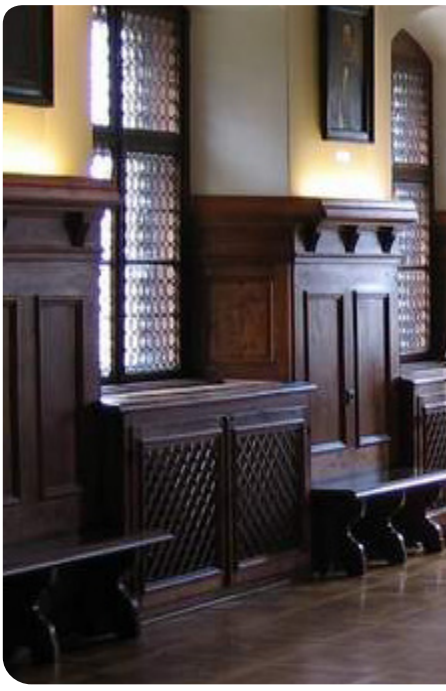
User's Guide To Lawyers



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Updated April, 2003

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Mentoring a Movement

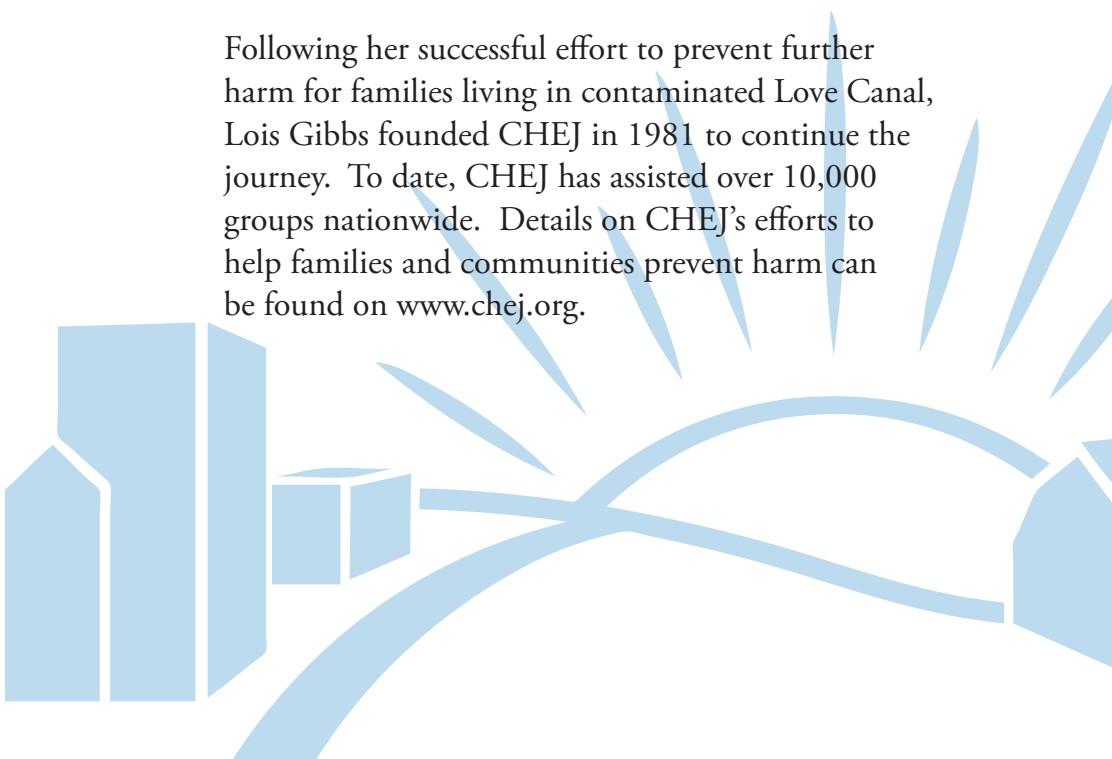
Empowering People

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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Chapter 1

Introduction

"And Jesus said, "Woe unto you lawyers also! For ye load men with burdens grievous to be borne, and ye yourselves touch not the burdens with one of your fingers." — Luke, 11:46

It's inevitable. Get used to it. At some point in your fight, you'll have to deal with lawyers, if not your own, then your opponent's. This book is about the uses and abuses of lawyers who get involved with citizen's groups. Since decisions about lawyers can be hard, we'll outline choices,problems, opportunities and ways to avoid lawyer trouble.

Our perspective is that the most effective way to win your issues is through organized citizens' action. It's far more effective than using the legal system. That said, lawyers can still play a valuable role, if they are a carefully used tool in your strategy to win political power.

We couldn't think of a better way to start this book about lawyers than this **disclaimer**. This is a book written **by** non-lawyers **for** non-lawyers about how to deal with lawyers. It's not a law book. References to specific laws, cases, and examples are for illustrative purposes only, not to set out legal advice. As it says in this book, if there's one thing lawyers are very good at, it's giving legal advice. And if there's one thing we **don't** want to do, it's practice law without a license!

Chapter 2

Why Do You Need a Lawyer?

We hear lots of reasons, some good, some that are wrong most of the time, some that are just awful, and others where it depends on the circumstances. Here are some common reasons and some new ways to look at them.

Belief: "A lawyer gets us credibility."
Reality: Seldom true. You get credibility by being an effective group. Some of your neighbors or even your opponents may be easily impressed and even awed by a lawyer. But, so what? The price you pay to gain this relatively slight advantage can be very high.

Belief: "A lawyer can represent us better than we can ourselves."
Reality: No, except for a formal court proceeding, you can usually do much better job yourselves. Further, when you bring in a lawyer to speak for you, normally at least half of your members will drop out, thinking that the lawyer will now do all of the work.

Belief: "A lawyer can get us information we can't get ourselves."
Reality: This can be very true, especially if your lawyer is creative and aggressive in dealing with your opponent during that portion of litigation called "discovery" (detailed later). For this to work, your lawyer has to believe in what you're trying to do and be willing to apply his or her skills to support your strategy.

Belief: "We need a lawyer to help us set up our organization."
Reality: Maybe. Most community based groups are "unincorporated associations" and don't have to file any papers. This is fine, unless there is some specific reason to incorporate. For example, you want to get a grant from a foundation or need to buy or own property. A lawyer's help is important if you decide to incorporate, file for tax-exempt status, and be responsible for on going reporting that's part of being a non-profit corporation. Generally, we advise groups to wait until there are several compelling reasons to incorporate before doing so. Before you make this decision, see CHEJ'S guide, "*Should Your Group Incorporate?*, which you can order from us.

If your group does want to incorporate or get tax-exempt status, be sure that your lawyer either knows the law as it applies to your type of community group, or has the resources to get help. If your lawyer makes a mistake in the filing, you could end up in

deep trouble with the IRS. Not every lawyer knows the law that relates to non-profit, community action organizations.

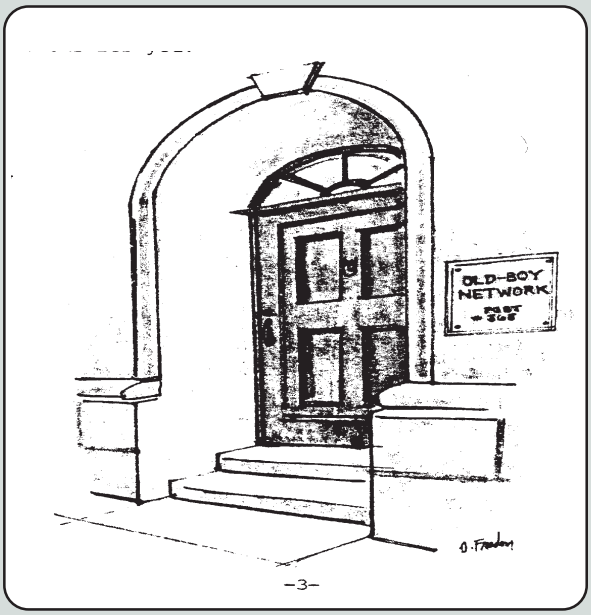
Belief: "If we get a lawyer, we'll also get the benefit of his connections."
Reality: Lawyers do travel in interesting circles and sure some of their connections might be good for you. The main pitfalls involve the kind of "Good Ole Boy" networks that many lawyers are part of. We've seen groups get "sold out" by Good Ole Boy lawyers, whose allegiances with buddies at the county courthouse far outweighed any commitment to the groups issue. Keep in mind that the reason why "Good Ole Boy" networks exist is to benefit the good ole boys and not you. What makes you think that your lawyer will "use up" his/her connections for you?

Belief:"A lawyer can keep us out of trouble."
Reality: There's a great line in a Marx Brothers movie where Chico says to Groucho, "When ya gotta trouble, getta lawyer. Then ya gotta more trouble, but at least then ya gotta lawyer."

Community groups that review all their strategies with their lawyer do seem to get into less legal trouble, but mainly because they don't seem to do anything at all!

Lawyering is a disciplined, conservative trade. Perry Mason may seem very imaginative, but that's not the way most lawyers behave. If you ask your lawyer whether you should demonstrate, picket, or get rowdy, the lawyer's whole training is to say "No!"

If you want your lawyer's advice on an organizing strategy, it's better to ask, "What laws would we be breaking?" "What are the odds of arrest or other legal trouble?" And "what can you do to get us out of this trouble?" Such questions tap into what your lawyer knows best: the law and how to deal with it. We're always surprised to see how much groups rely on lawyers for organizing advice. Generally, your lawyer knows less about organizing than you do, plus is further handicapped by legal training that argues against political action. Asking a lawyer for organizing advice is like asking a plumber for advice on curing a cold. Sometimes, you get lucky, but usually you don't.



Chapter 3

So What's a Lawyer Good For?

PLENTY, if you develop and maintain a good relationship. Examples:

- PROTECTION from you opponents
- LEVERAGE ("Bargaining Chips")
- MONEY (e.g. compensation)
- INFORMATION
- EXPOSURE (of your issue, of your opponents)
- ADVICE AND COUNSEL
- REPRESENTATION when appropriate.

Lawyers also know the laws on leafleting (are there easy places in your community where you can be legally restricted from leafleting?) and on deformation, libel, and slander.

The First Amendment to the Constitution protects you in most of these areas. But, just because you have a Constitutional right to freedom of speech, association, assembly and protest, doesn't mean local authorities will respect those rights. Generally, your group will win if you fight courageously and aggressively. Your lawyer's job should be two-fold: (a) to advise you in advance about your rights, but not stand in your way and (b) to get you out of trouble. If there's any one thing you have a right to expect from your lawyer, it's that s/he'll fight to the death to protect your Constitutional rights!

Here's an example of what we don't mean: a local leader in Kentucky was using a lawsuit against several chemical companies as part of her strategy. The chemical company's lawyer filed a motion demanding she turn over her membership list with addresses and phone numbers and a record of their problems. She called CHEJ to say her group was going to disband rather than disclose this information. we asked her, "What is your lawyer doing to protect you. She replied that her lawyer said she had no choice but to turn over the records. Her lawyer was dead wrong! The Supreme Court (In NAACP v Alabama) ruled that the First Amendment protected group membership lists. She then told her lawyer about this (it was the first he had heard of it) and then fired him!

This story does have a happy ending. After she fired her attorney, she consulted with a couple of other lawyers and found that she could get good legal

advice and representation. This time, she knew the right questions to ask.

Protection

When you fight for your rights, your opponents will fight back. Your lawyer can help you analyze some of the ways your opponents can retaliate against you and figure out how to deal with it. If there's one thing that's true in this country, it's that anybody can sue anybody for anything. Winning such suits is, of course, another story. You also can't count on your opponents to fight "fair." For every retaliatory action, there is law that your lawyer should be prepared to handle. These include:

- Laws on picketing (conditions and restrictions—some communities restrict "residential picketing," i.e. picketing somebody's home).
- Law on boycotts. You may want to know about "secondary boycotts" where,for example, you boycott a store to try to pressure them to stop selling products made by the company you are fighting.
- Laws on trespass (what would happen if you went onto the dump-site property, for example? What would happen if you refused to leave?).

Another example: A Maryland group now has a leaking, unlined; unregulated landfill in their backyard after they listened to their lawyer's advice to stay off the streets, to refrain from all direct action and to let him handle the county's application for a landfill permit, using his Good Ole Boy network. He sold them out almost immediately. The group was so demoralized and confused about tactics that there wasn't anything they could do about it. Further more, they lost most of their membership when this lawyer was hired ("He'll handle it; that's why we're paying him big bucks."). The county won.

Your lawyer has to be able to talk to the organizer or leaders and give them information they need to make decisions, but without giving direction. While the group may not always appreciate the lawyer's concern over a planned action or understand it, they need to hear it. The lawyer's role is to assess the vulnerability of an action being considered, honestly report this and let the group decide. IT'S ALWAYS GOT TO BE YOUR DECISION!

If your group uses direct action tactics, you may need a lawyer to run interference for you by talking to the police to convince them that you're o.k. and shouldn't be arrested (unless, of course, you want to be). You'll have to decide if this is a good use of the lawyer's time and your money.

Suppose there's a threat of legal action from your opponents. If you have a lawyer, your may be able to avoid being sued altogether. If you are sued, you have a bit of a head start in handling it. This could be very important to your group's morale. If you do get sued, your lawyer should be encouraged to regain the offensive by filing a counter suit on your behalf. Fear of being sued is not a good reason to spend money on a lawyer. Neither is the fear of somehow overstepping the law in your organizing tactics. There's little risk of legal problems, so long as you use your common sense.

Another protection a lawyer can give you is additional time to organize. Suppose "Chemical Industries" announces it'll try a new waste disposal method where they take toxics and blow them up with dynamite in the field they own next to the elementary school. They plan to start doing this in three days. Now, normally given enough time, this is an easy plan to defeat through organized political action by your organization. But, in this case, there just isn't enough time. In such a case, you need a lawyer to get you a "temporary restraining order" (also known as a "TRO") and even a "permanent injunction" which is orders from the court stopping Chemical Industries from doing this crazy thing while you start organizing your neighbors to beat them politically.

Leverage ("Bargaining Chips")

Your opponent will give up when you make it more costly to resist than to give you what you want. The best way to do this is through direct action, which makes your opponent uncomfortable and costs plenty

in adverse publicity. Lawsuits fit into this formula, too. Lawsuits can "up the ante." Example: The United Farm Workers Union would file lawsuits against growers constantly, on issues that weren't directly tied to the organizing issues (Why? So that they wouldn't lose members as is usual when lawyers get involved). If the UFW want a store chain to boycott lettuce, the lawyers and leaders would look at how the store did business, how it was set up and how it sold its goods. Then they would look for ways to sue the chain over consumer law. They would make it very costly for the store chain to resist.

Lawsuits are expensive and give you leverage value only if they are taken seriously. If your lawyer simply files lawsuits and lets them sit there, you're not going to get much leverage value out of them, only the negative side of them (e.g. your opponents won't talk to you anymore, saying that the matter is " pending litigation, so have your lawyer talk to my lawyer"). Your lawyer's got to file the suits and then keep going. The lawyer can't stop. By trying to win, you're more likely to increase the costs, plus, you might even win!

How To Excalate Costs: If your opponent is a corporation or government agency, they probably have a lawyer already, either an "inhouse" counsel or a lawyer they've hired from a law firm." "In-house" lawyers work on staff as regular employees.

Whether it's in-house or outside counsel, it's likely these lawyers have specialized skills that deal mainly with your opponent's business. If you sue on issues outside their specialties, you automatically raise the costs tremendously, because your opponent will have to hire other lawyers. Look at what your opponent normally does, then try to think of some way to sue outside of these normal areas. Let's say you're fighting Joe's Amalgamated Dumping Service, operator of your local landfill. You want Joe to clean up the dump. Joe's Amalgamated retains Billy Bob Skeezy, Esq. a specialist in sleazy land deals. Some ways to increase the costs for Joe's Amalgamated would be to sue on any issue other than Billy Bob's specialty. That way, you force Joe's Amalgamated to hire another lawyer, while still paying Billy Bob. If you're suing an opponent that has its legal counsel on staff, one more way to increase costs is by imposing inconvenient demands on their time. File lots of motions, lots of demands for information, hold lots of depositions and set all of these up in such a way that you require your opponent's lawyers to travel. Make them have to work hard to keep up. All of these tactics increase costs, increase the aggravation value of your campaign, and can force the hiring of outside counsel.

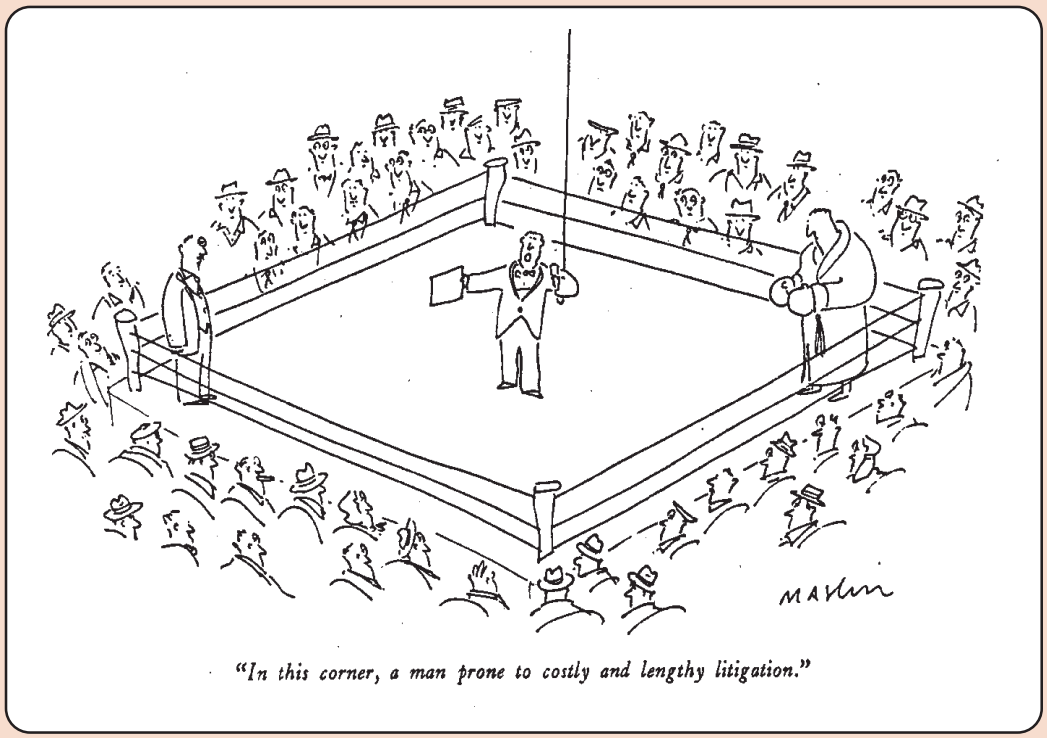
Another way to increase your leverage is to make the case very uncomfortable on your opponent directly. If your lawyer, for example, uses a deposition to force big-shot corporate executives to fly out to your community to answer questions, or uses motions to produce the disclosure of sensitive corporate information, or uses liens to tie up your opponent's property, the company that hired those lawyers isn't going to be very pleased with them. This could lead to the firing of your opponent's lawyers and more pressure on your opponent to give you what you want. There's more detail on these strategies later on.

The idea is to have your lawyer push hard on the legal end, while you push hard on the political and public opinion end, so that finally your opponent gets so brunt out that you win!

Money

When toxic chemical exposure victims think about money, they're usually thinking about compensation. You can often clearly see what you've suffered: health damage, property loss (e.g. loss of property value), nuisance damage, and emotional stress. Generally, the only way to recover these damages is by suing the responsible parties and you almost always need a lawyer to sue for these damages.

Unfortunately, if you think you're going to get rich from your lawsuits, you may end up very disappointed. Though toxic exposure victims are starting to win their lawsuits with greater regularity, the settlements have been running at around $10,000 per person in the major lawsuits.



"In this corner, a man prone to costly and lengthy litigation."

That's been the average figure after the lawyers' fees; costs and expenses are deducted from the gross amount. Some individuals who have sued have done better, but it's hard to say that you will get justice through the legal system.

Is money all you want? It sure helps and is a big priority for many exposure victims. But, when we posed the question of victims' compensation to a representative sample of community group leaders, they told us that their first priorities were to get the action needed to remove people from exposure, to make the polluter stop, and to win long term solutions to chronic toxic pollution problems.

Lawsuits for money can in fact, move both industry and government in these directions. In fact, it already has. After a series of lawsuit settlements in 1984 (e.g. Love Canal and Jackson Township, New Jersey), where victims were awarded millions in damages, the insurance industry decided the chemical and hazardous waste industry was too risky to continue insuring and began a boycott on new and renewed policies. Even though victims did not receive much compensation (the Love Canal average was $10,022), it was the insurance companies who paid the major price. For example, the insurance companies paid all but about $1 million of the $19 million judgment against Hooker Chemical for it's dumping at Love Canal. Already, this insurance "crisis" puts the industry in a very shaky position and they're looking for ways to try to "clean up their act" and regain the confidence of the insurers.

Information

"Discovery" is an important part of the legal process, which can help your group. See Appendix A for a description of the Stages of Litigation. After the case is filed, each of the "parties" to the case is entitled, under the Rules of Civil Procedure, to get information that is necessary to put their side of the case together. The main parts of discovery include:

- Interrogatories: written questions
- Depositions: sworn, oral statements
- Certain motions, such as "motions to produce"

documents, files, records, etc. or "motions to inspect" certain premises, etc.

You should be working closely with the lawyer on each and all of these. For example, you and your lawyer should sit down when it comes time to draft the interrogatories. Your lawyer should be open to including questions from you. What do you and your organization want to know about your opponent? You can find out things like financial status, insurance, taxes, patterns and practices, studies, tests, investigations, consultant's reports, background on individuals, organizational structure, extent of holdings and all kinds of goodies. DON'T EXPECT YOUR LAWYER TO ASK YOU WHAT YOU WANT TO KNOW: you should take the lead on this.

Depositions can be used not only to gather information, but also to apply pressure on your opponent. Depositions are normally very sedate affairs where a person is called to sit and answer questions relevant to the case, usually in some lawyer's office, under oath, with a transcript taken either by a stenographer or tape recorder. Some of you may have gone through one of these. (See Appendix B.)

Tactically, think about the people you want to have your lawyer call in for a deposition. How about the President of Chemical Industries? Force him to fly in from his corporate headquarters a thousand miles away to undergo a day or two of brutal, aggressive questioning. How about the director of your state environmental agency, to find out why the state is letting Chemical industries get away with murder? How about the head of your Regional Office of the federal EPA? Or, for that matter, the various division directors in the Washington office of EPA? Under the Rules of Civil Procedure, you have the right to gather the evidence you need to present your case.

And it can get even better than this, as you will see in the next section on "Exposure."

Have you been trying to get your hands on certain test results? Certain production information? Certain financial statements? During discovery, your lawyer can file "Motions to Produce" such documents. Have you been wondering what's really going on over at the facility, but haven't been able to gain access to the site? Your lawyer can file Motions to Inspect" to gain access.

Tip
Don't accept anything at face value. When a public official says, "we can" or "we can't," ask: "SHOW ME WHERE IT SAYS THAT." Get a copy of it and check it out for yourself. If a public official says, "I don't have the authority to do that," ask, "WELL, WHO DOES?"

Your opponent's lawyers will not sit still and let you aggressively use these legal tactics. They will seek a "protective order" from the judge trying to tone down your lawyer's aggressiveness in using discovery. They will try to "stonewall" demands for information and evidence by arguing that it's "burdensome" or "irrelevant" and on many other grounds. Your lawyer must fight each and every one of these dodges to the limit. Judges generally don't like it when parties to a lawsuit don't behave properly during discovery. Fines can be levied against your opponent when s/he fails to respond. When s/he fails to respond to a "motion to produce," your lawyer should go in for a "motion to sanction" and go for maximum penalties.

Exposure

Legal procedures can be used to increase the public exposure of your opponent and consequently, increase the amount of pressure. First of all, you can be pretty sure that, if you play your cards right, you can get some publicity out of filing the lawsuit. The number of new people you should be able to reach should at least partially offset the number of people you will lose as they go home thinking that the lawyer will now solve the problem.

During the course of the lawsuit, the "discovery" process should give you some juicy information, the likes of which you may never see in any other circumstance. This too can be the making of some great publicity.

Then, you can use the lawsuit process to expose your membership to how sleazy, callous and otherwise nasty your opponents are. This can have a very good effect on the group's morale and destroy any lingering doubts your folks have about the rightness of your cause.

The key to all of this is to have your lawyer conduct the lawsuit with maximum visibility. And here's where you might run into some serious trouble with your lawyer if s/he hasn't ever done a "political" case before. For example, most lawyers are under the false belief that you can't disclose what goes on during a lawsuit. This is wrong. They think they will get into trouble with the judge if the results of the legal proceedings end up on the 6 o'clock news. While this may be true in some situations, so what? Your lawyer gets the big bucks to deal with the judge. Any way, be prepared for arguments from your lawyer that you should keep what ever comes out of the lawsuit secret.

There are some circumstances where information generated by a lawsuit is restricted in the way it can be used. For example, it is a violation of the lawyer's Code of Professional Responsibility to "try a case in the media" (see next section for more detail on this Code). The lawyer him/herself may not be the one to call the news conference and blurt out "You won't believe what these crooks swore to in our deposition!" But that's O.K.—it shouldn't be your lawyer staging such a media event anyway. That's your organization's job!

While the lawyer may not be the one to release this information, this restriction doesn't apply to his/her clients. For example, a local group in Vermont had several members who filed individual compensation lawsuits. As part of the suits, the plaintiff's lawyer got the polluter and the state to conduct a full battery of tests. The organization wanted the results but was told by the plaintiff's lawyer that they couldn't have them. The group was depressed. SIMPLE SOLUTION: the lawyer gives the test results to the plaintiffs (who are members of the group). These plaintiffs then turn over the results to the group (as is their right) and everybody's happy.

Except the lawyer (who should've known better anyway). Keep in mind that whatever is said between a lawyer and client is covered under the "attorney-client privilege" and is confidential. However, there is an exception to this rule: suppose you are discussing your case with your lawyer in the presence of other people, your conversation is no longer covered under the "Attorney-Client Privilege."

When your lawyer sets up the deposition, keep in mind the advice we gave you earlier about the possibility of taking an active role in the deposition. There's nothing like seeing your opponent sweat out a tough, aggressive deposition to build the group's morale. And there's nothing like having the chance to turn up the heat yourself!

Here's a wild example of how this tactic was used: In Los Angeles in the 1960's there were continuing hassles between the black community and the police department. After a while, the black community filed lawsuit against the police, charging systematic brutality. The lawsuit stalled in the "discovery" stage for a long time. Every time there was a hassle in the street, somebody would file a brutality complaint. Then, as was the custom in the 60's the Police Review Board would dismiss the complaint. However, with the lawsuit, the police officer would dismiss the complaint. However, with the lawsuit, the police officer would then receive a deposition notice, telling him to appear for questioning at a church auditorium deep in Watts. He then had to appear and be grilled for hours in front of a hostile, angry crowd. While the lawsuit was never "settled" in the traditional way, the instances of brutality incidents on the streets of Los Angeles dropped to zero. Not only, in this case, did the people get what they wanted (an end to the police brutality problems) but also

got valuable exposure and education about the issue. You can do the same thing with your lawsuits, if your lawyer is working for you and understands that the political aspects of the case are more important than the legal fine points.

You can use the law to increase the exposure you get on your issue by using it to create "forums." For example, did you know that most states have "Administrative Procedures Acts" that allow "citizens' petitions for rulemaking." This means that if a certain number of citizens (or taxpayers—the rules vary from state to state) sign a petition to a state agency, the agency must respond by considering a rule change or holding a hearing. Some states will even allow you, as petitioners, to have the final say as to where and when such a hearing will be held. Your lawyer may know about this provision, but I'll bet he/she's forgotten about it!

In any event, go to your local library. In the Library Reference Room, there'll be a set of your state's laws. Find your state's Administrative Procedure's Act by asking the reference librarian to help you. While you're there, get a copy of your state's Open Meetings and Open Records laws. These laws define your rights as citizens to get access to meetings and information and you're probably going to use them a lot in your fight. Make sure you understand these rights. If you can't figure out the statutory language for yourselves, this is definitely a situation where you can use a lawyer's help.

Advice and Counsel

It's a fine but rare lawyer who knows how to walk that tight rope between giving you advice that helps you decide intelligently and direction that tells you what to do.

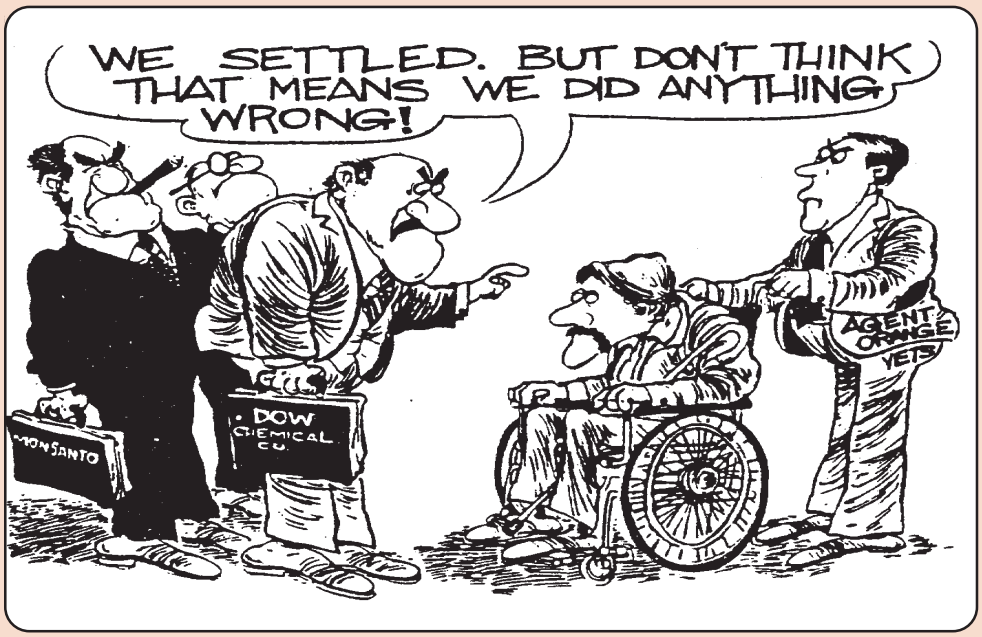
Many of the legal strategies we've discussed so far involve sensible, close relationships where you are advised by your lawyer and in turn are able to give him/her proper direction in what to do with your case.

The plain fact is that your opposition is probably more accustomed to using the law for their benefit than you are. You could find yourself in some legal situation that makes you awfully nervous. One of the things you're going to need from your lawyer is calm, cool, but honest advice that helps you deal with that anxiety and make the right decisions. When people get into legal trouble, they don't want to hear from you (unless you're a lawyer)—they want to hear from a lawyer, even though the lawyer may know as little or less about the real risks. They will also want to hear from the lawyer about the progress (or lack thereof) of any case they may have decided to file. This is the true test of how well a lawyer can deal with a group.

Generally, lawyers should provide routine progress reports to the group on the progress of the case. They should generally do this through the leadership, like through a short and to-the-point memo. Usually, you should avoid having the lawyer come to your meetings; because the natural outcome is that the entire meeting will be devoted to what is happening (or not happening) in the case. That's what we call a bad meeting!

Your group will probably need other advice as it goes along. For example, there's always one person who will make a big deal about incorporating. A good lawyer will tell you that you shouldn't do that unless you've got several good reasons. There will always be people in the group who get nervous about getting into trouble when your group takes action. At CHEJ, we're always amazed at how frequently people forget about their Constitutional rights. A good lawyer is clear and direct in advising you both on what your rights are and how the local officials are likely to honor or abuse those rights. The lawyer should never dictate strategy. However, your lawyer does have the obligation to tell you what might happen, what your legal rights are, what options you have and to then let you decide.

Since there's such a fine line between "advice" and "direction," how do you as a leader keep your group from being "led" by your lawyer? One way is to confine the settings where your lawyer gives that advice to private meetings between that lawyer and the key leadership. Unless there is a compelling



reason to have the lawyer come to your meetings, theirs no need for you to increase your legal expenses by having the lawyer attend.

Your lawyer should be advising you when you should sue. Again, the lawyer shouldn't be telling you what to do. However, you should expect your lawyer to pay attention to such details as your state's "STATUTE OF LIMITATIONS." The Statute of Limitations is your state's legal rule that sets a time limit during which you must sue or lose your rights to seek damages. For example, in Massachusetts, you have three years from the time you know (or should have known) that you were damaged, by toxic exposure, for instance, to file suit for damages. Wait too long and you're out of luck. Your lawyer should make sure that you don't lose because either you or s/he snoozed.

Here's a special case on lawyer's giving advice. Suppose you have a very complex case and there are several different lawyers involved, each dealing either with different plaintiffs or different aspects of the case. As a leader, never let the situation arise where you bring all the lawyers in before your group and let them argue the fine points of law. This is not only boring and confusing but also destroys people of law. This is not only boring and confusing but also destroys people's confidence that the case is being handled competently.

Representation

When people think about lawyers they almost always have a picture in their minds of the lawyer standing up in a courtroom presenting their case. Sure, that image is all right, but it hardly describes what lawyers do most of the time. Scant few lawsuits ever go to trial. Mainly, lawsuits end either in a "dismissal" (judge throws the case out) or a "settlement" (a negotiated deal that ends the case). So forget Perry Mason! Yes, you generally need to hire a lawyer to begin and carry out a lawsuit. While there are lots of great hero stories about average citizens who decided to be their own lawyers, these are mainly fairy tales.

However, we're not saying that you should do what most people do, which is abandon your selves to the will of the lawyer. Instead, think through those things the lawyer can do, what you need to do, and how the two of you are going to work on developing that working relationship for all lawsuits.

You generally do not need a lawyer to represent you or speak for you at public hearings. We hear from many groups who decide to let a lawyer speak for them at an agency hearing. Here's what they tell us:

"Our lawyer says that he should present our case because it's real important that we should get all of the right stuff into the record. That way, if we have to sue later, we'll be in the best shape to win our case in court."

Your lawyer may be right that certain, key facts have to be entered into the record. However, you can do that. Make sure the lawyer explains to you what these facts are and what needs to be entered, but — do it yourself.

Where you can reasonably represent yourselves, do it. Where only a lawyer can go, let him/her go. Otherwise, keep in mind that most hazardous waste fights are won through organized political action, not the courts.

It's better to be a lamb in the mouth of a wolf than a person in the hands of his own lawyer."

Old Italian Proverb

Chapter 4

Class Actions

Equal justice under law means that both the rich and the poor are forbidden to steal bread and sleep under bridges." — Aantole France

Many people have fancy, romantic ideas about a "class action." But, there's really no magic to it. A class action is a mechanism in which the case involves people who are not named in the lawsuit. Normally, the people in a lawsuit are those who have hired the lawyer to prosecute the suit. In a class action, people are represented who have not hired the lawyer. The class action lets the court decide the case of many people, who are injured in the same way, at the same time, by the same people. This both protects the rights of people who may not know about the violation of their rights and those who may not be able to hire an attorney.

In the section above on "Leverage," we discussed how one of the best things a lawsuit can do for you is to increase the penalty your opponent pays for resisting your demands. One negative reason for using the class action approach is that it makes it somewhat easier for your opponent to defend himself, because there's only the one case to fight. Why make it easy for him with a class action? Wouldn't a lot of little suits, each fought aggressively by a plaintiff 's lawyer, cause a lot more pressure on your opponent? Further, the chances of getting better cash settlement does seem to increase the fewer people there are carving up the pie.

Not long ago, an Illinois leader called CHEJ, to ask for advice on whether to follow their lawyer's counsel to file a class action. He told the group: "Get 200 families together. Then I'll file a $20 million class action and we'll really see some action!!!"

"What does this mean? She asked. First off, we told her, wait five years or more—that's probably how long the case will take.

Next, keep in mind that what you ask for in the suit is hardly the real number (example: the Love Canal victims asked for billions, but settled for less than $20 million). Chances are that after five years, you'll consider yourselves lucky to get a much smaller amount, say, $5 million.

Then, subtract the lawyer's fee of 33% + expenses which will probably come to about $2 million. NOTE: for federal suits, the Federal Torts Claims Act limits the lawyer's fee to 25%.

That leaves $3 million to be split among 200 families, or $15,000 per family. If the average family size is 4 people, that means the price of a human life in this case is less than $4,000. And, you'll have to wait 5 years to get it.

Chapter 5

Paying For a Lawyer

Customarily, there are three different ways to hire and pay for a lawyer:

Free ("Pro Bono")

Some—not many—lawyers might feel your case deals with some moral or political issue that's important to them and will represent you for free. Good luck! Also, under certain conditions, you might be able to get legal representation from either government-funded Legal Services or privately funded Legal Aid program. Generally, these programs can only represent very poor people and have to follow very strict rules about they type of case (like no "political" cases, though that's in the eye of the beholder, or "free-generating" cases where you're suing for damages). If yours is a poor community and some agency harms or plans to harm you, Legal Services or Aid might be able to take on a case to stop them.

You may be able to get free legal help from environmental groups that specialize in legal action, such as the Environmental Defense or the Natural Resources Defense Council. They'll usually consider it if the case might raise or challenge some major policy issue. If yours is "routine"—to them, not to you— they probably won't be able to help you.

Fee Basis ("Pay-As-You-Go")

You hire the lawyer; pay a certain amount (several thousand dollars), pay fees as the case goes on or some combination. This can be very expensive and painful as you watch your money fly out the window. The big advantage is you have a lot of control when you're paying the bills. You can, course, negotiate fees and shop around. You're the customer. Unfortunately, most people are as shy with lawyers as they are with doctors. If you can't get a free lawyer and don't have a sure-to-win damage suit, hiring a lawyer on a fee basis may be your only option.

Contingency Fee Basis

This is very common in toxic chemical cases. Here, you hire a lawyer whose fee is a certain percentage (commonly 33% plus expenses) of whatever you win in the case. Generally, win or lose, the lawyer bears the risk. Sometimes, though, the lawyer might add a clause to the contract that says that if you lose, or if you decide to drop the case, you have to pay the lawyer for all incurred expenses. Watch for such

clauses in the contract and ask for an explanation. In some states, such clauses are required in contingency fee contracts, even though the lawyer has no intention to charge you anything.

Sounds great, right? The lawyer bears the risk and you get your day in court. All things considered, it's a reasonable way to go, but it's not all roses. For example, you give up a lot of control over the case when you're not paying. Emotionally, you're less demanding when you're not paying. Also, the lawyer is much more assertive in protecting his/her investment. Come settlement time, you may be shocked at how the case turns out. Many people file multi-million dollar lawsuits and think they'll get rich. Surprise! This seldom happens, despite big settlements you read about in the paper.

The actual settlement will almost surely be much less than the asking figure. Then, subtract the 33% contingency fee and costs.

In a contingency fee suit, there's a lot of pressure on you lawyer. Your opponent knows this, will stall, run up costs and generally make your lawyer sweat. The longer they stall, the more money comes out of your lawyer's pocket. At some point, your lawyer will say, "Enough is enough—let's settle."

Before you hire a lawyer on a contingency basis, talk with him/her about (a) how long the case will last; (b) whether s/he has money or backing to hold out for a fair settlement and (c) what's the likely bottom line for what you might win. You probably shouldn't hire a lawyer who can't handle the financial pressure of a drawn-out case.

Suits Where Someone Else Pays

Winning some kinds of lawsuits allows you to have somebody else pay your attorney's fees. For examples, under "RICO" (the federal anti-organized crime statute), the Clean Water Act and many of the Civil Rights laws, you can win attorney's fees in the case, which then allows the victims in the case to enjoy the full benefit of the cash awarded to them by the court.

Shop Around

Don't hire the first lawyer you meet. Beware of lawyers who come sniffing around, trying to get you to hire them. The Bar Association does have rules against "ambulance chasing," but it happens anyway. S/he should tell you his/her experience, education and provide references. Check them out!

Talk to other groups about their experience with lawyers, especially if their situation is like yours. If you plan to hire a lawyer from a large firm, check out their connections (and probe for potential conflicts of interest) by looking in the Martindale-Hubbell Directory, kept in most public library reference rooms and can be accessed off the internet, the address is www.martindale.com. It lists most law firms and describes some of their major clients.

Finally, you can check with your local Bar Association. Ask if there have been any complaints or disciplinary actions against this lawyer. Some Bar Associations have "Lawyer Referral Services," which could let you meet with a lawyer to discuss whether you've got a case for a very small fee and no obligation.

The Golden Rule

Just about every last legal tactic described in this paper is a weapon you can use in your fight. However, every tactic that you can use can also be used on you.

Chapter 6

Protecting Yourself From Bad Lawyers

Don't ever forget that your lawyer works for you – not the other way around – even if s/he's working for free ("pro bono") or on a contingency basis. But things do go wrong.

Some danger signs:

- You don't hear from the lawyer for ages, plus s/he won't return your calls. Your lawyer does things (e.g. files important papers, goes to crucial meetings) and "forgets" to tell you.
- Your lawyer starts telling you what to do, interfering with the operation of your group.
- S/he starts complaining about what a hassle the case is, or how burdensome the costs are becoming.
- You find out your lawyer is missing or has missed important deadlines. Worse, your lawyer sluffs off these mistakes with a casual, "Don't worry, it's all under control."
- Your lawyer gives you advice that contradicts common sense. Or, your lawyer suggests a "compromise" that looks like a sell-out.

If you let these danger signs slide, you share the blame for the consequences. First of all, you should ask to be kept fully informed on the case. When your doctor recommends surgery, you have the right, even the duty, to ask "Why?" And hear about probable results and alternatives. The same goes for legal representation.

Your lawyer is obligated to behave responsibly under the Code of Professional Responsibility ("Canon of Ethics"). The lawyer must:

- Protect secrets and confidences that are part of your "attorney-client relationship."
- Avoid all conflicts of interest.
- Act with competence and exercise proper care in representing you, including staying current on the law, and not taking cases where the lawyer is not competent.
- Be "zealous" in representing you, meaning your lawyer must use every lawful trick in the book, aggressively, to win for you.
- Accept your right to make the decisions. S/he must give you advice, lay out the options and

their consequences and let you choose unless you decide something that's illegal, that's it. This Code does give some latitude to "withdraw" (quit), but not in a way that you're left high and dry.

The Code of Professional Responsibility is interesting in what it says (boring in how it says it) and you ought to read it if you're about to develop a serious, professional relationship with a lawyer. You should be able to get a free copy from your local Bar Association. It's the lawyer's equivalent of the doctor's Hippocratic Oath.

You're not going to have a very good relationship with your lawyer if, every time you meet, you pull out the code and say, "but according to the Code, you're supposed to…" Instead, be confident of your rights, clear about the lawyer's role and talk to your lawyer like a person. Try to reason out differences.

If that doesn't work, consider firing the lawyer. You may want the lawyer to reexamine his/her actions or ability to serve your needs. An amiable way to solve a bad lawyer relationship is to have the lawyer bring on another lawyer (like a partner from the same firm). If this switch is handled without too much anger and hostility, it may turn out fine. But, if push comes to shove, you will have to decide if it's time to cut your losses, reduce your risk of an unfavorable outcome and simply fire your lawyer.

If the lawyer's actions have harmed you, you may want to take action to punish him/her. Such actions include:

- Filing a complaint with the Bar Association. Be sure you can back up your charges. Lawyering is mainly a self-policing profession and this cuts both ways. On the one hand, the profession has self-interest in keeping its house clean. But on the other hand, there's an undesirable amount of mutual aid and protection that goes on among them. On the bright side, bad lawyers do get disciplined and the really bad ones do get debarred. Not always and maybe not often enough, but it can and does happen.
- Sue for malpractice. Really bad lawyers who mess you up in a big way can be sued and it is possible to win such a case. The trick is finding another lawyer who will represent you.

However, the best defense against a bad lawyer is to (a) make sure you hire a good one (b) be clear from the start about what your relationship will be and (c) stay on top of what's happening.

Appendix A

The Stages of Litigation

Lawsuits, otherwise know as "litigation," begin with the filing of a complaint. It's from this very beginning point that you must take and maintain control. You're setting yourself up for trouble if you lay back and take no role in the actual drafting of the complaint. What follows, in approximate chronological order, are the steps involved in carrying a lawsuit through its final conclusion.

1. Complaint.
You file paper with the court claiming that the "defendant" did, or plans to do, something that did/will harm you. You must describe the damages you suffered (or will suffer, if the defendant is allowed to continue) and ask ("pray") to the court for some answer ("relief"). You are the "plaintiff."

2. Answers.
The defendant responds to your complaint. Often this is in the form of saying you're full of baloney and asking the judge to dismiss the case in the form of a "motion to dismiss."

3. Counter-Claim.
Further, the defendant may not only say you're full of baloney but argues that you, in fact, did something wrong and sues you right back. In cases involving toxics, it's also common to see "Cross Claims" and "Third Party Claims" at this point, where the person you sue says, "I didn't do it—it was them!" And sue that other party. You sue Billy Bob Skeezy, owner of the local dumpsite, but Billy Bob says that Chemical Industries, whose wastes are dumped there is really responsible. So Billy Bob files suit to include Chemical in the case.

4. Motions.
For example for "Dismissal" or "Summary Judgment." These are legal maneuvers aimed at bringing the case to a swift conclusion asking the judge to make a quick ruling either in support of your case, or if brought by your opponent, to throw your case out. There are any number of types of motions that can be filed at this stage, most of them involve controlling the timing and of the case.

You should be asking the lawyer what kinds of motions s/he is filing and what they mean. Don't settle for superficial answers, like "Oh, that's only a minor technical matter that doesn't really mean anything." If it's so minor or irrelevant, then why is your lawyer doing it?

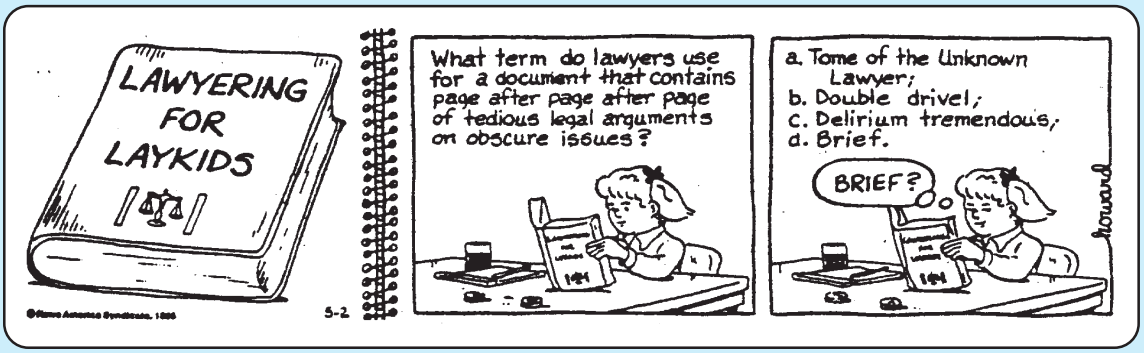
5. Interrogatories.
A list of written questions filed by either the defendants or the plaintiffs to the opponents, demanding information that is supposed to be relevant to the case. Whoever gets the interrogatories is supposed to answer truthfully, under penalty of perjury. There is often a lot of fooling around with these questions as one side tries to make the other side squirm by asking (a) many, many questions that take a lot of effort to answer and (b) as many embarrassing questions as possible. The sides being asked the questions, on the other hand, tries to get around answering by claiming questions are "burdensome" or "irrelevant." The judge then arbitrates and rules on the appropriateness of the questions.

6. Request For Admission.
The judge is asked to officially accept evidence, such as documents, test results, affidavits, etc.

7. Requests For Production,Inspection, Etc.
"Motions" demanding documents or the right to inspect premises, file, etc.

8. Deposition.
Oral questions where one side interrogates witnesses from the other side, under oath, to gather evidence for the trial.

9. Settlement/Negotiation.
This can happen at just about any time during this whole



process. You and your opponent come to some agreement, and it's all over.

10. Trial.
The formal presentation of the case, either in front of a jury or, in some cases, simply before the judge. Rarely do cases ever get this far.

11. Appeal.
The side that loses the case in court appeals the decision to a higher court, arguing that the decision was wrong usually on the grounds that some error of judicial procedure was made during the trial. You don't automatically get your appeal heard. Many people say, "We'll take this all the way to the Supreme Court!" This is pretty much a naïve hope. The appeals court have the right to refuse to hear an appeal if they think there wasn't anything wrong with the way the case was originally handled.

12. Enforcement.
Assume you win some sort of judgment in your case, either in the form of a "Court Order" requiring your opponent to do (or not do) something, or to pay damages. The law requires your opponent to obey this order. If the court order—and this includes settlements—requires you to do something, you too are under legal obligation. If either side violates the order, that means going before the judge again to ask for a ruling to compel the violator to obey the order.

Appendix B

So You've Been Summoned To a Deposition

By Lois Gibbs

Many of you may have already participated in an oral deposition. For those who have never been involved and need to understand what will take place and how to behave, the following is a brief description. You should keep in mind, however, that every deposition is slightly different.

These hearings are generally held in a small room. However, it could be held in a large room with other plaintiffs in the room.

- You generally meet with your attorney just before your deposition. S/he will explain that you'll be asked all sorts of questions and that you should answer them honestly, do not volunteer any information and count to three to allow enough time for your lawyer to object if necessary.

Now you are supposed to feel confident and at ease walking into the room … but you still want to know what's going to happen. You don't feel secure at all. Too often, attorneys don't tell people, step-by-step, what's going to happen for fear they'll get nervous. In CHEJ's experience, people become more nervous and uptight over what they don't know rather than what's explained to them.

- When you enter the room, everyone will greet one another pleasantly ("We're nice people you're suing.").
- Then you're asked to take an oath – the whole truth and nothing but …
- By now, you're probably a nervous wreck. "They" have seven people there, a person is busily recording every word and your mind just went blank.
- Things are suddenly jumbled in your head. Was the baby born in '74 or '75? What did I figure last night – 6 hospital visits or 8?

At this point you should take three deep breaths and stop thinking about everything and concentrate on what's going to happen.

Now the questioning begins. They pose a question to you and you must answer honestly. But you only need to answer the question, do not volunteer any information.

For example, the question "Do you have any health problems" should be answered yes or no only. If you answer "yes", I have lung cancer and it's not from smoking. You just gave away 3 important unsolicited pieces of information to your enemies. – Yes – (1) cancer – (2) lung cancer – (3) you smoke. They will ask you each question at least twice and maybe more to see if your answers are consistent. They'll just change the question around.

Sometimes they'll ask a question that you don't understand. Don't answer what you think his/her question is. Instead, make them clarify the question for you.

- They will ask questions to deliberately upset you, hoping you'll say something they can use against you in court. For example: Do you use nail polish remover? Do you know that has the same type of chemicals in it that you're claiming made you sick from our site ¼ mile away? Why do you think it is our site ¼ mile away and not your nail polish remover?

  These questions are asked purposely to make you mad … make you lose your cool. Answer the questions honestly. If you don't know the answers, then say so. Saying I don't know what's in nail polish remover is o.k.

- They can and will twist things that you say. You must really listen to every word in the question. For example, at the Love Canal deposition, Hooker wanted a 400-page citizens registry that the association kept. Because it was a membership registry, they could not have it. However, if it was a health related registry, they had a better chance of getting it through discovery. Consequently, Hooker would continue to ask about what is in the "health registry"? Every time they passed that question, they had to be corrected that it is a membership registry not a health registry. If Hooker was not corrected each time, they could ague that you admitted under oath it was a health registry, which they would be entitled to get. The key is listening to the questions.

- They try to wear you down. If you're tired or need a break, ask to go to the bathroom. Or say you feel you need to talk to your lawyer.

  No one can deny you a toilet if you really say you need one. Caucusing with your lawyer and taking a break is o.k. It works for you and against them.

- Remember you are not a toxicologist or the encyclopedia of dates, time and illnesses. If they ask

you about each date a family member was hospitalized, tell them your lawyer will submit that later (check with your attorney first) as you can't remember every date for the past 10 years or so.

If they ask you about chemical X, tell them what you know and from what source but don't try to be an expert yourself because you're not and you can lose credibility. For example, I think the benzene in my home caused my baby's blood disorder because I read several reports that clearly document this type of affect in humans.

The question that generally follows is who gave you those reports and at what level did they say client X caused problems. Don't volunteer to give them a copy when they ask, rather tell them you'll let them know where they can write and obtain a copy. They have more money and research abilities than you. Don't give them everything you have or know about. Don't talk about more than one piece of information, unless asked.

You can survive and ultimately win in a deposition if you remember to:

- Listen to the questions.
- Count to three before you answer
- Answer only what you have been asked.
- Do not volunteer information. Remember, the person asking you the questions is not your friend. You have no obligation to help your enemies.
- Keep your cool.
- If you're losing your cool, get tired, or need to ask your lawyer something, call for a break or caucus with your attorney.
- Lastly, don't guess at an answer or pretend you know something. Just tell the truth and only talk about what you know.

Related CHEJ Guidebooks and Factpacks

- *Fight to Win: A Leaders Manual*, by Lois Gibbs
- *User's Guide To Lawyers: How to get them to work for you so you're not working for them*
- *Should Your Group Incorporate?*
- Reprints: *Legal Corner*, by Ron Simon
- *How to Deal With a Proposed Facility*

"CHEJ is the strongest environmental organization today – the one that is making the greatest impact on changing the way our society does business."

Ralph Nader

"CHEJ has been a pioneer nationally in alerting parents to the environmental hazards that can affect the health of their children."

New York, New York

"Again, thank you for all that you do for us out here. I would have given up a long time ago if I had not connected with CHEJ!"

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