Legal Advice for Community Leaders

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Mentoring a Movement

Empowering People

Preventing Harm

About the Center for Health, Environment & Justice

CHEJ mentors the movement to build healthier communities by empowering people to prevent the harm caused by chemical and toxic threats. We accomplish our work by connecting local community groups to national initiatives and corporate campaigns. CHEJ works with communities to empower groups by providing the tools, strategic vision, and encouragement they need to advocate for human health and the prevention of harm.

Following her successful effort to prevent further harm for families living in contaminated Love Canal, Lois Gibbs founded CHEJ in 1981 to continue the journey. To date, CHEJ has assisted over 10,000 groups nationwide. Details on CHEJ's efforts to help families and communities prevent harm can be found on www.chej.org.

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QUESTION: About a year ago we found out that a factory near us had contaminated the neighborhood. We spent a lot of time organizing and have been able to get a lot of community support. We have gotten good coverage in the media and are starting to get attention from state and federal agencies. Our goals include stopping the pollution, getting a new water supply, getting monetary compensation, health care and medical monitoring. We also are seeking evacuation.

Recently, a number of lawyers have approached our group and want to represent us. They tell us they can file a lawsuit that will be directed to all of the things that we want. The lawyers also tell us they can help us get government funding to do some of the testing and studies we want. They say they can file lawsuit under the Clean Air Act and Clean Water Act and can get us a Technical Assistance Grant under Superfund.

What do you think of this proposition?

ANSWER: Non-lawyers frequently ask whether they can file a lawsuit for one thing or another. I usually respond by saying that whether you can file a lawsuit asking for something really isn't the right question. You need to ask what the likelihood is that you can accomplish a particular goal through a lawsuit, how long the lawsuit will take, and how much it will cost. Then you should compare the lawsuit to other ways of accomplishing the same goal. Are the other ways more likely to succeed? Are they cheaper or faster: most important, you must look at the overall impact of pursuing your fight in a particular area? Will turning it over to the lawyers and the courts help build your group? Will your group be able to direct the litigation toward its goal or will the lawsuit take the fight out of your control?

Generally, the most effective way is to get economic compensation without the help of aggressive lawyers.

Evacuation is best achieved through political means. People have forced polluters and the government to move them by conducting direct action campaigns, together with pressure on the government through the Superfund and other programs. I would not turn the fight for evacuation over to the counts and lawyers.

Political pressure has also forced the government and polluters to conduct environmental testing and studies. This can be done through various government agencies. Again, this work can be done by citizens. While some lawyers are extremely knowledgeable about how to manipulate these agencies, it is the political pressure of citizens that forces the studies to be done. Technical Assistance Grants under Superfund are available to community groups. CHEJ provides materials on obtaining these grants. Lawsuits under the Clean Air and Clean Water Acts are designed to force compliance with the

standards set in the statutes. While these efforts can be useful, my experience is that this kind of litigation is too often pursued by lawyers or other self-style environmentalists without much regard for the goals or needs of the community.

Sometimes lawyers will file these "environmental" lawsuits as a way to recruit plaintiffs for their tort actions. When people propose these kinds of lawsuits, I advise citizens to ask how the relief sought will contribute to the specific goals that the group is trying to attain. These efforts can be useful if controlled and directed by the group, but they often deliver little in terms of what people are really seeking to accomplish.

Filing a Lawsuit

QUESTION: Two years ago, our community found out our water was contaminated by an abandoned dump. We were told our water contains 18 carcinogens and other chemicals that attack every system of the body. We immediately went on bottled water. After 1-1/2 years of going to every agency we could think of, we're still on bottled water. No one will spend the money to have us connected to the public water supply. We were told over and over that though the chemicals in our water are dangerous, they're at "safe" levels. We're sick from these chemicals. The state health department did a "study" and concluded there's no unusual pattern of illness linked to our contaminated water.

We've systematically sought legal help. Local lawyers and out of state law firms met with us and looked at our data. They're always friendly and encouraging at the first meeting. But at the second meeting, they usually ask lots of hard questions. Then they tell us they understand and appreciate our problem but won't take our case.

The last lawyers said we had 2 years from when we knew about our problem to file suit. With that deadline near and no lawyer to take our case, we filed the suit ourselves, suing the federal, state and local government as well as the owners of the closed landfill. We're confident we'll prevail but could you explain why our legal system forces us to take such a course?

ANSWER: Your letter is very moving. I'm sure all people who've lived in a contaminated area faced the same frustrations. Your situation results from a variety of problems in the legal and political system. I'll address them separately.

Political Issues:

Many communities have succeeded in forcing either the polluter or the government to get them public water. This success isn't due to litigation; the reason for this is simple: the government and the polluter aren't required by law to give you clean water.

I look at the goal of getting public water under the general category of changing someone's present or future behavior. In that same category are: closing existing dumpsites or preventing a new facility from being opened. There are many legal technicalities that might help you in each of these goals. But what your opponents do or propose to do are essentially within their legal rights. Therefore, a lawsuit is not the most likely route to success. You are in a more favorable position when you fight them in the political arena.

Also in that same category is your health department's statement that the cancer causing chemicals in your water are at a "safe" level. There's no scientific way to be sure exposure to a specific level of a carcinogen is safe. The health department made its guesstimate of what they feel is an acceptable level of safety. You're not required either to agree with their assessment or to accept it. However, the success of any challenge isn't just a matter of science, but of politics. Namely: do you have the political muscle to force the government to do what you want done?

Barriers to Getting a Lawyer:

I'm not surprised at your difficulty in finding a lawyer. The key issue is money ---who's going to pay the lawyer. Most lawyers bill their clients by the hour, but I assume you were looking for a lawyer to take your case on a contingent fee basis, since you could probably find a lawyer to take any case, as long as you're willing to pay.

Clients with compensation cases for past injury seek a lawyer who will work on a contingent fee. The lawyer gets a percentage (usually 33-40%) of the recovery. This means the lawyer is willing to prosecute the case because s/he feels the chance of winning and getting a sizeable recovery is great enough to pay for work the lawyer puts into the case.

In most contingent fee cases, the lawyer is risking more than just his or her own time put into the case. Typically, the lawyer agrees to advance (pay for) all of the expenses of the case, such as travel, deposition cost, and fees to pay experts. Lawyers shrewdly calculate the odds of winning because of all these cost factors. Lawyers are more unwilling to take environmental contamination cases on a contingent fee basis. One reason is courts have been hostile to plaintiffs in many cases and the chances of success are less. In many instances, plaintiffs won jury verdicts but saw their verdicts taken away, either by the trial judge or on appeal. Some judges openly mocked plaintiffs' experts and evidence and imposed their own, often biased, "scientific" judgments to reduce or dismiss jury awards. Though there are lots of complaints about this trend, it's encouraged corporate

defendants to take a tougher position.

The defendants' strategy is generally to delay---they have the money and you have the injury. In addition, the defendant tries to make the case complicated and expensive. Though this is costly to them, too, they figure your lawyer is paying for the case out of pocket in the hope of a recovery. Delay and increased costs might force them to either drop the case, or seek a settlement more favorable to the defendants than to you. This plus judges' willingness to impose their own "scientific" judgments, makes the area of toxic torts less attractive to lawyers you and other exposure victims try to recruit.

Statute of Limitations (the time limit on filing suit):

Most state laws require injured parties to file suit within a fixed number of years (usually 2-4) from the time the person knew of his/her injury. Some states allow injured parties to file suit within a fixed time of when the injured person knew the cause of the injury. In most cases of toxic exposure, knowing or proving the cause is difficult. When a lawyer doesn't take a case, s/he is inclined to play it safe and warn the victim about the statute of limitations. Lawyers do this so you won't blame them later, if you should file suit, but lose because of the statute of limitations.

Getting a Lawyer?

QUESTION: We live near an abandoned factory. The land is heavily contaminated with solvents and heavy metals. The state has been working for years with the owner of the site on cleanup plans. Our well water smells and tastes terrible, but the state tells us there's little or no proof of contamination. People have been drinking bottled water for 10 years. This process is breaking our backs. For years, lawyers have said the town and the state aren't legally required to give us a safer water supply. How do we get a lawyer to take our case?

ANSWER: It terrifies me that in America, people have been carrying water for 10 years to drink and still are using contaminated water for bathing and household use, all of which could cause higher exposures to the chemicals than drinking the water.

The answer to your question is you do not need a lawyer. There are probably many lawyers who would take your case. They could sue both the factory owner and the city, and probably get them to pay a good portion of the funds to get a public water supply to everyone's spigots. However, there are a number of solid reasons why I don't advise you to take this course:

1. Courts are very--slow. People are always elated when they get a lawyer to take their case and even more elated when the lawyer files the suit making lots of demands and accusations. But, the courts are the slowest institution in the world.

2. The courts are the arena in which the defendants' best like to be right. Not only are courts slow, but the opposition can use endless technical arguments to slow you down, if not to defeat you outright. Technicalities, such as the exact amount of contamination, accuracy of samples and degree of certainty required to prove danger, can all be held to exacting standards in court. Courts can demand high levels of proof about contamination and danger and make you spend lots of time and money to prove it. But in the political arena, your own belief and common sense about the water carries a lot more weight. You can 'prove' your case in the 'court of public opinion' even though you'd have technical problems proving it in a court of law.

One reason the court process is so long and drawn-out is that lawyers and experts used by the defendants are all paid by the hour. The polluters figure delay works to their benefit and so do their hired guns.

3. Suing the government is especially difficult. In most situations, you can't sue the government unless it gives you permission. This is called "sovereign immunity," based on old English common law meaning you "can't sue the king." Translated to modem times, it means "you can't fight city hall," at least not in court --- if you want to win. People HAVE forced the government to bring them clean public water, to relocate people from contaminated neighborhoods and to do site cleanups.

But these victories are rarely won in the courts. The best way to put pressure on government agencies is through direct action that gets you lots of publicity and makes them deal with you constantly. Once the politicians realize they can't get rid of you, they will figure it's easier to give you water than to have to face you at every meeting and in front of the media and explain why they refuse to give you water.
Once you take your case to court, you give the government a great excuse ---"it's up to the courts." Don't give them an easy way out.

How do We Get a Good Environmental Lawyer?

QUESTION: I have learned that our community is one that is being considered as a possible site for hazardous waste disposal. What legal handles exist? Can we win?

ANSWER: The Resource Conservation and Recovery Act (42 USC 6921) regulates the disposal of hazardous waste. The law creates a so-called "cradle-to-grave" system to regulate the flow of hazardous materials. Under this statute, the U.S. Environmental Protection Agency has rules which govern the disposal of hazardous waste. States are permitted to take much of this responsibility on themselves. Some states have taken the authority while others have allowed it to remain at EPA.

Communities have been very successful at preventing the development of new facilities for the disposal of hazardous waste. I can almost guarantee that a community can prevent a hazardous waste disposal facility from being sited in their community. However, keeping the facility out is not a matter of knowing the correct statute or regulations. You will need to learn about the law. But if you turn over your fight to a lawyer, you may be creating the only scenario in which you can lose.

The new hazardous waste disposal facilities has been routinely defeated by local communities. These victories have almost always been accomplished through the political process. The courts and scientific experts rarely turn away a proposed facility. Only when the community gets organized and makes itself heard in the political process do the courts and experts respond.

A lawyer can tell you the legal steps that need to be followed to get a permit for the facility and a scientist can help you look at the plans for the proposed facility in order to understand its shortcomings. However, a good environmental lawyer will not take the fight out of your hands and into his/her own.

I have heard it suggested that a lawyer is good because the lawyer can speak for the group, give it credibility and get the right things in the record.

I thoroughly disagree with this notion. If there is a public hearing, it is important that the people making the decision hear from the residents who would be effected and not from their lawyers. Facilities have not been stopped by the strength of legal or scientific arguments, but rather by the strength of the community opposition. No matter how brilliant a spokesperson, your lawyer will be matched by a high paid lawyer for the company. If it is a match of lawyers, you stand a good chance of losing since the law allows new facilities to be built. It is your power, voice, and vote as citizens that have kept new facilities from being sited. A lawyer can provide information (as can other experts) but the proven way to win and keep winning is in the political arena. If you get a lawyer, make sure the lawyer understands this.

Even if the site approval is being conducted by the state and/or federal officials, do not forget to involve local and county officials on your side. They can pass licensing and zoning requirements that make it difficult to site a new facility. Do not be dissuaded. By arguments that these ordinances may be illegal; they are an effective way to express political support and keep the fight in your arena.

For years, every group that's followed our advice has won!

Should We Hire a Public Interest Lawyer?

QUESTION: We've been trying to get some legal help and have not been successful. Someone from a neighboring town told me we should get a "public interest" lawyer. What does that mean? Is it a good recommendation? How do we find one?

ANSWER: Most lawyers are paid by their clients to represent their interests. The term "public interest lawyer" typically refers to a lawyer who works for an organization which has some type of overall political or social goal (such as fighting the death penalty). Two factors distinguish "public interest" lawyers:

1) The lawyer serves an organization with goals, rather than the specific needs of particular clients;

2) The lawyer is paid by the organization to pursue these goals, rather than by the particular clients.

Having a lawyer work for you without having to pay the lawyer is an attractive notion. To find such a lawyer, a good place to begin is to look to organizations such as environmental groups to see if they can help. Generally, public interest lawyers handle very specialized kinds of cases, such as challenging governmental rules or policies, rather than, say, helping an individual who's been harmed receive monetary compensation for the damage. Public interest lawyers generally do not accept the same type of cases that other lawyers are willing to prosecute, because public interest lawyers receive funding from foundations to provide services that are not otherwise available.

Finding a public interest lawyer to take your case may be quite difficultsince there are very few of them. To decide whether to hire a public interest lawyer, you need to consider whether the goals of the public interest group and its tactics and strategies are designed to achieve your goals in the way you desire to achieve them.

Sometimes a public interest lawyer will agree to take your case in the hope or expectation of collecting fees from the party you have sued after the case is successfully resolved. Sometimes the courts will order the other side to pay your attorney's fees when you win. If the lawyer can get paid by collecting fees in the end, you may be able to get other lawyers, including those who do not call themselves "public interest" lawyers, to take your case. In some instances, the public interest lawyer will take part of your case for free and expect to get paid for providing representation on other parts. Again, non-public interest lawyers may be available on the same basis.

Although there are very few lawyers who are full-time public interest lawyers, many lawyers spend part of their time providing help to clients or causes without charge. In fact, lawyers are required to do some of this work as part of their obligations in serving as a lawyer. Through the local bar association you may be able to find public-spirited lawyers to help you, even if they don't call themselves public interest lawyers.

Another way that people receive legal help is through a team of a public interest lawyer and a lawyer charging a fee. The public interest lawyer may offer representation on political or regulatory issues and, in turn, work with a lawyer who will handle the rest of the clients' case for a fee.

As you can see, an infinite number of relationships and arrangements are possible, but these are only as good as the lawyers, the causes and the cases themselves. Many public interest lawyers are unselfish people who give their work for little monetary reward and who are among the most experts and skilled attorney's in their fields. But remember, public interest lawyers also owe allegiance to a group or cause, not just to your case, and you need to evaluate this allegiance as you would the credentials and allegiances of any lawyer.

Since battles for environmental justice are more likely to be won in the political arena rather than the courts, you need to choose a lawyer who is attuned to this reality. Because public interest lawyers tend to be politically active, the public interest lawyer's expertise in a particular subject may lead the lawyer to want to control tactics and strategies outside the counts - or even to exaggerate the importance of the courts in environmental justice struggles. The public interest lawyer may be inclined to believe in fighting these political battles not in the streets but in court, because that is what the lawyer knows how to do.

Just as in hiring any lawyer, you need to see what kind of services you will get. Will the attorney be responsive to your needs? You need to compare help from a public interest lawyer to the other help you can get, and be aware of exactly what you are getting for free.

Should We Hire a Lawyer

QUESTION: Our local group of homeowners just found out our tap water is contaminated by some dangerous chemicals. Our group is small, it has little money and we are thinking about hiring a lawyer to help us. Do you have any advice?

ANSWER: In choosing a lawyer, you should find out about:

1) Experience - many toxic chemical cases are complicated. Be sure that the lawyer has experience handling cases involving difficult scientific issues, lots of people and large corporate defendants.

2) Commitment - find out whether the lawyer is willing to take responsibility for everything you want, not just a limited part.

3) Working with experts - does the lawyer know, have access to, and experience with scientific experts. The lawyer must be knowledgeable enough so that s/he will not be intimidated by complex scientific evidence.

4) Working with groups - the lawyer will have to work with your group. That means dealing with various individuals, answering their questions, and being willing to take direction from the leadership of the group. Since each group has its own internal struggles, the lawyer must be willing to work with the group in fulfilling its complicated needs.

5) Conflicts of interest - toxic waste litigation is likely to involve private individuals, corporations and government entities. The lawyer must be willing to pursue any of the group's objectives against any of these groups without any hesitation. Since toxic issues involve political conflict, a lawyer who is hesitant about taking on government authorities may have problems. The lawyer should be comfortable with the public conflict that your political strategies may cause.

6) Preconceived notions - sometimes the client and the lawyer enter a case with a notion of how the case should be resolved. The client may want $100 million dollars in health damages and the lawyer may think that the case should be ended if the company will put a clay cap on the dump. To be successful each side must know and accept what the other wants. Even though the client has ultimate approval of all decisions, the relationship will not work if the lawyer doesn't want to pursue the direction desired by the client.

7) Fees - lawyers work on two kinds of fees-one is by the hour and the other is by contingency (the lawyer receives a percentage of the recovery). In either case, find out what both you and the lawyer will receive. Get an estimate of potential legal funds for expert witnesses and litigation costs while cases go on.

Being clear about all of this in the beginning is the best way to avoid misunderstanding later.

We can offer one general piece of advice. Getting all the information we suggest may seem both difficult and time consuming. But remember that the litigation process is long and choosing someone quickly without considering the above could lead to problems.

Chapter 2
How Lawyers Can Help

Fitting Lawyers Into Your Organizing Plan

QUESTION: We have been living in a community that is heavily contaminated with waste products from a large smelter. Over the years we sought attention and concern from the community by various activities that got our dilemma into the media. We have found that we got more results from television and newspaper stories than we ever got from writing letters and petitions. Our experience teaches us that our government officials are much more responsive when they are made to answer us in public when we have a lot of supporters present so that they can be embarrassed publicity if we don't get the response we want.

Recently we hired an experience environmental lawyer, who will be challenging some of the permits of the plant. In addition, we've filed a lawsuit to get medical monitoring for our children who have had heavy metal exposures. At a town meeting we had signs out front and made something of a commotion. We did not let city and county officials cut us off after 15 minutes and move on as they had planned. The local media showed us to be a bit rowdy and our lawyer got upset. The lawyer says that as long as the lawsuit goes on, we should not take these kinds of actions or make any statements in public that are not first cleared by her. What would you think of this deal?

ANSWER: Lawyers are not infrequently concerned about their clients' actions and statements. Undoubtedly, things that you do and say can have an effect on your position in litigation. However, to evaluate this deal you were offered, we need to put the cart before the horse. This means understanding and prioritizing your goals and then assessing the tactics by which you are pursuing these goals.

People fighting contamination have generally had the best success by political action that is not only public but highly visible. I have seen precious few examples where being polite and following the rules and etiquettes of the government in order to maintain a good reputation had led to success. On the other hand actions that have gotten people's attention even at the risk of being labeled rude. Disruptive and even obnoxious have generally been much more productive. You must remember that you formed your group because you just were not satisfied with going along with the way things were going. You are asking the government agencies and corporations to change their behavior in ways that they do not want to change. Your demand probably will cost them both money and aggravation. It is not surprising that they label your actions as rude. If they are not calling you obnoxious, I suspect that you have not yet begun to create serious pressure.

Fighting in the courtrooms and through official government "public hearings" has rarely been as successful as community based political fights. The legal system greatly favors the polluter. Not only is the

law on the site of the polluter, but the formal process puts great weight on data and economic resources. The polluter has a great advantage in both of these areas.

Some struggles have successfully combined both formal litigation and agency proceedings with public actions. Governmental decision-makers, whether in the executive or judicial branch, are aware of and sensitive to public opinion. Keeping your story in the newspapers may help your case in court. There needs to be a combination of in-court and out of court strategies. The things that happen outside the courtroom could have a negative and/or positive impact. The client and lawyer need to be aware of the implications of their actions.

The approach to coordination that you described is too narrow and limited. You do not want your lawyer to have a veto. Instead, the lawyer needs to be aware of your overall goals and how the lawsuit fits into the overall goals. At that point, it is necessary to discuss and think through the implications of each tactic.

Too often, when a client hires the lawyer the only goals that survive are the goals that the lawyer is pursing. The case becomes the lawyer's case and things that were your goals, but are not part of the lawsuit, fall by the wayside. Blaming this on the lawyer is too simple. There are many things that you seek that will not be won in the lawsuit. It is your job to pursue them and remind the lawyer of the lawyer's role in the overall plan. If you don't have any plan except to have a lawyer file a lawsuit, you can hardly put all the blame on the lawyer.

Should We Hire A Lawyer To Incorporate?

QUESTION: We have received some advice that our group should incorporate so we can raise money and protect our leadership. Should we do it? Should we hire a lawyer to do it for us?

ANSWER: When citizens join together, it is generally a good idea to give the group a structure and a name. By sitting down and doing this, the people in the group work through their goals and how they plan to attain them. In the process of doing this, people often decide to incorporate. In order to have a group and use a name, it is not necessary to incorporate. However, there are a number of advantages to incorporating. Consider the benefits and liabilities before you make your decision.

The first reason to incorporate involves money and taxes. Organizations that take in money have to pay taxes on their income unless these organizations have been granted tax exempt status by the Internal Revenue Service (IRS). Many groups raise money from foundations or charitable donations. Many foundations are not allowed to make grants to groups that don't have a tax-exempt status. Similarly, individuals can take a tax deduction for a charitable donation only if the group is tax exempt.

Incorporation, non-profit status, and tax exemption are separate questions. First, the organization must incorporate, choosing to be for or non-profit. Then, the group can seek tax exempt status from the IRS (generally sought under section 501 (c) (3) of the Internal Revenue Code). CHEJ has information on both of these application processes. Although there are a variety of legal questions involved, lawyers usually can just fill out standard forms to do the incorporation and seek tax- exempt status.

A second aspect of the question is whether incorporation protects the group and its leadership. If someone decides to harass the group or sue the members for libel or slander, members can be sued even though the group is incorporated.

An advantage of incorporation is that the by-laws that define how the group will be governed are legally adopted rules. Therefore, the future control of the group is set out in rules (how officers are elected and policies are made) and these can only be changed by following specific procedures.

A disadvantage of incorporation is that the group must fill out forms and documentation that consume time and money. In addition, making the rules of the organization formal may limit flexibility. If you can't answer questions about how the group should be governed, you can't incorporate and wouldn't want to adopt a particular structure and set of rules.

Our advice is to get information and forms about incorporation and tax exemption and review them and think about the questions that are raised for your group. After you have thought through these issues, a lawyer could be useful in answering further questions. The most important question that only you and the other members of your group can answer is why do we want to incorporate?

Should We Sue as a Group or as an Individual?

QUESTION: We live near a toxic waste site and are considering suing the responsible party for damages etc. Should we sue as individual families or should our citizens' group sue as a group? What about the citizens who are not part of the group?

ANSWER: In order to answer your question, I have to know about the objectives of the lawsuit. If the lawsuit seeks to compensate victims, then the people who have suffered the damages must be the parties suing for compensation. If the lawsuit is brought to seek compensatory costs under the Superfund National contingency plan, then the people that spent the money are the proper parties to bring the lawsuit against the polluter. The citizens' group as a group can only bring an action to get compensation for damages it has suffered. Thus, if the group spent money for such things as environmental testing, it could recover this money under Superfund.

The idea that a party can only bring an action for an injury to its own interests is referred to as "standing." A person only has standing to raise issues in which he or she had a direct and tangible interest. The idea behind standing is to use the courts only to resolve actual disputes among people or groups with real interests. The legal requirement of standing poses a problem to people or groups that want to complain about general problems in the environment such as cutting down trees or killing animals. The law requires that the person bringing the lawsuit have a tangible interest that is affected by the act that is challenged, a generalized concern about the environment may not be a specific enough interest to give a person standing in a court of law.

People sometimes choose to list the group as a party to a lawsuit for political reasons. They may feel that naming the group gives either the group or the lawsuit credibility and publicity. Usually the first person or group listed on the lawsuit becomes the name by which the lawsuit is commonly known. Because the person filing the lawsuit has the choice of what party to list first, the lawsuit can be given the name of the group. This tactic can be used to give the people in the lawsuit a sense of purpose and identity.

On the other hand, by making the group a party to the lawsuit, you are making the group itself an issue. The people you have sued have the right to ask questions about the group. What is it? Who are its members? How does it make decisions? How did it make the decision to file the lawsuit? How does the group decide when and whether to settle the case? Where does the group get its funds? Unless you want to answer these questions and more like them, you should not make the group a party to the lawsuit.

In the lawsuit, you may have to deal with other people with similar interests to yours whether or not they are members of your group. If people are not part of your lawsuit or your group, they still have ways to make themselves heard in your lawsuit if they choose to do so. People who file a lawsuit raising claims similar to those you have raised may have their case joined to yours even if you do not desire them to do so. If you file a suit with a political objective – such as to close a facility- people with opposing points of view will be drawn into the case by the people you have sued who will work hard to show the Court that you do not represent a unanimous community.

Should We Be Worried About Being Sued For Libel And Slander?

QUESTION: We've been fighting for months now to keep a big multinational corporation from putting one of those new high-tech waste disposal plants in our community. Just recently, however, the corporation's public relations people told our local newspaper that they're "tired of irresponsible people (meaning us) telling, lies about them" and threatened to sue for libel and slander. I want to know: Are they serious? What can they do to us? What's likely to happen? What can we do about it? Some of our members are getting nervous and I'm worried that even if we don't get sued, this scare will make our group more timid. What should we tell our members to keep this from happening?

ANSWER: Citizens whose organizing is successful are often told that they will be sued for libel and slander if they do not be quiet. As you have probably figured out, you need to make a lot of noise to be successful in bringing your issue to the attention of the public and public officials. It is in the interest of the companies to keep things quiet.

Although the threat to bring a libel action is common, it is not done very frequently. Litigation is expensive and time consuming and libel and slander litigation is difficult to win. The threats to bring the litigation, as well as the lawsuits themselves, have the effect of harassment and intimidation. The companies are not looking for monetary awards from the citizen group; they are simply looking for a way to get the citizen group to shut up.

Libel and slander cases involve factual issues. Did the person say something he or she knew to be false with the intent to hurt someone else? From the citizen's point of view, they should not say things that they know or believe to be false. Citizens should not stop talking; they merely should say what they think is true based on the facts that are available to them. Since the overwhelming majority of people are doing this already, my advice may seem rather obvious. However, the obviousness of the advice makes it clear that the use and threat to use libel and slander cases is primarily an intimation tactic.

Of course, if you do get sued, you will have to defend the suit. When and if you get a lawyer to represent you in other aspects of your problem (such as to close or clean up a dump or get compensation for victims) you may also want to make an agreement with the lawyer to defend any lawsuits that are filed against the group or individuals. Some lawyers may suggest that they review and veto all statements by the group before they are made. However, this is an important political decision and the lawyer cannot and should not make all of these decisions solely on a legal basis or alone.

Finally, some people have suggested incorporating their group to prevent the individuals from being sued. This is not an effective remedy since individuals can be sued even if there is a corporation.

What Should We Look For in a Legal Contract?

QUESTION: We just read in the newspaper that our city council is planning to open a landfill in the community. We are told by members of the city council that this is being done with a nationally prominent, very reputable firm and that this will be done according to "state of the art" technology. There is a committee meeting set for next week and we are concerned with looking into this situation. We were told that a draft of a contract has been submitted by the company to the city. What should we look for?

ANSWER: The contract between your local government and the company that wants to open the landfill is something that deserves very serious attention. Get a copy of the contract and read it yourself. You will be able, in most instances, through use of your own common sense, to determine what is reasonable and good for the community and what is not.

Make sure you analyze the economic basis of the agreement. Frequently the community is obligated to produce a guaranteed tonnage for landfill. In order to keep up its obligation of tonnage, your community may have to bring in waste from other communities. This could cause traffic problems and loss of control over the kinds of material put in the landfill. The guaranteed tonnage requirement could force the community to keep operating the landfill even if problems with landfill itself develop. Another financial aspect that needs your attention is the tax and other economic benefits that are built into the agreement. Often the agreement will incorporate zoning traffic or other requirements that affect the taxes that will have to be paid by the operator of the landfill. This is not infrequently accomplished by having the company operating the dump pay a low tax on the grounds that the dump itself is not ca particularly expensive or intensive use of land.

The company may also try to justify not paying substantial taxes by arguing that the community gets the benefits of a free place to get rid of its waste, this condition is wrong for various reasons. The dump generates many costs, including the monitoring needed at the dumpsite. Potential problems that any dump might cause (such as pollution, contamination, noise, smell and infestation with various kinds of animals) must be monitored and remedied.

There will be additional traffic on the roads, different kinds of traffic, and noise. The kind of vehicular traffic that is generated is a problem that the community will have to deal with by maintaining better roads and more police. These efforts will be expensive. A community needs to negotiate so that all of the copsts forced on the community by the dump is paid for by the landfill operator, since it's the operation of landfill that will create all of these costs.

You must look at what the company is required to do to maintain and monitor the dump. A general promise not to create pollution and to follow existing state and federal regulations is not enough; the community may not have the funds or expertise to monitor the various kinds of pollution created by the dump.

Another concern involves insurance. Who is ultimately responsible for this landfill? You need to be sure that there is adequate insurance both for the landfill operator and all commercial dumpers. You must be sure that there is no "hold harmless" agreement. Often the company will put in their contract an agreement which will "hold harmless" the landfill company or the city government of all possible liabilities.

Make sure that the landfill operator has the economic ability to carry out its objectives. Make sure that the community receives adequate information and revenue to make sure the landfill operator is keeping up this part of the contact.

Once the contract is in place, improving it becomes much more difficult. The time to have the most impact on the situation is prior to the agreement being made. Too many times a local government will secretly enter into an agreement to create a landfill. Only after the landfill generates problems do the people in the community become aware of a contract and agreement. At that point, the community is locked into an arrangement which may not be beneficial to the local government or its citizens. I strongly commend your efforts to get involved at this early stage, because only in this way can you protect your rights as well as the interest of the community at large.

Chapter 3
Legal Terms

What Does The "Statue Of Limitations" Mean?

QUESTION: I recently moved into a town house and soon read that I am nearly on top of a site where toxic chemicals were dumped. I am really worried but I don't know where to begin. Somebody told me that I don't have any legal recourse because of something called the statute of limitations. What does that mean?

ANSWER: Statutes of limitations are laws that prevent a person from suing someone else for something that happened in the distant past. The purpose of these laws is to insure that disputes are settled within a certain fixed period of time after the cause for the complaint.

Statutes of limitation vary from state to state depending on the type of event that caused an injury. For instance, in some states, an action based on the sale of a car (a contract) can be brought for four years after the sale. But in the same states, a lawsuit may be filed only for two years after someone is injured in a car accident.

In terms of your situation, the important question is when the time limit begins to be counted. The time period for a car accident usually begins to run from the accident itself. In other situations, such as when a doctor leaves a pair of scissors inside you during an operation, it is not clear when the statute of limitations begins to run. Toxic dumps pose similar legal problems since the dumping of the chemicals, exposure to the chemicals by the residents, and injuries from the chemicals occur at different times. Because of these problems, there are a number of different times when a statute of limitations may begin to run: when a person is first injured; when a person is last injured; when a person is aware of the injury or when a person is aware that another person caused the injury. This means that you will have a certain time from one of these dates to file a lawsuit. If a lawsuit is filed too late, it may be dismissed and you may lose the right to go to court. Court decisions vary from state to state about the proper time periods for persons exposed to hazardous chemicals. Finally, some legal actions such as actions to clean up toxic wastes are based on legal theories or statutes in which the statute of limitations does not come into play.

In terms of where to begin, we have three pieces of advice:

1) Find out what is known about the dump site. Start by talking to your neighbors and contact government agencies, especially the United States Department of Health and Human Services and United States Environmental Protection Agency.

2) Work with your neighbors. Toxic dump problems are community problems and working as a group is the key to success.

3) Get a lawyer who can answer your questions. Lawyers have their own language and may act as if they expect you to understand their jargon. Make sure you get answers to questions that you understand.

What Is A "Class Action"?

QUESTION: I live near a factory and we are concerned that it has polluted our neighborhood. People in the community met with a lawyer who said that the case must be pursued as a "class action." What does this mean?

ANSWER: A class action is a legal device that combines a number of individual cases. However, many people can sue the same person in the same lawsuit without the case being a class action.

In the class action, the court has to approve the case and ultimately decides who is in the group. If the case is brought as a class action, it is brought on behalf of everyone in a defined and identified group such as everyone who lives or lived within "x" miles of the plant for more than "y" months during the past "z" years.

Of course, anyone who fits this definition could bring his/her own lawsuit. All the people who fit the definition could also hire a lawyer or lawyers and bring suit and this still would not be a class action.

What makes the case a class action is that the court defines a group which includes people who themselves have not brought a suit. Courts have traditionally been cautious about class actions because the lawyer and the plaintiff who represents the class is given the right to represent people who themselves have not hired the lawyer.

Although the lawyer may call the case a class action when it is filed (this is referred to as a putative class action), the case is not a class action until the court has certified the class. In order to certify the class the court must determine that the questions common to the people in the class predominate over individual questions. This is why personal injury cases are not frequently certified as class actions, because the injuries are by their very nature individual. In addition, the court must find that people in the class do not have adverse interests with regard to the litigation. Any settlement and attorney's fees in a class action must be approved by the court. Before settlements are approved, the court must look at the overall fairness of the settlement and will seek input from affected members of the class.

When a court decides to certify a class, it has a number of options. An "opt-in" class means that people are in the class only if they choose to be. An "opt-out" class includes everyone who is in the defined group, unless they specifically and formally notify the court that they do not wish to be in the class. A mandatory class represents in court the rights of all people in the defined group and does not give individuals the right not to be in the litigation.

Class actions were for many years proposed by plaintiffs because it was seen as a way to protect and notify many people and to aggregate enough small claims so that it would be economically feasible to get good legal representation for people whose individual claims were small. At that time, large defendants regularly opposed the certification of class actions because the defendants believed they resulted in more claims being filed against them.

However, in many instances, the defendants now actively seek class actions because they allow all claims to be tried at one time and, thus, help the defendant cut down legal fees and reduce the uncertainty of having lots of different courts decide cases. The results will vary from court to court; some will be individually higher than average and a few high judgments could be very damaging to the defendant.

Some defendants believe that putting all of the cases in front of one court makes the court necessarily sympathetic to the overall plight of the company. This is particularly true if the defendant believes that the particular court will reach a result the company can live with. The defendant may also not oppose a class action if it believes that the representative plaintiffs and their attorneys are inclined to reach out of court settlements the company can live with.

These factors have led many injured people and their lawyers to oppose class action. These people believe class actions tend to be certified when a settlement is likely. The result is that the individuals are not heard.

A comeback to this opposition to class actions is that unless the entire situation is reviewed, including the ability of the defendant to pay all current and future claims, many injustices can occur. People in the same situation with the same injury may get very different compensation because their cases are heard in a different court. People whose cases are heard at the very first instance may have a hard time because it takes a long time and lots of expense to develop the information needed to prove a case.

The general pattern is that after the first few cases, the lawyers become more successful at getting information the defendants have tried to hide. This, in turn, could lead to another potential risk. If a strong case is developed and some injured people win and collect large verdicts, it may deplete the defendant resources and insurance. As a result, people injured in the future may have no recourse. Advocates of the class action point out that although the claims do not get individual consideration and the results are more even, people with similar injuries get similar recoveries. This means that things are leveled out and the highest and lowest recoveries are eliminated.

Despite your thoughts and the thoughts of your attorney regarding the merits of pursuing a class action, the truth is that what happens is not entirely in your hands. If you do not pursue a class action, others may file one and your rights may be affected if you are put in the class. Courts also can put cases together through various methods of consolidation which, even though not a class action, can seriously affect your case, your rights and the outcome.

What Are Depositions?

QUESTION: We filed suit against a dump that contaminated our community because we believe it made us sick and will cause future illness. Recently I was deposed for 3 days. It was grueling! Most of it seemed unnecessary. I couldn't understand how the questions or answers related to the case. Two parts of the deposition puzzled me: when they asked about pollution effects, the dumper's lawyer said I could only answer about what I knew of from personal knowledge and not to include hearsay. What is hearsay? I was also asked questions about my chemical exposure and the medical effects of exposure. When I'd answer, the dumper's lawyer kept saying I'm not an expert so my opinions aren't admissible. What does this mean? Why ask me questions if they don't want my answers?

ANSWER: The deposition is a legal procedure where parties to a lawsuit can find out about the other side's case before trial. There are two reasons for this procedure. One is to avoid trial by surprise or ambush. The legal system uses the principle that trials are fairer when each side can "discover" the other's case. Second, if each side knows the other's case, trial might be avoided through a settlement, since each side will know what it's up against.

In a deposition, the deponent (witness) is questioned by a lawyer for one of the parties. Lawyers for both parties are present. A court reporter makes a transcript. In a case like yours, the deposition's purpose is to understand your case: what are your injuries and what's your evidence. Also, the lawyer can evaluate what kind of witness you will be at trial.

In their search for information, the defendants' lawyer will often probe areas that don't seem relevant. Often, you can guess what the lawyer's wants for the defense. For example, the lawyer might be looking for evidence that the illness you blame on toxic exposure was the result of you exposure to toxicc hemicals. you were exposed. Or, other family members who weren't exposed but have the same illness so it can be argued the illness was hereditary.

Sometimes you can't figure out the purpose for the questions because the lawyer is on a fishing expedition. Fishing expeditions aren't necessarily improper and might even be necessary, since the lawyer doesn't know in advance what to ask in order to discover relevant information. When you don't know where to look, you go fishing.

There are other reasons for long depositions. Usually, defense lawyers are paid by the hour. The longer the deposition, the more they can bill their client. Further, the lawyer may want to jack up your lawyer's costs even if your lawyer is representing you on a contingency fee basis. Also, the dumper may want to drag out the case, especially if he can profit from his polluting activities, so long as the case drags on. And, if he expects to have to make a cash settlement, he may decide to drag out the case so he can keep using the money he would otherwise have to pay you.

Finally, they know how stressful (and costly) a drawn-out case is on you (lost work time, experts' costs etc.). The lawyer may try to use the deposition to intimidate you. Even if there's no attempt to intimidate, a nervous plaintiff often feels inadequate when the defendant's lawyer explores the far-reaches of the plaintiffs' knowledge. Result: the plaintiff answers "I don't know" to too many questions. This makes many people feel stupid. Psychologically, the witness starts to feels s/he should have answers to questions just because they are asked.

Often the most exasperating depositions result from these insecurities. Some defense lawyers go over and over the details so they don't miss anything. But sometimes, depositions drag on because the witness is afraid to say "I don't know and, instead, gives long answers. The lawyer then follows up on each detail. Your question about hearsay fits into this context. Hearsay means a statement that isn't something you've seen but something you've heard. Let's say a child falls off a bike. Direct evidence is eye-witness testimony from someone who saw the child fall. But if the child told you he fell, your evidence is hearsay, since you didn't see it. If you saw a videotape of the fall, your testimony would still be hearsay because you didn't see it with your own eyes.

The law favors non-hearsay evidence because it's subject to cross-examination. The person who saw the fall can be asked how close they were; were there distractions; is their vision good; was the path blocked; was the witness prejudiced in some way. When the witness uses other person's perception these questions can't be asked. Evidence isn't always excluded because it's hearsay. People often make decisions based on hearsay. The reliability of all evidence needs to be reviewed, whether or not it is hearsay.

Under the rules of evidence, only experts are allowed to give opinions. Non-experts are only supposed to testify on what they perceived. Conclusions on these perceptions are left for experts to draw. The line between opinion and perception is vague. Almost every experience is part perception and part opinion, based on what we conclude from the perception. This distinction often puts the plaintiff in a box. If the plaintiff doesn't believe she had an injury caused by exposure, the plaintiff has no case. On the other hand, the plaintiff's opinion about the injury and the cause isn't admissible evidence because conclusions are reserved for the experts to make. So there is a built-in bind that makes you feel insecure and which gives the side with the most money to hire experts an edge. It's a fact of life about this type of legal action.

What Do You Have To Do To "Intervene" In A Legal Case?

QUESTION: I live near a Superfund site. The government has sued the operator of a local dump to require cleanup. Someone suggested to me that our group "intervene" in this litigation. What does that mean?

ANSWER: The legal term "Intervention" refers to a situation in which a 3rd party participates in litigation that already exists between two other parties. Thus, "intervention" is the correct term to describe your desire to become an actual participant to litigation that already exists.

If you don't want to file a separate lawsuit or intervene in an existing one, you can take advantage of what is happening. Once a case has been filed in court, much of what happens is public record and you can find out about it without becoming a party. You can attend hearings and see and copy papers filed in court.

Intervention has some very clear advantages. An intervener is an actual participant in the case. Not only will you know everything that goes on but you will be able to speak out and have your views considered. As the case goes on, a variety of decisions may be made about methods of cleanup and other activities. The government's view of what is needed and/or is best is not necessarily the same as your view. Intervention provides the opportunity to have your, views considered by the court.

Even if you are considering an independent lawsuit against responsible parties; your participation in the government's suit can provide information and input into the solution. Since the government's actions are so important, this opportunity should be very carefully considered. It provides a way to apply pressure, get information and keep things moving in a desired direction.

If you decide not to intervene and become a party to the lawsuit, this should not stop your efforts to be heard and participate. Under 28 C.F.R. §50.7 you have 30 days to comment from when a settlement agreement is published in the Federal Register. Government officials may tell you that they can't discuss the case with you since its very delicate or its "in litigation," (in fact, the Freedom of Information Act allows the government to keep certain documents prepared in litigation secret from you). You should expect their response but not settle for it. You must use all of your political effortsto participate. The alternative is to have you rights, health and safety affected without you having a say, which strikes me as a very bad idea.

In some instances, the government agency which is bringing the legal action will be enthusiastic about your participation. Some officials have realized that citizens have the best information about a site. In addition, active participation by citizens helps the government force the offending party to take the desired action.

What Is Pleading "Self Defense"?

QUESTION: We are in the middle of a long fight with a neighborhood landfill. As a last resort, we are considering using a physical blockade at the landfill. We are planning a peaceful but militant protest and will refuse to move from blocking the entrance. We have heard that criminal charges can be brought against us. We read that some groups and people have been successful in defeating the criminal prosecution by pleading "self-defense." What do you think of this defense in these circumstances?

ANSWER: People who have blocked the entrance to dumpsites or other hazardous facilities have been successful in defending against criminal charges based on a theory of "self-defense."

In order to wage this defense successfully, you need to be aware of the legal elements of the defense. I will describe them in general; the specifics vary from state to state, and you should check them out with a local criminal lawyer.

A person pleading self-defense can use reasonable force when s/he reasonably and honestly believes s/he is in immediate danger of unlawful bodily harm.

None of these elements should be particularly hard to meet. The blockade is hardly "unreasonable force" since it is not dangerous and does not physically hurt or threaten anyone else's physical or bodily safety. The protesters generally believe they are faced with a threat of physical harm.

When faced with the citizens' attempt to allege self-defense, the other side typically attacks on a number of fronts. The first argument is to say that there is no immediate threat of physical harm.

The dumpers and government argue the danger is unlikely and distant in time. The companies generally have also argued that the people doing the protest are not themselves faced with the threatened danger. They typically argue that the activity being protested is not unlawful because it has all necessary government permits. Knowing these legal arguments, you can plan your activities to anticipate the expected arguments from the other side.

You need to recognize that militant protest will have dramatic effects including on your allies. You do not need all of your allies to participate in the militant action nor even to support it. Most people accept that some members of their group will take steps that they themselves neither approve nor desire.

But you need to consider the effects of taking these steps on those who do not like them. You need to have a strategy for how you will deal with the fact that some allies do not support your militant actions. Disagreements over strategy need not be fatal to your plan, but you need to address the problems and disagreements up front. In self-defense, be prepared for opposition from both your friends and your enemies.

What Is Medical Monitoring?

QUESTION: We live near a large industrial facility that has polluted ou rneighborhood. The EPA has spent millions studying the contamination. They sued the plant and forced them to pay for the cleanup. We filed a lawsuit that has dragged on for years in court. The government has done virtually nothing to help or support us. Our lawyer has recommended that we accept a settlement. The centerpiece of them settlement would be a medical monitoring program for us. Is this enough to get in exchange for dropping our lawsuit? We are suing for $800 million. Also, will this settlement provide anything for the workers at the facility? I heard that workers and residents at Fernald, Ohio both got medical monitoring as a result of litigation.

ANSWER: Medical monitoring programs as a remedy for people wrongfully exposed to toxic chemicals have received much attention over the years. Before explaining this legal and medical concept, however, I will answer your specific questions.

In order to evaluate the settlement proposal, I would need to know much more. One thing for certain is that the dollar figure mentioned in the initial lawsuit has little, if any, bearing on the final settlement. An appropriate settlement figure is based upon the strength of the legal claim (i.e., what the claim is likely to produce at trial; whether a verdict for you would be appealed; whether you would win the appeal; or when the compensation you win would be paid). The second factor is whether or not the predicted results and the defendant's offer match your desires. The client is the only person who can decide to accept or reject a settlement.

You say that the lawsuit was filed on behalf of the community. In evaluating the settlement the first step is to clarify who the clients are. If the plaintiff is an organized group, such as a corporation, it has rules about who its members are and how decisions are to be made.

Most cases have individual people who are plaintiffs. If the case has specified individuals, it is up to those people to decide whether they accept the proposed settlement. If the case has been certified by the court as a class action (the court defines the plaintiffs as a group, such as people who live within a certain geographical area, whether or not they have filed a case or hired a lawyer) then the court must hold a hearing to determine whether the proposed settlement is fair even if the named plaintiffs (class representatives) and their lawyers want to accept it.

In all situations, the people in the case may have different goals. Some people may want to be compensated for personal injury or damage to property. Other people may believe that they have not yet suffered any injury, but are concerned that they might get sick because of their exposure. These people may be interested primarily in medical monitoring.

Medical monitoring has both a medical and scientific meaning. In scientific terms, medically monitoring is related to what is sometimes called medical surveillance or screening. This involves looking at a population of people to look for signs of injury for which they may be at risk. For example, the American Cancer Society recommends that women have routine pap smears. Medical monitoring generally means that you look for medical indications or disease before the person identifies any symptoms. The idea is that this early detection will lead to a better chance of effective treatment.

Medical monitoring also can be used to determine whether people have been and are being exposed to toxic chemicals. For instance, the Centers for Disease Control (CDC) recommends that children under the age of 5 be screened to see if they have lead in their blood. Rather than testing housing for lead contamination, sometimes workers are medically examined either to find the presence of hazardous substances that indicate exposure (uranium found in urine) or the harmful effects of exposure (blood injury indicating benzene exposure).

The courts in many states have allowed people wrongfully exposed to hazardous materials to be awarded medical monitoring. The monitoring has most typically been allowed in cases where people have been exposed to chemicals which cause cancer many years after the hazardous exposure. The courts have also recognized that a medical monitoring program for the exposed population may also help discover patterns of disease in the exposed group that would not be noticed if people went to different doctors had different tests and did not share information. Medical monitoring should be designed by experts who are aware of the medical hazards of the exposure and the examination necessary to discover these hazards.

A program should be flexible so that changes can be made to reflect patterns in the group as well as new medical and scientific findings. If the direct evidence of past exposure is not available because measurements were not taken, the pattern of illness found by focused medical monitoring may be the best evidence that the exposure took place.
The answer to your question about whether workers at the plant will benefit from the medical monitoring and other parts of the settlement depends upon whether they were plaintiffs in the lawsuit. Although nothing would preclude workers and residents from being plaintiffs in the same lawsuit, this has very rarely been done.

In 1985, residents near the Fernald, Ohio uranium plant filed an action against the plant for medical monitoring. The case excluded personal injuries which mean that every person believing they had a personal injury from the plant could file a separate action. The case was filed as a class action for everyone who lived within a certain number of miles from the plant. When the case was certified as a class action, the court excluded workers from the class because workers had different rights and different exposures. This meant that if a family lives near the plant and one person in the family worked at the plant, the person who worked at the plant was not in the lawsuit.

The residents settled their lawsuit in 1988 and a court supervised medical monitoring program was set up. Residents also got compensation for property damage and emotional distress.

In 1990, workers and their unions filed an action seeking medical monitoring and other relief. This class action also excluded personal injuries and any worker with a personal injury could file a separate action for compensation for the injury.

The lawsuit was settled The workers were able to file the lawsuit and bypass the workers compensation system because they claimed they were intentionally injured by the defendants. The settlement included the implementation of a medical monitoring program, changes that prevent the company from resisting workers compensation claims (the company must agree to a claim if its approval is recommended by a panel of 3 doctors, one chosen by workers, one chosen by the company and one by the other two members, and the company will not appeal any decisions in favor of the workers) and money for emotional distress.

Chapter 4
Settling a Lawsuit

How Much is Enough?

QUESTION: My attorney has called and told me that the defendants in our lawsuit are planning to make an offer to settle our case. The attorney says the offer "looks good." There are 22 families in our neighborhood who are plaintiffs in the lawsuit. How do we know how to evaluate their offer and tell whether it's any good?

ANSWER: Evaluating whether the money offered in a settlement offer is enough is one of the hardest, things in the world to do. The simplest answer is that the dollars you get paid should equal the amount, of damages you have suffered. However, putting all of the injuries and suffering into a dollar figure is very difficult.

Some of the damages are easy to compute. If you have suffered economic loss such as reduced property value, lost profits from a business or expenses for wells, water, or other expenses, these are relatively easy to put in dollar figures. Similarly, if you have been sick and had medical bills, these have a dollar cost which can be added up.

Other damages are much harder to evaluate in economic terms. If you have suffered psychological injuries or fear, damages can be awarded for these, but figuring just how much they are worth is a puzzle. Sleepless nights and anxiety can be disabling and terrifying but evaluating them is hard. Similarly, the destruction of a community and a way of life is also compensable but putting a dollar figure on them is hard.

If you have an injury, the law allows you to be compensated for the damages .that come from the injury. For example, if you have your legs cut off and cannot walk, the law allows you to be compensated for the damage (your inability to walk, work, etc., that will occur in the future).

In hazardous waste cases claims have been made and sometimes allowed for the risk of future injury. Courts have said that you can be compensated for the medical tests that are required because of the increased risk of disease.

The above paragraphs talk about the value of your damages and injury however, these do not translate directly into the value of your case. In order to evaluate the value of your case you must consider the total of your case. In order to evaluate the value of your case you must consider the total of your damages (as described above) and reduce that figure by the chances of winning the case. Thus, if the damages are $100,000 and the chances of winning are 50% then the value of the case is $50,000.

In addition to the chances of winning and the damages, you must also look at other factors. There may be reasons why the defendant will settle out of court that do not directly translate into the same

chances for your success at trial. For instance, the defendant may believe that you, the plaintiff, only have a10% chance of winning at trial, but the defendant may wish to avoid the legal precedent or publicity of a trial.

On the other hand, the defendant may be afraid that if they settle with you, others will be more anxious to sue them because they will get a reputation for not defending cases vigorously. Of course, settlement offers involve negotiating and you may believe that the offer you receive is only a first offer and will go up as time goes on. On the other hand, the defendant may make a "take it or leave it" offer and say you have a limited time to accept it. The negotiating posture must be considered as best you can estimate the ability of each side to produce more pressure on the other as time goes on. Another way of saying this is that the settlement value equals what the defendant is willing to pay.

The decision of whether and when to settle is the decision of the client. (One exception to the rule is a "mandatory" class action in which the court has certified a class action not allowed people to "opt out" and the decision of whether the settlement is reasonable is ultimately up to the judge who considers the input of plaintiffs.)

In cases involving more than one plaintiff the settlement figure you have heard ($19 million at Love Canal and $180 million for Agent Orange) are total figures. Since the amount the individuals will receive is less than clear (or to be more specific, almost entirely unknown) at the time that the settlement offer is made, how much you might get is an almost impossible question to answer.

Out Of Court Settlements

QUESTION: We are being offered an out of court settlement in our lawsuit against a local polluter. Can we insist that the records of the case be made open to the public and that the company admit its responsibility?

ANSWER: When you settle a case, the terms of the settlement are based on the agreement between the parties. Whether the terms of the settlement and any part of the case are public or not, depends entirely on that agreement. However, if there is no agreement between the parties, then the case records are public, not secret. You are probably wondering why court records are so commonly secret if the rule is that the records are public unless there is an agreement. Typically, the person bringing the lawsuit has less interest in secrecy than the person who is sued and accused of wrongdoing. You can almost always expect the defendant to seek secrecy in an out-of-court settlement.

Defendants use a number of maneuvers to try to force the plaintiffs to accept the secrecy that the defendants desire. The first tactic is to refuse to produce the information that the plaintiff requests in discovery. Even though the defendant is required to produce relevant materials and information, the defendants will try to force the plaintiff to accept terms of secrecy by dragging out the process and coming up with flimsy excuses. The plaintiff must go through a long process of forcing the defendant to produce materials.

The defendant will often ask the court to keep details secret by claiming they are confidential business matters. The rules require the defendant to produce relevant material, but the court, when faced with repeated disputes about what is being produced, will usually try to force the plaintiffs to accept the defendant's secrecy demands. Thus, the defendant can often force the plaintiff to agree to secrecy merely by flaunting the rules. Too often, the courts allow the defendants to get away with these tactics.

Whether the ultimate resolution of the case is public is up to you. If you are offered a settlement and one of the terms of the agreement is secrecy you do not have to accept it. You can continue your case in court and the final decision of the court will be public. A settlement means that the parties have made their own agreement. If you do not like the terms, do not accept them.

The same approach applies to admission of guilt or liability. Rarely will a party who settles a case admit any wrongdoing. While I understand why you would want them to admit what they did, in my opinion, whether they do or not is not critical. What is important is that the public knows the terms of the settlement. If the terms of the settlement are public, then it becomes obvious whether the company is guilty or not, regardless of whether they actually admit any wrongdoing. For example if a company gives you $10 million to settle a case, but denies wrongdoing, it is clear they knew they were wrong or else they never would have given you the money. It would be ideal if they admitted guilt, but don't waste a lot of resources on getting them to say something they are unwilling to admit. As long as the terms of the agreement are made public, everyone will know the truth no matter what the company says.

What Is a "Release"? What is a "Fair" Settlement

QUESTION: I live near a dumpsite and the state told me my water is contaminated with trichloroethylene (TCE) and methyl ethyl ketone (MEK). The state has been providing us with bottled drinking water, but we still have rashes which we think are from the chemicals in the bath water. We have been contacted contacted by a lawyer who said he represents the owner of the dump. The lawyer said that the company will buy our property but we need to give the company a "release" of liability. We are concerned that we may have future illnesses and are concerned about getting a fair settlement of all our claims against the people who polluted our land. What is a release? Do we need a lawyer?

ANSWER: A "release" is your statement that you will release someone from future liability. Simply stated, you are saying that you will not have rights against that party in the future. Since you will be giving the release in return for money, the release will be a legally binding contract.

The most important thing about a release is to look at it and see who it releases and from what. The rights affected by the release depend on what the release says. First, you only give the release to the party with whom you make the settlement and you can reserve your rights to pursue grievances against other parties.

(How the release of one party affects your rights against other parties is primarily a question of state law referred to as "joint tortfeasor.") You definitely should have a lawyer consider all of this before signing anything.

Whether the release is fair depends on your injuries. In addition to property damage, many people feel that their health has been injured by their exposure to chemicals. If you have been made sick by the chemicals, you have claims for your medical bills, lost wages, and pain and suffering. In addition, you may have legal claims for these injuries if the injuries continue in the future.

Evaluating your damages includes one especially tricky problem. Injuries caused to humans by chemicals in many instances (particularly with diseases such as cancer) do not occur until many years after exposure to the chemicals. Thus, it is possible that you will become ill in the future because of the chemicals. If you believe that this is possible, then you must decide whether you will sign a release that prevent you from suing in the future for illness that you don't have yet.

In determining whether to sign a release of your right to sue in the future, you must look carefully at the law in your state. The statute of limitations in some states allows you to sue within the time you get the illness; while in other states you must sue from the date of the last exposure even if you have not gotten sick yet. The law also varies from state to state as to whether you can bring a lawsuit against a party based on a new illness, once you have had some resolution (settlement or decision from a court) of another illness caused by the same chemical and the same defendant.

In thinking about possible future illness and placing a settlement value on them (in exchange for a release) you also need to look at the kinds of health tests and treatments you may need to look for and treat those diseases that are most likely to occur from the chemical exposure. In addition, you have to look at problems you may have in getting health and life insurance because of the increased likelihood of future illness and the fact that you will have received money in exchange for a release of liability.

In conclusion, a release is technical legal matter and you need to review carefully with a lawyer what rights you are giving up before making an agreement.

How to Pay a Lawyer

QUESTION: I am hiring a lawyer to file a case for me seeking compensation for property damage, personal injury and mental stress because of the contamination from a nearby hazardous waste facility. I chose a lawyer who was willing to pursue the case without me paying lawyers' fees unless and until the case is resolved. The lawyer agreed not only to invest his own time for free, but to pay for whatever expenses that it takes to prosecute the case. The lawyer called this a contingent fee, meaning his payment is contingent on him getting me a recovery. The last line of the contract the lawyer gave me to sign says I'm responsible for costs of the case if there is no recovery. This last line terrifies me because I've heard litigation costs such as expert fees; travel and deposition costs can easily run into hundreds of thousands of dollars. Should I sign this agreement?

ANSWER: Lawyers who take cases on a contingency (they get paid only if and when there's a recovery) often advance costs to prosecute the case, plus their own time and effort. When the cases are unsuccessful and there is no recovery, the clients very rarely pay the lawyer for the expenses that have been advanced.

Despite these facts, contracts lawyers ask their clients to sign generally have the clause you mention, making clients ultimately liable for costs. Why do lawyers insist on this clause if they don't generally collect these costs? The reason is simple: most states' laws require the attorney to put this statement in the agreement.

The rules that govern lawyers' conduct are set out in "legal ethics" or the "Code of Professional Responsibility." These rules vary from state-to-state though they are based on a "model" set of rules drawn up by the American Bar Association (ABA).

Until recently, almost every state required clients to be ultimately responsible for litigation costs. This was to make sure litigation wasn't being drummed up by lawyers merely using the "client" as a front to advance the lawyer's cause. The idea was to require the client to have a financial stake in litigation and prevent lawyers from creating phony litigation in which the alleged client had no interest.

The ABA recently changed its model rules to allow lawyers to be ultimately responsible for all expenses of litigation that's filed based on a contingency fee contract. The rule was changed because some people with valid claims were afraid to vindicate their rights, fearing they'd lose their life savings or homes if they lost. This possibility was particularly intimidating for the people with limited resources.

The ABA rule also recognizes there are other ways to uncover phony lawsuits. The plaintiff in a lawsuit is almost always deposed. In the deposition, the intentions and legitimacy of claims is evaluated. The lawyer is subject to a variety of sanctions for bringing a fraudulent action.

In addition, the rule change fit legal requirements to the realities of life. Lawyers very rarely pursue their own clients for these expenses; the legal requirement was an artificial construct. Some states adopted the ABA rule. Others are doing so. Still others may stick with the old rule. If the old rule is still in effect in your state, the lawyer must say you ultimately are responsible for expenses if litigation is unsuccessful. You should then ask your attorney whether it's the attorney's practice and intention to seek to collect expenses from the client.

Often lawyers say it's not his or her intent to collect. When the lawsuit is over, if unsuccessful, the lawyer will send a bill for expenses, but make no effort to collect.

People have asked me whether they should sign such a contract and trust the lawyers. If the law requires this condition in the contract, you shouldn't expect the lawyer to omit it. Whether you trust the lawyer is something you must decide. Your choice of lawyers should always be based on trust. You need to trust the lawyer and if you don't have confidence and trust in the lawyer, get another one.

Chapter 5
Legal Strategies

Can I Sue a Facility to Get Relocated?

QUESTION: Our town is besieged by a dump in our midst. In the past it took a variety of different kinds of waste. We fear much of it was hazardous. The dump still is operating and we have tried politically to get it closed and have been unsuccessful.

We now have changed tactics and want to be bought out of our house and move away. We filed a lawsuit that says that the dump is contaminating the neighborhood and asks for money for a buy-out and damages. What do you think of our strategy?

ANSWER: Relocation has become a popular goal. The tendency to seek relocation results at least in part from frustrations people have encountered in seeking other goals, like cleanup. Even though it is often quite possible to prove many violations of the law by a facility, the courts have been reluctant to close down a facility. As a result, your best chances of fighting an ongoing facility are through direct political action.

On the other hand, direct political action is not always instantly successful and long term efforts are very hard to sustain. In addition, if the operating facility is supported by powerful interests, your only hope may be not only to confront politicians but also to participate actively in the political process. Some groups have resorted to working to put their own leaders into political office in order to influence the political system.

Relocation has at times been successfully pursued. The most common of these successes have been through the administrative process. In these actions, the citizens have forced the state or federal government under Superfund or a state statute to require the operator to move people out in order to keep the facility open. In some instances, the EPA may, as part of its Superfund Remedial Investigational Feasibility Study (RIFS), decide that it is best to move people out as part of its "cleanup" plan.

Private legal actions by citizens are becoming more common and successful. These suits often resemble actions that are brought for property damage. The plaintiffs say their properties are damaged and want compensation and part of the compensation they seek is for relocation.

Property damage claims are sometimes sought in the same lawsuits that seek damages for personal injuries. In many cases, the personal injury cases are settled for the property value which is much less than the personal injury damages. If a case brought for personal injuries in the amount of forty million dollars is settled for the cost of relocation, then the personal injuries have not received proper compensation. This problem has led some lawyers to file cases only for property damage. This allows personal injury claims to be dealt with separately. While these claims can be worth more money, they

are both hard to prove and expensive to prosecute. In other words, the personal injury part of the case has a higher potential recovery. But the chances of getting this recovery are smaller and the costs of getting it are higher. If you bring a suit for relocation, you must be careful to design it in a way that does not compromise a personal injury claim.

I strongly favor action as a way to deal with facilities that are still operating. But a lawsuit on behalf of individuals seeking to be moved can be a useful tactic because it clarifies the rights and demands of those seeking to be moved. Remember, the legal processes may offer some protection but it does not offer any guarantees.

Contamination From A Chemical Plant

QUESTION: A number of people in our neighborhood, me included, were bought out of our homes because of contamination from a chemical plant. This was the culmination of many years of organizing the community and making the public and government aware of the hazards we faced from chemical contamination. Now, only four years later, we read that the state government is planning to move people back in. We are outraged and frustrated. The state, which we finally convinced to take some action and have us moved out, now says it has a study which shows the neighborhood to be safe. Is all of our work in vain?

ANSWER: You are not alone. The scenario you describe has been happening more and more often I know of at least two neighborhoods, Love Canal and Caudal Cristiana in Puerto Rico, where the government is working to "re-settle" communities that were evacuated due to toxic contamination and its effects.

Unfortunately, the news is not good. The activists who alerted both communities to the hazards and protested the resettlement have had their efforts fall on deaf ears. No legal maneuvers have, as of yet, been able to prevent resettlement, but people continue to analyze the situations.

In Love Canal, the relocation process is governed by the Superfund statute. That statute requires that a habitability study be done to address is the health risks. This process, directed by EPA, took over six years; and involved numerous expert panels and review bodies. As you might expect, the results of these studies have not been satisfactory. The panel determined that it could not measure the risk because the toxicity of many of the chemicals in question was not adequately studied; that there is not only inadequate toxicological information but there are not even guidelines for many of these systems. Because of this lack of data, the study conducted was merely a comparison of Love Canal with other areas. The study never looked at the questions of health or safety. But merely compared Love Canal to other contaminated areas of Niagara Falls.

When EPA's plan to resettle Love Canal was challenged, EPA stated that the study complied with legal re-requirements (even though it did not actually evaluate habitability). The decision of what to do with the land was left to other agencies.

Community leaders fighting resettlement have looked at a number of avenues. Pressure has been applied to the banks that would have to hold the mortgages. Former Love Canal residents started a letter writing campaign to banks and other lending institutions saying they would publicly announce, through the media, that the banks were poorly managing their depositors' money by mortgaging homes on contamnated land. A total of 72 letters were mailed and all but three banks responded. The banks were very nervous about the prospect of a public debate on their investments.

Federal agencies such as Housing and Urban Development (HUD) and the Farmers Home Administration (FMHA) plays a role in guaranteeing mortgages and have legal responsibility to inspect property. Mortgages held on these properties may violate the agencies' own requirements.

Love Canal can serve as a model for how these situations can be approached in the future. At the time of the evacuation, people need to consider that, at some later time; the government or a private group will try to resettle. You should try to determine and control the potential for resettlement at the time of evacuation because this is the time when citizens have the most leverage. Only a firm and enforceable agreement not to resettle can prevent a change in policy. A process that turns the decision into a scientific battle, when much of the information you would need is simply not available, is not likely to lead to a happy result.

Lead Poisoning

QUESTION: My children came home from daycare with a note from the State Health Department saying that she had lead in her blood. A few days later, someone from the city came out and found lead in the apartment I rent. My child was sent to the hospital. I was told that I had to get the lead out of the apartment. What can I do?

ANSWER: Lead poisoning of children is one of the most serious public health problems in our country. Millions of children are poisoned by lead at this very moment. Most of this poisoning comes from lead paint.

Despite the seriousness of the problem, houses are not regularly tested for lead paint. In some states, children are tested for lead poisoning when they start school or daycare. People are working to get laws passed in other states that require lead testing of all children.

Only when a child has been reported as being lead poisoned does anyone test the residence, this situation reminds me of the old coal miners who took canaries with them into the mines. When the canaries died, the miners knew there was poisonous gas and knew to escape the danger in the mines.

You have two different kinds of legal rights that need to be explored. In terms of your apartment, your landlord has an obligation to provide a place to live that does not have lead paint at levels that are dangerous. The city, county or state housing department should force the landlord to remove the lead paint. The landlord can be citied for both civil and criminal violations and be fined for having lead in your apartment.

You also may have a claim against your landlord for a portion of the rent you paid. Until the lead is removed, you also should have reduced rent. The procedure to force the landlord to eliminate the lead paint and to adjust the rent varies from state to state. You also have legal rights because of the lead poisoning of your child. Lead poisoning causes very serious injuries. The most serious problems caused by lead are the ways in which lead affects the brain of young children. Lead causes brain injuries and even relatively low doses of lead can lead to a significant drop in a child's IQ. Young children are most vulnerable to lead poisoning because their brains are still developing and because they take in the most lead.

You can sue the landlord on behalf of the child because of the injury caused by the lead. The lead poisoned child may have a variety of problems. Many

behavior and lead problems that plague children have been related to lead. The landlord has a strict obligation not to poison children who are tenants and can be sued if the child has been harmed.

The injuries caused by lead are very serious. If a child in your family has been injured by lead, you should consult an attorney who has experience in lead poisoning cases. You may not be able to identify the medical and learning problems that could and may already have resulted from the lead. As the child's parent, you have an obligation to investigate with an attorney what can be done to protect and help your child.

MCS And the Law

QUESTION: I suffer from multiple chemical sensitivities (MCS). I cannot tolerate being in an environment which is treated with chemical pesticides. I live in a condominium complex and the management wants to treat the common areas with pesticides. I have sent letters telling the management that the pesticides make me ill and have had my doctor send a letter telling them that the chemicals make me sick. Is there anything I can do to stop the application of these chemicals?

ANSWER: People suffering from multiple chemical sensitivities have had some success recently using the Americans with Disabilities Act (ADA) of 1990. This statute, 42 U.S.C. 12101, says that "no person with a disability shall by reason of that disability be excluded from services or denied the benefits of services, programs or activities of a public entity or be subject to discrimination by any such entity."

This statute has been used in the following manner. The person with MCS argues that their condition is a disability. The person suffering with MCS is in a difficult position because they cannot use the building as long as the pesticides are being used.

The biggest legal problem faced by the person with MCS is being able to show that the facility the person is complaining about is a public facility. In Texas, people with MCS have forced a county government to lessen the use of pesticides in public buildings by arguing that the use of pesticides kept the people with MCS from being able to use the building. Recently, the Department of Housing and Urban Development (HUD) filed a complaint against a housing development because the use of pesticides discriminated against a person with MCS. Although the federal law only applies to public entities, prohibitions against discrimination against the handicapped exist in many states and localities.

HUD General Counsel made a determination that pesticides in a condominium and by a lawn service could constitute discrimination against a resident on the basis of handicap. This case was entitled Melinda M. Lebens v. Country Creek Association, Inc., et al. (HUD ALJ 03-93-002-1).

How Do You Adopt A "Bad Boy" Ordinance?

QUESTION: We want our local government to adopt a so-called "Bad Boy" ordinance that would prohibit the county from making contracts with companies that have been convicted of crimes. This would give us a new handle to deal with polluters. The county attorney says our bill is unconstitutional. Is he right? What can we do?

ANSWER: Laws preventing government from doing business with companies who've committed illegal acts are common. After World War II, Congress passed the Armed Services Procurement Act of 1947 (10 USC 2301) and the Federal Property and Administrative Services Act of 1949 (41 USC 251). Both acts authorized government to contract with "responsible contractors." The government interpreted its authority to contract with "responsible contractors" to include the right to refuse to contract with "irresponsible contractors."

The process by which a contractor is found to be irresponsible and therefore ineligible to contract with the government is called "debarment." A contractor who isn't allowed to contract with the government is said to be "debarred" This of course is a serious problem for companies that get much revenue from the government.

The debarment process has been challenged in court and the courts have said the concept of debarment is legal. In Gonzalez v. Freeman, 334 F. 2d 570 (D.C. Cir. 1964), the debarment process was challenged on constitutional grounds. Contractor debarment was said to be unfair and unconstitutional. The court said debarment was not unconstitutional; the government merely had to follow general rules of fairness, such as letting accused persons know what they're accused of, giving them a chance to address the charges and having the rules applied fairly to all, parties. These principles of fairness in applying a set of rules are referred to as "procedural due process." When government takes action, it must comply with procedural due process. The government achieves this result by following the Administrative Procedures Act (federal or state laws that set out specific procedural rules for government action).

In the second case, Horne Brothers v. Laird, 463 F. 2d 1268 (D.C. Cir. 1972) debarment regulations were attacked because the contractor had not yet been indicted for a crime. The court again upheld the legality of the debarment process. No criminal indictment or conviction is needed as long as there's evidence of criminal activity and the government agency has a factual basis for finding this criminal activity.

Bad Boy laws continue to flourish. The federal debarment process is set out in the Federal Acquisition and Federal Procurement Regulations. Some states have debarment laws. In planning your statute, you can begin by looking at existing statutes. Consider these questions:

1. Should the law require conviction, indictment or evidence of crimes?

2. Should the violations include civil as well as criminal violations?

3. Should the law specifically include violations of environmental statutes?

Bad Boy laws are constitutional. The county lawyer should make sure that the statute provides the procedural due process to make sure that the law stands up to constitutional challenge. Our final suggestion is that all people applying for contracts or permits be required to disclose all criminal and civil convictions and penalties, as well as on-going investigations that relate to price-fixing, violation of environmental laws and false statements. There's no reason any company should be allowed to apply for government contracts that concern environmental matters without revealing its history of violations. This requirement should also be applied to all of its corporate subsidiaries.

Property Values vs. Freedom of Speech

QUESTION: I live near a landfill and they are proposing to expand it. Sensing community opposition, the operators of the landfill have proposed that they guarantee the value of our property in exchange for our not challenging them. Is this legal? Doesn't it violate our constitutional rights? Would you tell us your opinion about making this kind of arrangement?

ANSWER: The contract that has been proposed does not violate your constitutional rights. Your rights of free speech would be violated by a government action that prevented you from saying what you wanted to. What the dumpsite operator wants is common. They want you to agree, for a price, not to complain about what they are doing. It doesn't violate the First Amendment to buy someone's right to speak out.

Before you settle on such a deal, it is worth figuring out what you will be getting. Lawyers can be clever people, so you need to watch the fine print. In order to evaluate whether the contract is fair you need to look at what you are giving up. In the first place the contract says that you are giving up any right to complain about the operation of the landfill. What you would be giving up is very broad, since you do not know what possible problems can come up.

In addition, you are being asked to give up any and all claims you have against the landfill operator. You are not just giving up claims that your property is being devalued. You are giving up claims that could involve personal injury or other economic losses, including such things as the expense to get clean water. You are being asked to give up nuisance or mental aggravation caused by the landfill. In exchange for all this, you are simply guaranteed the value of your property. This deal is very unfair to you. When the details of the agreement are looked at closely, problems will become more obvious. Here are a few things to look out for:

- When does the contract go into effect? Before or after the landfill gets all of its permits? If the guarantee is only good in the event of expansion, the operators are putting one over on you.

- Are you required to attempt to sell the house first? This could cost time and money.

- Are there other stipulations that make the arrangement uncomfortable? Would you rather keep your rights and stop the landfill, for example?

I would close by making some suggestions for a more even and just contract. The first and most obvious way is that the landfill operators buy the property at market value now. Then, you can move right away. The second condition would be for the landfill operator to simply
give you a property value guarantee without removing your right to collect other damages. Another way the landfill operator could accomplish the same goal and be fair would be to buy the property from you and continue to let you live there and pay rent. You would be free to leave whenever you felt the problem was too severe. But if you want to get the dump owners to give you the best deal, you need to build a community group and stick together. A good starting point is to list all your demands, then figure out how to work as a team to win them all.

Hold Your State Responsible
by Lisa Foster, Esq.

In January 1990, the State of California was found liable for the cost of cleanup at the notorious Stringfellow Acid Pits, a toxic dump site near Riverside, California. Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), popularly known as "Superfund," persons or companies that generate toxic waste, own or operate a site where toxic waste poses a threat to the environment or public health and safety, and/or arrange for the disposal of toxic waste at such a site, are responsible for the costs of cleanup costs that, in the case of Stringfellow, can easily total hundreds of millions of dollars.

What is remarkable about the Stringfellow decision is that the state of California neither owned nor operated Stringfellow, never generated waste disposed there, nor transported waste to the site. (Over thirty corporations that did so have already been found liable for cleanup costs.) The State licensed the facility, inspected it periodically and took emergency action once it had determined that the site threatened human health and the environment. Although the State argued strenuously that its actions at Stringfellow were part of its traditional regulatory role, a jury found, and the Court confirmed, that the state is liable for an as yet undetermined percentage of the cleanup costs.

To be sure, the extent of the State's role at Stringfellow was unprecedented, but so was the liability decision. Although state regulatory decisions are often challenged at the time they are made, particularly when they impact the environment, states are rarely found liable for the consequences of their regulatory decisions when, twenty years after the fact, environmental damage occurs.

The impact of the Stringfellow decision is already being felt, particularly in California. Indeed, in a context that is likely to have profound national implications, at least one agency of the State is objecting to the licensing of a low-level nuclear waste disposal site because of concerns that the State may there, too, be found liable for subsequent environmental damage.

The State of California solicited applications for the construction and operation of a Low-level Radioactive Waste (LLRW) disposal site at Ward Valley. The Ward Valley site is owned by the federal government, which has agreed to transfer ownership of the site to the State for the purpose of constructing a LLRW disposal facility. Four companies submitted applications to the State, but three of the four applicants withdrew, citing potential liability problems. The fourth applicant,

US Ecology, was ranked last by the State Department of Health Services (DHS), the agency responsible for licensing the facility.

Despite its own concerns about the company, DHS is recommending that the Ward Valley site be licensed to U.S. Ecology. However, the question of the State's potential liability has been raised by the State Controller and others, and threatens to derail the licensing.

Potential state liability in connection with Ward Valley could come from a variety of sources. First, the State will actually own the site. Second, the State is licensing and regulating the facility, and many questions have been raised about the location of the site, a mere twelve miles from the Colorado River, a major source of drinking water for Southern California -and the site design essentially an unlined ditch that could leak.

Third, under the terms of the proposed agreement with U.S. Ecology, after 30 years of operation, the State would be responsible for the closure of the site and for post-closure monitoring activities. Fourth, the State, notably through the University of California, is a generator of some low-level nuclear waste. Finally, very serious questions have been raised about the U.S. Ecology's license. Two of the three low-level waste sites operated by U.S. Ecology have leaked. At one, in Maxey Flats, Kentucky, US Ecology is arguing that the State of Kentucky should be solely liable for the site.

Prior to the Stringfellow decision, it was unlikely these liability issues would ever have been considered and even less likely that they would have been raised by a State officer, such as the Controller. After Stringfellow, states simply cannot afford to ignore their potential liability.

For environmentalists, the Stringfellow decision can be a potent new tool. Most significantly, the Stringfellow decision should force states to take licensing

and regulatory decisions more seriously. States will need to more closely scrutinize applicants and project designs and demand additional safety features because if something goes wrong, the state may well find itself defending against costly litigation and paying enormous claims. As in the case of Ward Valley, the pressure to consider liability is not likely to come from the environmental regulatory agencies but from those charged with ensuring the fiscal health of the state. Controllers, treasurers, governors, and legislators, who may not have been environmental allies in the past, may be swayed by hard dollars. The result may well be to build greater accountability into the regulatory process.

NOTE: Add Note about author.

Private Meetings

QUESTION: Every time our group has a meeting, we are invaded by a number of our opponents. Employees of the company who want to build the incinerator, as well as public officials who support the incinerator, keep showing up. They not only disrupt the meeting by talking endlessly, they intimidate many of our members. I am concerned that we have no privacy or confidentiality in our deliberations. What legal tools do we have to keep these people out of our meetings?

ANSWER: A public meeting is different from a private meeting. A public meeting is just what the word implies: it is public. And a private meeting is private. However, in practice the differences are hard to specify and enforce. Government bodies have truly public meetings which the public cannot be excluded from. Public access is guaranteed by the Constitution and so-called "sunshine laws" that prevent government bodies from having secret meetings.

At the other extreme is a meeting in your own home. Your home is your property and you do not have to allow anyone to enter your property. You can tell a person to leave your property. If the person fails to leave, you can call the police and have the person removed and prosecuted for trespassing. You can also go to court and get an order for the person to stay off your property. A person that violates this kind of court order can be subject to punishment for "contempt of court."

Most community group meeting are somewhere between these extremes. They are not governmental meetings, nor are they usually in someone's home. Instead, they are held in a school, church and/or community center. If you want to keep someone out of one of these meetings, you have to go through a number of steps. First off, who is doing the keeping out? If it is a formal group, you must look at the group's structure and rules. Does the group have any rules about who its' members are and how its' meetings are to be conducted? How does the group make decisions? How will it decide to keep people out, by majority or unanimous vote? Who can vote? This is usually spelled out in written rules (such as the group's by-laws and constitution).

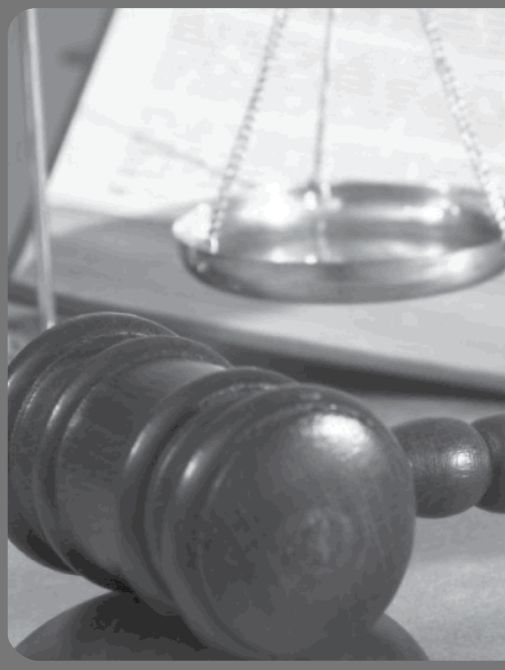
If a group tried to keep me out of their meeting, I would ask what rules the group has about its meetings and how it makes decisions. Even if the group voted unanimously to keep me out, I would still argue that they are not following any written rules and that their rules are undemocratic.

A second concern has to do with the rules that apply to the property the meeting is being held on. If it is a church, school or some other kind of quasi-public institution, the institution may have rules about how their space is used and who can come or be excluded from a meeting. If you are planning to try to keep someone out, you need to look at both the rules and structures of your group and the rules of the owner of the property.

My experience is that people often assume that their actions are secret, private, or confidential, and do not contemplate that their so-called "privacy" may, one day, become public. As a lawyer, I have spent my career representing people who are in disputes. In almost all of these situations, after the battle lines have become clear, the people on each side are confronted with, and undercut by, their own documents from an earlier time.

Frequently, people believed the document would be secret. The lesson I have drawn is that you should not try too hard to achieve privacy and confidentiality. Instead, you should assume that the things that you think are private may become public. You should act and speak accordingly.

Community groups can anticipate that someone who is now on your side may later change their position. Similarly, someone in the group, even if the person does not change positions, may not be as protective of your privacy as you would like. A person may not understand the reasons why a particular issue is sensitive to you or the group. Rather than striving to close meetings, you should be sure that you can live with opponents throwing in your face whatever you have said or done.



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