sale. During sale negotiations, a prospective buyer specifically asks Company A representatives if any hazardous wastes have ever been disposed of on the parcel. Company A's representatives state that no such disposal has occurred.

Ethical Issues: --As the lawyer representing the seller in the transaction, are you obligated, or even permitted, to disclose the continuous dumping of Waste X on the parcel, assuming you don't know if Waste X is hazardous?

Case Study 2 – Confidentiality in Transactions

Hypothetical issue 2- You are asked by the buyer's lenders to issue an opinion letter based on an environmental audit of the property that was supervised and signed by you.

Ethics issue: What are your obligations in regards to rendering the opinion?

Hypothetical issue 3- You decide that due diligence requires you to have an independent environmental consultant analyze the material, but you do not inform Company A of your decision. The analysis demonstrates that Waste X is indeed hazardous but does not pose any risk of imminent death or substantial bodily harm to persons exposed to it. As a result, you are concerned about the validity of the property's environmental audit and your opinion letter, which were previously given to the buyer. When you confront Company A management, it insists on remaining "uninformed" and wants to continue with the transaction without disclosure.

Ethics issue: What are your obligations in this case?

What are the consultant's obligations?

Case Study 2 – Confidentiality in Transactions

Hypothetical issue 4- The analysis of Waste X determines that direct exposure to Waste X will cause death within hours.

Ethics issue: What are your obligations in this case?

Hypothetical issue 5- You hired an environmental engineer to assist you with the environmental audit. You show the results of the analysis to the engineer.

Ethics issue: What are the engineer's obligations in this case?

Case Study 3 – Experts

Hypothetical: You get a call from an industrial client that a burst pipe at the client's facility has resulted in a spill of unknown chemicals to the soil. You contact the environmental consulting firm that you frequently work with, and both you and the environmental consultant go the site to investigate. The engineers' investigations confirm the spill does not present a risk of "reasonable certain death or substantial bodily injury," but that it is likely to pose ecological harm and, if it reaches groundwater, and may create some risk of minor human health effects. The client decides that it does not want to report the spill to any regulatory body.

Ethical Issue: What are your ethical obligations in terms of reporting?

Case Study 4 – Phase II Environmental Site Assessment Dilemma

The Environmental Engineer leading a Phase I ESA which was expanded to a Phase II ESA during the historical file review identified City Building permit documents from the Early 1980s that indicated that several underground storage tanks (UST) had been installed at that time for both fuel and solvent storage. The Phase II activity included the use of both ground penetrating radar (GPR) and soil borings for soil sample collection and Analysis. The current owner was not aware of the USTs. The GPR was nonconclusive about the presence of USTs and associated piping. The soil boring samples when analyzed, revealed low level contaminants representative of fuel oil, but below the State trigger levels to require remediation.

Questions?





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Biography

Edward “Skipp” Kropp was born and raised in central Indiana and, after having spent a number of years in Ohio and West Virginia, where he is also licensed, relocated to Indianapolis in 2010 to continue his practice. He represents a number of Indiana clients, including the largest wastewater treatment operator in the state. Skipp has deep and broad environmental experience in the areas of air, water, and waste. As the former Chief of the WV DEP Office of Air Quality and former Deputy Director of the WV DEP, Skipp is a respected and serious environmental lawyer, with a hands-on approach to helping clients. That approach involves significant time working hand in glove with a number of trade associations in Indiana and Ohio. Skipp organizes an annual meeting among US EPA Region V, the environmental agencies in both Indiana and Ohio, and trade associations to discuss issues facing the regulated communities in both states.

Skipp’s clients depend on him to help them navigate environmental regulatory changes and to understand the impact on their operations and bottom line. In the unfortunate situation when a client is on the wrong side of regulation, Skipp helps them propose solutions, negotiate penalties, and obtain compliance. He enjoys being a lawyer who can help his clients stay in harmony with ever-changing environmental regulations.

Representative Experience

- Regulatory enforcement counsel for operator of the wastewater treatment facility of a major metropolitan area
- Defense counsel for state Clean Air Act enforcement action involving major industrial facility
- Represented trade association in Clean Power Plan administrative proceedings and subsequent litigation
- Represented small materials handling company in developing Clean Air Act compliance program and defending multiple notices of violation in two states
- Provided guidance for state-wide stormwater association on national MS4 litigation
- Represented PCB disposal company in multi-year, multi-million dollar CERCLA litigation
- Defended PCB disposal company against EPA Toxic Substances Control Act notices of violation
- Represented an electric company in an intervention in federal court in support of USEPA Affordable Clean Energy Rule
- Defended electric companies against petitions by various northeast states to impose pollution controls in the Midwest
- Represented coal-fired electric utility regarding waste management regulation and permitting
- Participated on the defense team defending carbon black company against several hundred plaintiff toxic tort action
- Participated on defense team defending large refinery against several thousand plaintiffs toxic tort action
- Participated in defense team defending coal company against several hundred plaintiff water contamination action
- Located and developed scientific expert witnesses for various toxic tort matters
- Represented chemical company in CERCLA cost recovery action for PCB contamination
- Represented trade association in appeal of EPA Mercury and Air Toxics Standard
- Represented trade association in appeal of EPA Clean Air Transport Rule

Licensed In

- Ohio

- Indiana
- West Virginia

Education

- J.D. Capital University Law School
- M.S. Purdue University
- B.S. Purdue University

Memberships

- Organizer of annual meeting among senior management of U.S. EPA Region V, senior management of Indiana Department of Environmental Management, and members of Indiana Chamber of Commerce, Indiana Manufacturers Association, Indiana Energy Association, and NW Forum
- Organizer of annual meeting among senior management of U.S. EPA Region V, senior management of Ohio Environmental Protection Agency, and members of Ohio Chamber of Commerce, Ohio Manufacturers Association, and Columbus Chamber of Commerce
- Barbershop Harmony Society Immediate Past President, 2019-2020
- Barbershop Harmony Society President, 2017-2018
- Director, Indiana Air & Waste Management Association, 2013-2024
- Board of Directors, Air & Waste Management Association, WV Chapter, 1997-2009
- Board of Directors, Barbershop Harmony Society, 2007-2009; 2014-2020
- Member, Indiana Chamber of Commerce Energy Policy Committee, 2014-2024
- Member, Indiana Chamber of Commerce Environmental Policy Committee, 2014-2024
- Member, Ohio Oil & Gas Association Environmental Committee, 2023-2024

Achievements

- The Best Lawyers in America®, Environmental Law (2010-Present)
- Super Lawyers® 2011



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EDUCATION BSCE University of Kentucky, 1974

John Keeling, PE, CIH, CSP, QEP, LRS is a Senior Environmental, Safety, and Occupational Health Consultant with more than 40 years of experience in Environmental and Occupational Safety/Health issues. Keeling has a BS Degree in Civil Engineering from the University of Kentucky and a variety of Professional Certifications/Licenses. As Senior Environmental, Safety, and Occupational Health Consultant he routinely provides services for environmental assessment and remediation projects, environmental due diligence associated with property transactions, NSR and Title V air emissions permitting/compliance, above ground storage tank compliance, NPDES related compliance (Process and Stormwater), Process Safety Management, workplace indoor air quality and working conditions assessments, IH Monitoring Program development, ISO Environmental Management Assessments, and litigation support. He has managed multiple WV Voluntary Remediation Program (VRP) projects. He has served as an Expert Witness in multiple Federal and State Court Cases over the past two decades.

WORK EXPERIENCE

2020 to Present - Senior Environmental, Safety, and Occupational Health Consultant – Steptoe & Johnson PLLC
2019 to July 2020 – Director – Benchmark EHS, Inc.
1990 to July 2020 – Vice President - MSES Consultants, Inc
1986 to 1990 - EHS Manager Specialty Graphite Operations – Union Carbide Corporation
1983 to 1986 - Superintendent of Production – Union Carbide Corporation
1976 to 1983 – Environmental, Health, and Safety Manager – Union Carbide Corporation
1974 to 1976 – Plant Engineer – Union Carbide Corporation
1970 to 1974 - Engineer in Training – Kentucky Department of Transportation

MEMBERSHIPS AND AWARDS

PROFESSIONAL

Registered Professional Engineer, State of West Virginia, Commonwealth of Kentucky
Certified Industrial Hygienist, American Board of Industrial Hygiene

Certified Safety Professional, Board of Certified Safety Professionals
Qualified Environmental Professional, Institute of Professional Environmental Practice
Licensed Asbestos Inspector/Asbestos Management Planner/Clearance Air Monitor
Licensed Remediation Specialist, West Virginia
Building Code Official – WV State Fire Marshall Office

INDUSTRY/CIVIC

Professional Member, American Society of Safety Professionals
Full Member, American Industrial Hygiene Association
Member, Air and Waste Management Association - Former West Virginia Chapter Chairperson
Chairman, Harrison County SARA Title III Local Emergency Planning Committee - Past Chairperson