ATTORNEY'S GUIDE TO USING ENVIRONMENTAL CONSULTANTS AS EXPERTS

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Your client has just called with an environmental issue. The issue could run the gamut from the receipt of an administrative order from Environmental Protection Agency (EPA) or the State Department of Environmental Protection requiring remediation, to an environmental condition found on property. Often, it will be in connection with an acquisition of industrial property and the client wants to conduct due diligence on environmental conditions prior to the purchase. What steps would you take to help the client to perform the investigation and remediation in a cost effective, efficient manner, yet providing confidential advice and guidance?

Identify the Issue

In the first instance, you need to determine the level of experience you need in a consultant to assist the client. The level of experience required is minimal for a consultant performing a simple Phase I Environmental Site Assessment in connection with the acquisition of property. However, specialized experience may be needed to assist in evaluating the cleanup of a massive release of toxic chemicals.

Environmental Site Assessments

Normally, Environmental Site Phase I Assessments are the first step in identifying what might need to be remediated. A Phase I Assessment is performed pursuant to guidelines issued by the American Society of Testing and Materials (ASTM).

A Phase I Assessment involves no invasive testing. However, it is intended to identify past uses that may trigger concern. A Phase I assessment can assist you in identifying possible areas or sources of contamination that should be studied.

There are a few formal requirements under the ASTM standards for the consultant who will conduct a Phase I Environmental Assessment.

First, you should request that the consultant use the current standard, ASTM E1527-13. This standard is acknowledged by the EPA to provide certain defenses to liability, and is important to consider for defense of any later claims.

Second, "environmental professionals" who are allowed to sign Phase I assessments that comply with ASTM standards are defined by regulations at 40 CFR § 312.10. These regulations require that the consultant be a licensed or registered professional engineer or professional geologist who has three years of full-time experience. Frequently, consultants will have a person with these credentials supervise a young consultant who performs the leg work.

The Phase I assessment does not have to provide recommendations for more study. Recommendations are optional and consultants may include them. You should consider whether or not you want recommendations. If you do elect to include them, you should consider what will happen if the client does not follow those recommendations. There is often a balance between what a consultant thinks is important to recommend and what that consultant thinks is merely interesting.

Phase I assessments raise an additional issue if they identify new conditions. The lawyer may need to consider if there is any required reporting to regulatory agencies. Whether reporting is required varies by state.

Remediation Work for Serious Contamination

At the other end of the spectrum, you may be faced with a major site cleanup. This requires more focus on the criteria you are looking for in a consultant. A convenient first stop for identifying consultants is the Internet. Different specialties may need to be involved, often driven by the type of contaminate involved and whether it is in soils or water. Consultants for major cleanups will normally prepare qualification statements and be ready to bid for the work.

It is important to ask potential consultants questions such as:

(1) Have you managed projects like this in the past?

(2) Are you qualified to do the full-scope of the work or would you need to subcontract?

(3) If you use subcontractors for services like excavation, monitoring well installation, laboratory analysis and other services what is the responsibility of the contractor and subcontractor?

(4) Does the manager of the project have experience that is relevant?

(5) What is the company's experience working either with EPA or DEP?

It is also important to check references. Ask the reference if they were satisfied with the work, performance and fees. Also, ask whether the project was completed on time and within budget.

For larger projects, you may wish to have a written proposal, which would include a scope of work, resumes, estimated work schedule, anticipated costs, total project costs, itemized fees and references.

Also consider whether the consultant has familiarity with any governmental agency personnel who may be involved in the matter. Often, personal interaction can affect what needs to be accomplished and what is acceptable to an agency. Consultants, like lawyers, develop reputations that may or may not affect what needs to be accomplished.

Who Retains the Consultant?

You and your client have now selected an environmental consultant. Who formally retains that consultant – the lawyer or the client?

The first question to ask is whether or not the client wishes to have attorney/client privilege or work product doctrine protecting the papers prepared in connection with any reports.

There is a difference between attorney/client privilege and work product. Generally, the work product privilege protects work prepared by the attorney in anticipation of litigation. The attorney/client privilege protects the confidential communications between a client or agent of the client made in order to obtain legal assistance. Both of these privileges are usually extended to employees or agents of the client or the attorney.

Work Product

Work product definitions vary by state. For example, Rule 4003.3 of the Pennsylvania Rules of Civil Procedure generally protects any attorney mental impression from disclosure. California absolutely protects writings reflecting an attorney's impressions, but provides limited protection of other materials "derived" at the attorney's direction.

In federal court, Federal Rules of Evidence 502 and case law define the term. Courts generally apply a "but for" standard to determine if the work product privilege

applies - if the work would not have been created but for possible litigation, it is privileged.

Keep in mind that a stronger case exists for applying work product privilege to work performed by consultants if the investigation is related to an existing court proceedings or instances in which administrative orders have been issued. In a purchase or sale transactional, where due diligence is involved, courts sometimes will not protect work product from disclosure, as these engagements are often begun before litigation. Again, this varies by state. For example, California courts have focused less on the "trial preparation" component of the privilege and have held that work product exists in negotiation of purchases or sales of property.

Attorney/Client Privilege

Federal Rule of Evidence 502 addresses the attorney/client privilege. That privilege prohibits the introduction of communications between the attorney/agent and the client in trials. Communications can include memos and notes. Again, states vary, but normally protect the communication between the lawyer and the client from disclosure.

In Pennsylvania, the attorney client privilege is codified in 42 Pa. C. S. § 5928. The privilege extends to the consultant retained by the lawyer to assist in providing legal advice.

In California, the privilege is set out beginning at section 950 of the Evidence Code. Section 952 limits the privilege to "confidential communications" and has been held to embrace communications between the client and the attorney's consultant.

Courts have also extended the privilege to outside consultants retained by lawyers. Attorneys may need to use consultants to review legal issues, such as the scope of representations and warranties made in contracts or the client's potential liability for conditions. The key to the privilege is to insure that there is involvement between the attorney and the consultant, as the privilege applies to situations where an attorney is using the consultant to aid in providing legal advice. If environmental work is performed and not reviewed by a lawyer it may not be privileged.

The attorney/client privilege has been found to be limited when applied to scientific data. Soil samples, for example, have been found not to be privileged as they consist of factual data gathered from a source other than the client. Data is often not considered to be a confidential communication.

Note, though, that the privilege need not be in connection with litigation.

Contract Provisions

Written contracts between the consultant and the attorney help demonstrate the relationship to the outside world. The consultant is enabling the lawyer to provide informed legal advice. If the attorney is not a party to the contract, it may not look to others like the consultant was retained to assist the lawyer in providing legal advice.

A major concern of attorneys who retain consultants is whether the attorney has to pay the consultant without first being paid by the client. The contract should address this. If the attorney is billed by the consultant, the contract should state that payment will first come from the client.

At a minimum, the legal privileges and confidentialities should be set out in a contract with both the lawyer and consultant as parties.

Commonly, consultants request a limitation on liability or request provisions that disclaim responsibility for certain items of work. These limitations can cause problems to the lawyer who agrees to them. If a lawyer agrees to limit the consultant's liability, he must also ask the client to accept a similar limit on the lawyer's and the consultant's liability. If the consultant's advice is faulty and the lawyer is sued, the lawyer would have no recourse against the consultant if his contract with the consultant contained a waiver of liability.

Consultants would also like to restrict any recovery to the amounts they have billed for the project. This raises a similar concern if the work is faulty. The attorney may be "on the hook" if the consultant insists on this restriction.

Some attorneys allow the consultant to contract directly with the client if there will be a restriction on the consultant's liability. Be aware that if the contract is between your consultant and your client, that may serve to "water down" your assertion of both work product protection and attorney/client privilege.
On the other hand, if the consultant wishes limitations on its liability, either the attorney must ask the client to extend those same limitations to the attorney, or the client must separately agree to those limitations with the consultant and extend them to lawyers.

You should also consider what standard of care is placed in the contract with the consultant. This is a special concern if the consultant is being hired for his or her expertise in a given area. If the consultant is a specialist, be careful about agreeing to a standard of care that only applies a standard for all consultants in the profession.

Liability shifting should consider insurance that parties can provide. A consultant's insurance typically covers malpractice claims against that consultant. The cost of that insurance is part of the consultant's rate it charges. It often makes sense to provide that there will be indemnification if liabilities are insured.

The consultant may also have its own list of standard terms that it will propose. The first question is whether those standard terms truly apply to the attorney seeking a consultant's advice. If not, these standard terms are not appropriate for the contract with the attorney.

Some consultant contracts provide that the consultant owns the work and only authorize the client's use once fees are paid. This can create major problems if state or federal agencies are involved. These types of provisions should allow distribution of documents if required by governmental agencies.

Performing the Work

Consultants and lawyers may have different views of the work needed to allow the attorney to provide legal services. This difference typically involves what type and how many samples are necessary. In order to determine up front whether or not samples or data need to be collected, you should consider several factors:

(1) Are there regulations that may be applicable for the investigation or remediation and does the agency have a list of required data? If so, there should be little debate as to the minimum that needs to be tested.

(2) If there are no required samples under regulations, what is each sampling intended to accomplish?

(3) How does the proposed work answer the project objectives?

(4) Is DEP/EPA approval of the work plan required?

(5) What are the possible outcomes based on the tests and what would happen if contamination is detected?

(6) How does the work plan address the client's concerns?

Keep in mind that many consultants recommend acquiring data solely for the purpose of "completeness." There is a balance between the wish for completeness and the need for it.

The Final Environmental Reports

If reports are to be submitted to regulatory agencies, they should be reviewed by counsel prior to submission. When reports are shared outside of the attorney and client, any attorney client privilege and or work product doctrine is waived. So, you should be sure to keep drafts of the reports to the attorney and the consultant.

In their review, attorneys can apply a broader understanding of the legal implications of the report. Attorneys are generally more aware of issues that may arise in litigation due to their experience, which is not normally possessed by consultants. The word choices or the interpretation of data can be used against the client if not carefully reviewed.

For example, the word "contamination" or "contaminant" conveys a negative impression that could be avoided by the use of the word "impact." Lawyers understand that these words could have a negative effect on a judge or jury. Consultants, who are not normally familiar with legal proceedings, seldom think of this as an issue.

When a consultant draws conclusions regarding the applicability of the law to the set of facts found at the site, in essence, they are drawing conclusions based on a mix of fact and law. Some consultants are very willing to instruct clients on the applicability of the law, but do they have a law license?

Once a draft is completed, the findings should:

(1) Clearly present the "facts" (data).

(2) Meet any reporting requirements.

(3) Describe the methods used.

(4) Provide sufficient detail so that someone else can duplicate the result.

Reports containing maps and data tables should include the following:

(1) A north arrow.

(2) A legend showing distances and symbols.

(3) Sampling locations.

(4) Groundwater flow.

Be aware that consultants may change reporting units in tables. In general:

(1) "ppm" means part per million.

(2) "ppb" means part per billion.

(3) "mg/l" refers to water samples, "ppm" to soils.

(4) In water results, 1 mg/l is like 1 ppm in soils.

(5) 1 ppm is 1,000 ppb.

Conclusions/Recommendations in Reports

Conclusions reached by the consultant are by far the most subjective area of the report. The consultant puts results into context, and that is often the focal point of an agency or a potential plaintiff reviewing and using the report.

The lawyer is often the last person to review a draft before delivering it to the agency or closing the deal. Experienced lawyers look at the conclusions to determine whether there is factual justification for the conclusion. They also can review the conclusions to determine whether or not they trigger new issues or reporting requirements.

Consultants may offer recommendations at the conclusion of the report, and these recommendations may go beyond what is needed or appropriate. Recommendations submitted to regulatory agencies could become regulatory mandates, and should be considered before the report is final.

Always look at what is required to be in the report and ask:

(1) What is the advantage to having recommendations or extra information?

(2) If the client disagrees or declines a recommendation, will someone later try to second guess or assume the client was hiding something?

(3) Does the recommendation help the client finalize the issue?

There are perils and pitfalls in using consultants. However, carefully thinking through the issues and reviewing the reports can assist lawyers in avoiding the most egregious errors.

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