

# How to Fly with Legal Eagles and Not Have a Crash Landing

*Tips on how to minimize your stress level and maximize your job performance when working with attorneys*

By Will Gaston, JD

Although some find working with attorneys to be stressful and unpleasant, it can be a rewarding experience for the environmental professional. Whether involved in a real estate transaction or litigation, the technical environmental person provides needed assistance to the legal team. The environmental professional, as technical expert, gathers, reviews, and synthesizes technical data pertinent to either quantify risk in a property transaction or to successfully pursue or defend a lawsuit. Whether functioning as a testifying or non-testifying expert, the environmental technical specialist provides the attorney with the needed experience and help to succeed in his or her efforts.

## **Working with Attorneys**

Working with an attorney on an environmental matter can actually be a rewarding opportunity for the environmental professional. Whether you are an in-house environmental manager, a consultant, or other environmental professional, if your firm or organization is in some way involved in litigation, or if you are closely involved with a real property transfer or refinancing of a tract of real estate, you will likely have occasion to work with attorneys.

The purpose of this article is to provide you some introductory information regarding working with attorneys to help

make the experience professionally enjoyable and to avoid or minimize some of the anxiety that can develop when dealing with legal counsel.

## **The Role of the Attorney**

An attorney involved in an environmental matter will usually act as a clearinghouse for the various activities being conducted. If you are working for a business entity that is involved in a lawsuit, it can be comforting to know that there is someone who serves as the "big gun" watching out for everyone's best interest...at least everyone on his or her side of the fence.

The attorneys with whom you will work will likely be either environmental or real estate attorneys. Typically, the role of the real estate attorney is to facilitate the desired real property transaction. For example, the real estate attorney may retain a consultant to conduct a Phase I environmental site assessment of the subject property. Upon completion of the Phase I, the attorney will discuss any identified or potential environmental concerns with the consultant. After the attorney understands the environmental liabilities, the consultant's role is usually complete.

## **Types of Attorneys**

For our purposes, there are two types of attorneys: litigators and transactional. Litigators sue people. Their arena is the courtroom and their mindset is how to

destroy the other side's position in order to achieve victory for their client. Their conqueror mentality can make working with litigators stressful, but exhilarating at the same time. Alternatively, transactional attorneys typically work for their clients to complete a deal, sale, lease, or property financing. They work in the transactional "real world." Their mindset is to do what is necessary to best represent and protect their clients' interest and hopefully facilitate completion of the desired transaction. Their goal is to put the deal together. By contrast, working with a transactional attorney is generally much more pleasant than working with a litigator.

## **The Role of the Technical Professional**

Of course, the attorney is the legal expert. The environmental professional, however, can be someone adept at one or more of various technical disciplines. Depending upon the issues involved, the attorney will direct the non-attorney to complete the needed tasks to develop facts necessary for the litigation or property transaction.

Keep in mind that it is a team effort and that the lawyer needs the technical support of environmental professionals. Even if lawyers have adequate scientific knowledge due to the experience of prior work or education, they generally cannot testify as to the facts in their case, hence their need for technical assistance and experts. If they are suing

on an environmental matter, they cannot do it without the technical expert to help gather and testify to facts. If they need an evaluation of whether a property is or may be contaminated, the attorneys are not going to the site with a hand auger. The environmental professional who is not a consultant, such as the in-house environmental manager, is commonly called on to compile and review company records, documents, and data, and perhaps prepare to testify as to the factual nature of those data.

If actual or potential environmental issues exist, a consultant could be retained to perform Phase II or Phase III activities to assess or clean up a property. Again, the attorney would typically function as an overseer or gatekeeper through whom all information and documents must pass. The attorney may have been retained by the client to review the planned scope of work and costs, and review and probably edit the technical reports that are prepared. The overarching purpose of the attorney in such a project is simply to protect the client's interest, avoid liability, and prevent future lawsuits. The environmental professional is involved to assist the attorney with accomplishing these tasks.

**Litigation Support**

Environmental litigation support can cover a wide range of tasks to provide whatever technical assistance the attorney may require. This can include normal field services, but with lawyer oversight. Document review provides the attorney with a review and interpretation of the facts. The environmental professional may help the attorney draft or review interrogatories, which are questions that are asked of a witness under penalty of perjury. They may assist during the taking of a witness deposition. This can include providing technical questions or actually sitting with the attorney at his or her side during the deposition to provide on-the-fly technical input as needed. You may be called on to prepare or review affidavits and statements of fact and opinion, which are made under penalty of perjury. You might also be called to serve as an expert.

**The Designated Expert**

There are two general types of expert in litigation: testifying and non-testifying. A testifying expert is one who has been retained to provide an expert opinion at trial. If you have been designated as a

testifying expert, the attorney will at some point have to disclose your name, your background, your resume, and your billing rate to the opposing counsel because you will eventually be called to testify in court in the event that the case proceeds. If you are a non-testifying expert, there are many ways to assist counsel in preparation of their case, as have been discussed above. You could even function as essentially the attorney's "right hand" to review and

site to observe your actions and field procedures. You do not want to have inexperienced staff on those jobs. You need to have people who know how to stick to their knitting, who are consistent, and thorough. When you or your staff are working with representatives of the opposition in litigation, everyone must be keenly aware of whom they are with, to whom they speak, and what is said. Generally, the best policy is to have everybody

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interpret all of the technical data and strategize with counsel as to how best to bolster the client's case or to identify and capitalize on weaknesses in the opposition's case. Litigation is fact based, and as an expert, your role can be critical to the success of the case.

**To More Mundane Matters — Don't Forget the K**


"K" is the common abbreviation for "contract." Prior to commencing any work for an attorney, make sure that you have a written agreement in place. Be aware that following completion of the work, the attorney may want to review and edit any reports you prepare. Protect yourself so that you will get paid for what could turn into seemingly endless rounds of editing. You can state in your agreement that the report includes one round of editing, for example, or includes one meeting. Watch your account receivables closely. It is not uncommon for you to be retained by a law firm but to have your bills paid by a third party, such as an insurance company, which could take months.

**More Letters of the Alphabet**

Finally, mind your Ps and Qs. The attention to detail should ratchet upwards whenever attorneys are involved. This is particularly so in a litigated matter. Your work is not being reviewed solely by the attorney on your side. The other side also has attorneys and consultants poring over your work. You may have consultants from the other side with you at the job

keep their mouths shut. The non-legal personnel generally do not know any of the legal issues involved and should adhere to the philosophy of "discretion is the better part of valor."

**Conclusion**

There are environmental professionals and consulting firms for whom working with attorneys is their daily bread. For others, it may occur only periodically. In any case, it is likely that you as an environmental professional will eventually have occasion to work with an attorney. Litigation support or other activities with lawyers are a part of our professional repertoire of services, so let's do it effectively. 

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