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Environmental Law

Tactical Issues When Multiple Parties Oppose Your Client

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Environmental matters typically involve adverse organizations—government agencies, business entities or NGOs—not just two individuals. Moreover, they quite typically involve more than one party on each "side," and sometimes have more than two sides. That situation poses some tactical issues for environmental lawyers.

While individual people may not always act rationally in a business or litigation context, they often do. A lawyer can assume that an individual opposing party has interests that he or she can express or that can be inferred by how he or she acts. The lawyer can expect those interests to result in a set of preferences among alternative outcomes that are predictable and rational.

That just is not true for any group of people or parties. You can convince yourself of that by considering a simple, stylized environmental enforcement case.

Suppose that there is some environmental discharge at a facility that may or may not be a violation of the law. If the discharge is a violation, the facility could implement a conventional fix that almost certainly would bring the facility into compliance, but the fix would cost a lot. Alternatively, the facility could implement an innovative fix that would only have a 75 percent chance of achieving compliance, but would cost relatively little. If the parties did not reach agreement on what the facility should do, then the matter will litigate and the facility will either spend nothing or have to shut down, depending on the decision as to whether the discharge is a violation.

Now suppose the matter involves three people who have a say in the decision about how their side of the matter (and this hypothetical intentionally obscures which side that is) negotiates or litigates. Call them Peace, War and Tech.

Peace values a settlement and values certainty in the outcome. His preferences are (in order): conventional fix over innovative fix over litigation.

War wants to win. If she cannot win, she wants to do something certain. Her preferences are: litigation over conventional fix over innovative fix.

Tech wants to do something new and notable. Her preferences are: innovative fix over litigation over conventional fix.

In a choice between litigation and the conventional fix, War and Tech outvote Peace in favor of litigation. In a choice between the conventional fix and the innovative fix, Peace and War outvote Tech in favor of the conventional fix. Because litigation beats the conventional fix and the conventional fix beats the innovative fix, you would expect litigation to beat the innovative fix, but of course it does not; Peace and Tech outvote War to choose the innovative fix over litigating.

If you are representing a discharger against a government agency staffed by Peace, War and Tech, you likely face this issue. There are potential coalitions in the opposing camp that will be more or less favorable to your client's interests. A discharger will typically prefer the innovative fix to other outcomes. In the stylized hypothetical here, that requires you to figure out that Peace, War and Tech have the disparate preferences posited here, to keep the conventional fix off the table, and to encourage a coalition of Peace and Tech to support settlement of the matter for the innovative fix.

A parallel set of tasks exists if you are representing a government agency against a discharger represented or managed by Peace, War and Tech.

Within a single organization, individuals may not vote. One person may be the final decision-maker. But the internal politics leading up to that decision are the same. A CEO or general counsel who regularly overrides his or her staff will not last long. He or she will typically test what the internal views of a problem may be. So too will a decision-maker in a government agency.

A more challenging set of issues may confront a lawyer opposing multiple agencies or multiple private parties. That discharger may face enforcement threats from the Department of Environmental Protection, the U.S. Environmental Protection Agency, and a citizens' group. Coalitions and alliances among the agencies—or the specific representatives of agencies—remain equally important.

The coalitions that form on the other side of a real case—not a stylized hypothetical—depend to some extent on the sorts of pressures that the opposing party can bring to bear. From the private perspective, one can see different responses from different agencies or different people within an agency to litigation options.

Litigation conventionally addresses just a single administrative decision. One challenges a permit or rule or one defends an enforcement action. However, sometimes, the regulated entity (or an environmental group) can find an issue within that single decision which, if decided in the regulated entity's (or environmental group's) favor, would not only threaten the single decision, but would threaten the program.

So, for example, at the recent Environmental Law Forum, I heard one environmental advocate question whether a general permit could ever be consistent with the Environmental Rights Amendment to the Pennsylvania Constitution; a general permit, after all, affirmatively avoids individualized weighing of costs and benefits that some might say is required by the Environmental Rights Amendment. A challenge to an individual application of a general permit on that basis threatens the whole program.

If one can find an issue like that to litigate, then one can create pressure in one's client's favor. But different people within a regulatory agency will feel that pressure differently. The person who issued the general permit may simply want to be vindicated and may not care about programmatic integrity. A more senior person may not care as much about the individual decision and may care more about the program.

Similarly, different corporate functions yield different sensitivities to pressures. Financial disclosure and accounting will affect some within a public company, and operational flexibility may be more important to others.

When the opposing group is not within one organization, or when it does not have streamlined decision-making processes, the politics of the other side of a case may disable everyone on it from negotiating well. The government agencies (or the potentially responsible parties) may so exhaust their flexibility fighting with each other over the proper approach to a matter that they have no latitude to negotiate with the regulated entity (or the enforcing agency).

All sorts of matters pose these sorts of tactical puzzles. However, environmental matters pose them often. Skilled practitioners attend to them when crafting their strategic approach.

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