13 Reading the Report and Admissible Environmental Evidence

JENNIFER T. NIJMAN
SARAH ANNE JEHL

I. [13.1] INTRODUCTION

The environmental attorney assists his or her client with numerous aspects of a property transaction and is, or should be, part of the transaction from the very beginning to the very end. The environmental portion of a transaction often begins with hiring an environmental consultant to perform a Phase I environmental assessment and compliance review of the target site. Once the Phase I assessment has been performed, there may be some strategizing on how to proceed — *e.g.*, should additional testing be requested before proceeding with the transaction? Most often, however, after the Phase I has been conducted, negotiations begin over the environmental language that will be included in the agreement consummating the transaction. Overarching the entire process of the environmental transaction is the environmental attorney's task in aiding the client not only to understand the environmental liabilities of the transaction, but also to take each step necessary to meet, for example, the elements of the appropriate defense to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. §9601, *et seq.*, or to its Illinois equivalent, §22.2(f) of the Illinois Environmental Protection Act, 415 ILCS 5/1, *et seq.*, in the event such a defense may be required sometime in the future. Thus, the environmental attorney in the midst of a transaction needs to carefully consider the impact of his or her actions on two potential future events: litigation over the terms of the sale agreement; and the development of admissible evidence to maintain liability defenses.

II. [13.2] ENVIRONMENTAL CONSULTANT PRIVILEGE

The terms of a purchase or merger agreement generally include representations and warranties relating directly to environmental issues and include some form of environmental indemnity. These environmental provisions contain expedient terms such as "reasonable," which are in turn used to modify other terms such as "costs," "investigations," or "remediation." While terms such as "reasonable" are easy to agree on and often necessary to use in the inevitable time crunch of a transaction, the ambiguity of these words, while convenient in the short run, can turn out to be the source of litigation. One of the first questions arising in such litigation is likely to be whether documents drafted, prepared, reviewed, scrutinized, and revised by the environmental consultant during the transaction are protected under the attorney-client privilege. There also exists the equally important question of whether any documents prepared by a consultant in the face of impending litigation qualify for protections offered by the work-product doctrine.

A. [13.3] The Attorney-Client Privilege

The issue of privilege should ultimately be considered at the very outset of an environmental attorney's involvement in a transaction that requires the use of an environmental consultant. By the point in time litigation arises, an environmental consultant has already amassed files full of documents that include a Phase I environmental assessment investigation, possibly a Phase II environmental assessment investigation and compliance review, correspondence, proposals, e-mails, and memoranda discussing strategy. Also, consultants have a general practice of taking and retaining notes of their calls, meetings, and field work. Finally, the environmental consultant may have had input on the language of the merger or purchase agreement. The attorney-client privilege can potentially be used to protect these reports and communications from discovery.

The attorney-client privilege has been described in point-by-point form as follows: "(1) where legal advice of any kind is sought; (2) from a professional legal adviser in his capacity as such; (3) the communications relating to that purpose; (4) made in confidence; (5) by the client; (6) are at his instance permanently protected; (7) from disclosure by himself or by the legal adviser; (8) except the protection may be waived." *In re Grand Jury January 246*, 272 Ill.App.3d 991, 651 N.E.2d 696, 700, 209 Ill.Dec. 518 (1st Dist. 1995), citing *People v. Adam*, 51 Ill.2d 46, 280 N.E.2d 205, 207 (1972). This privilege encompasses not only attorneys and clients but can extend to an attorney's agent, such as an environmental consultant. However, it is not simply the agency relationship between an attorney and a consultant that protects a consultant's communications from discovery. Rather, in order for the communications of an agent-consultant to qualify for protection under the attorney-client privilege, the communication made to the consultant or by the consultant must be submitted to the attorney for the purpose of assisting with the provision of legal advice. *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) ("What is vital to the privilege is that the communication be made *in confidence* for the purpose of obtaining *legal* advice *from the lawyer*" [emphasis in original], quoting *United States v. Brown*, 478 F.2d 1038, 1040 (7th Cir. 1973)). Thus, the privilege would not apply if what is sought is the consultant's advice on something such as a purely technical matter, and neither would it apply if something other than legal advice, such as business advice, is sought from the lawyer. *See id. See also CNR Investments, Inc. v. Jefferson Trust & Savings Bank of Peoria*, 115 Ill.App.3d 1071, 451 N.E.2d 580, 583, 71 Ill.Dec. 612 (3d Dist. 1983) (documents relating to business decisions, as opposed to legal advice, are not privileged).

In order to maintain an argument that the attorney-client privilege applies in relation to reports, documents, and other communications produced by an environmental consultant, the environmental attorney should attempt to establish an agency relationship with the environmental consultant by initiating the relationship with the consultant and managing the consultant (rather than having the client do so) and should have all documents and communications from the consultant directed to the attorney. Once the agency relationship is established, counsel should become familiar with the types of documents the consultant generally keeps and inform the consultant that anything the consultant puts in writing could eventually be disclosed; this "anything" includes all electronic data, ranging from draft reports (with comments or redlines) kept on a computer hard drive to e-mails (both formal and informal) saved in an inbox. Counsel should discuss with the consultant the types of documents and information that can more properly be orally transmitted. The attorney should be aware, however, that consultants might struggle with the concept of oral information, given their proclivity to fully paper every decision. Counsel should also ensure that the legal purpose of any specific request made of an environmental consultant is clear at the outset in order to increase the likelihood that the environmental consultant's communication will indeed benefit from the attorney-client privilege. Finally, counsel should be aware of the way in which and to whom a consultant circulates drafts and should discuss the consultant's document and e-mail retention policies.

In taking these steps to safeguard an environmental consultant's communications, it is prudent to remember that the attorney-client privilege extends only to communications and not to any underlying factual information that can be gathered from some other source. *Sterling Finance Management, L.P. v. UBS PaineWebber, Inc.*, 336 Ill.App.3d 442, 782 N.E.2d 895, 905 – 906, 270 Ill.Dec. 336 (1st Dist. 2002). This is a significant concern in environmental matters,

particularly when reporting obligations exist. Moreover, Illinois courts sustain a broad discovery policy and therefore interpret the attorney-client privilege quite narrowly. *See Archer Daniels Midland Co. v. Koppers Co.*, 138 Ill.App.3d 276, 485 N.E.2d 1301, 1303, 93 Ill.Dec. 91 (1st Dist. 1985). *See also Lama v. Preskill*, 353 Ill.App.3d 300, 818 N.E.2d 443, 448, 288 Ill.Dec. 755 (2d Dist. 2004) (attorney-client privilege "is not without conditions and should be 'strictly confined within its narrowest possible limits' "), quoting *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill.2d 178, 579 N.E.2d 322, 327, 161 Ill.Dec. 744 (1991).

In any event, as a practical matter, the privilege question can become a nonissue in relation to due diligence and other transactional documents. During discovery or at trial, an attorney may need to produce all of the consultant's transaction documents in order to establish the client's defense. For instance, to establish a defense that actions taken by the client or consultant were "reasonable" in accordance with the use of this term in a disputed agreement, an attorney may need to produce a Phase I environmental assessment, consultant notes, or consultant memoranda to provide a detailed explanation for a particular action. Further, privilege is often waived in relation to transaction documents as they are necessarily produced to the other side, to lenders, to investors, or to other third parties in order to complete the transaction. Privilege is more likely to become an issue when it comes to documents created sometime between the closing of the transaction and litigation. For those documents prepared *after* closing but *before* some threat of litigation, the attorney-client privilege remains the best and perhaps the only source of protection. However, once the potential for litigation has arisen, then a document created after closing and in anticipation of or in preparation for that litigation may be best protected by the work-product doctrine as discussed in §13.4 below.

B. [13.4] Attorney Work-Product Doctrine

The protection offered by the attorney work-product doctrine is, in general, broader than that offered by attorney-client privilege. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 189 Ill.2d 579, 727 N.E.2d 240, 246, 244 Ill.Dec. 941 (2000). *See also Dawson v. New York Life Insurance Co.*, 901 F. Supp. 1362, 1368 (N.D.Ill. 1995) ("The work-product doctrine is 'distinct from and broader than the attorney-client privilege.' "), quoting *United States v. Nobles*, 422 U.S. 225, 45 L.Ed.2d 141, 95 S.Ct. 2160, 2170 n.11 (1975). The general purpose of the work-product doctrine is to "protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former's efforts." *Fischel & Kahn, supra*, 727 N.E.2d at 246.

The Illinois and federal work-product doctrines each involve a timing element. More specifically, in Illinois, in order to potentially qualify for protection of the work-product doctrine, a document must first be created "in preparation for trial," which typically means that litigation is either pending or imminent. *Monier v. Chamberlain*, 35 Ill.2d 351, 221 N.E.2d 410, 416 – 417 (1966). *See also Lawndale Restoration Limited Partnership v. Acordia of Illinois, Inc.*, 367 Ill.App.3d 24, 853 N.E.2d 791, 798, 304 Ill.Dec. 417 (1st Dist. 2006) (document not protected by work-product doctrine because there was "nothing to indicate the document was created in anticipation of any pending or imminent litigation"). The federal work-product doctrine provides its protection to certain documents created in "anticipation of litigation," which means that a "substantial and significant threat of litigation" must exist before any document created (because

of this threat) may be considered for work-product protection in the federal courts. *Coltec Industries, Inc. v. American Motorists Insurance Co.,* 197 F.R.D. 368, 371 (N.D.Ill. 2000), quoting *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.,* 145 F.R.D. 84, 87 (N.D.Ill. 1992). *But see Binks Manufacturing Co. v. National Presto Industries, Inc.,* 709 F.2d 1109, 1119 (7th Cir. 1983) (party seeking to assert work-product privilege has burden of proving that "at the very least some articulable claim, likely to lead to litigation, [has] arisen"), quoting *Coastal States Gas Corp. v. Department of Energy,* 617 F.2d 854, 865 (D.C.Cir. 1980).

In Illinois, the exact parameters for the scope of discovery of work-product material are set forth in Supreme Court Rule 201(b)(2), which provides, in pertinent part, as follows:

> **Material prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney.**

The Illinois work-product doctrine does not extend to all documents prepared for trial. Rather, ordinary work product, which is any relevant material generated in preparation for trial that does not reveal the theories, opinions, mental impressions, or trial plans of any attorney, is discoverable under the doctrine. *Waste Management, Inc. v. International Surplus Lines Insurance Co.,* 144 Ill.2d 178, 579 N.E.2d 322, 329 – 330, 161 Ill.Dec. 774 (1991). Even for the materials that do contain opinions and trial strategies, the work-product doctrine's protection is not absolute. These materials can be discovered "upon a showing of impossibility of securing similar information from other sources." 579 N.E.2d at 330.

The federal work-product doctrine is presented in Fed.R.Civ.P. 26(b)(3), which, as amended effective December 1, 2007, states in pertinent part:

> **(A)** ***Documents and Tangible Things.*** **Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:**
>
> **(i) they are otherwise discoverable under Rule 26(b)(1); and**
>
> **(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.**

This rule is substantially similar to that of Illinois. The only practical difference is that, under Rule 26(b)(3), ordinary work product is exempt from discovery unless a party can show "substantial need" and "undue hardship." *See Jackson v. City of Chicago,* No. 03 C 8289, 2006 U.S.Dist. LEXIS 56675 at *15 (N.D.Ill. July 31, 2006) ("A party may obtain discovery of ordinary work product only upon a showing of substantial need for the work product and proof of undue hardship if forced to obtain the requested work product in some other way.").

Both the federal courts and Illinois courts have extended the protection of the work-product doctrine to consultants' documents. The federal courts have incorporated protection for consultants' documents directly into Fed.R.Civ.P. 26(b)(3). As set forth above, Rule 26(b)(3) provides that, should an agent (consultant) prepare a document "in anticipation of litigation" for a party to the litigation or for the party's attorney, that document will be considered work-product immune from discovery unless the opposing party "has substantial need of" the document and "is unable without undue hardship to obtain the substantial equivalent of the [document] by other means."

The protection offered to consultants' documents by Illinois is slightly more narrow than that of the federal courts. As the work-product doctrine of Illinois generally protects only opinion product, such is also the case as relates specifically to consultants' documents. Indeed, Illinois protects from discovery only those documents that "concern creative and/or intellectual work product that is derived from the [consultant's] *mental processes.*" [Emphasis added.] *People v. Spiezer,* 316 Ill.App.3d 75, 735 N.E.2d 1017, 1026, 249 Ill.Dec. 192 (2d Dist. 2000). However, it is not only the existence of a consultant's "mental processes" that qualifies a document for protection; rather, the document must also be "shared with the attorney *to facilitate the attorney's preparation for trial*" in order to be defined as "work product." [Emphasis added.] *Id. See also Neuswanger v. Ikegai America Corp.,* 221 Ill.App.3d 280, 582 N.E.2d 192, 195, 163 Ill.Dec. 926 (3d Dist. 1991) (determining that work-product doctrine protects from discovery those documents prepared by nontestifying, consulting experts to help attorney prepare for litigation when documents expose attorney's or expert's mental processes).

There are some, but very few, cases in which the courts have applied the work-product doctrine to documents produced specifically by environmental consultants. *See In re Grand Jury Subpoena,* 357 F.3d 900 (9th Cir. 2003); *Brookfield-North Riverside Water Commission v. Martin Oil Marketing, Ltd.,* No. 90 C 5884, 1992 U.S.Dist. LEXIS 8160 (N.D.Ill. June 8, 1992); *State of Arizona ex rel. Corbin v. Ybarra,* 161 Ariz. 188, 777 P.2d 686, 691 – 692 (1989). In *In re Grand Jury Subpoena,* which is perhaps the most well-known of these cases, Ponderosa Paint Manufacturing hired an attorney to defend it in anticipated litigation with the United States Environmental Protection Agency (USEPA), who had informed Ponderosa that it was under investigation for violating federal waste management laws. Ponderosa's attorney, in turn, retained Mark Torf, an environmental consultant, to assist in preparing a defense and to help Ponderosa with certain cleanup efforts. Later, a grand jury investigating the Ponderosa matter issued a subpoena to Torf requesting production of "records relating in any way to any work completed by [Torf or his company] concerning the disposal of waste material or any other material whatsoever from Ponderosa." 357 F.3d at 906. Ponderosa moved to quash the subpoena, but the district court ruled that all documents must be produced. The Ninth Circuit reversed, holding that the documents were protected by the federal work-product doctrine.

The circuit court reasoned that most of the documents prepared by Torf fell squarely within the confines of Fed.R.Civ.P. 26(b)(3) — these were documents requested by an attorney in anticipation of litigation for the purpose of providing a client with litigation advice and establishing a defense. In addition, the circuit court chose to protect as work product certain documents prepared by Torf that complied with an information request and consent order or addressed cleanup of the Ponderosa sites; the court labeled these documents " 'dual purpose'

documents." 357 F.3d at 907. In choosing to protect these documents, the court employed a "because of" standard, stating that "a document should be deemed prepared 'in anticipation of litigation' and thus eligible for work-product protection under Rule 26(b)(3) if 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained because of the prospect of litigation.'" *Id.*, quoting Charles Alan Wright et al., 8 FEDERAL PRACTICE AND PROCEDURE §2024 (2d ed. 1994). Thus, in the Ponderosa matter, when the threat of litigation "animated every document Torf prepared, including the documents prepared to comply with the Information Request and Consent Order, and to consult regarding the cleanup," the Ninth Circuit determined all documents prepared by Torf to constitute work product. 357 F.3d at 908.

Maintaining the protection of the work-product doctrine in relation to a consultant's documents involves many of the same steps as protecting the attorney-client privilege, including making the purpose of a specific document clear upon requesting or drafting it. Given that the work-product doctrine protects only those documents made in "preparation for trial" or in "anticipation of litigation," the litigation purpose of a particular document should be spelled out at its inception. Counsel should also be careful as to where he or she writes his or her personal notes or opinions and warn the consultant about being careful as well. Although an attorney's or consultant's notes can be redacted off otherwise discoverable documents, the process is often time-consuming and can be difficult if, for example, notes are placed within text, are scribbled on several pages of a draft, or are written on the original copy of an important report.

C. [13.5] The Expert Effect

It is important at the outset of a case to determine who, if anyone, will be used as a testifying expert. Expert testimony may be especially helpful if the litigation involves an argument over the reasonability of certain investigations or remedial actions. Should the environmental consultant become a testifying expert, then, at least at the federal level, the protection provided by the attorney-client privilege and the work-product doctrine may be completely destroyed.

Fed.R.Civ.P. 26(a)(2)(B) obligates attorneys to disclose all information "considered" by an expert in forming his or her opinions. "Considered" does not necessarily equate to "relied on." Indeed, if material furnished to a testifying expert is to be used in forming an opinion, it has been "considered," regardless of whether the expert actually uses the material in forming his her opinion. See Notes of Advisory Committee on 1993 amendments, Fed.R.Civ.P. 26(a)(2)(B).

For the majority of courts, if "considered" information includes what otherwise might be deemed privileged information or work product, it must nonetheless be handed over to opposing counsel. *Bitler Investment Venture II, LLC v. Marathon Ashland Petroleum LLC*, No. 1-04-CV-477, 2007 U.S.Dist. LEXIS 9231 at *5 (N.D.Ind. Feb. 7, 2007) ("Rule 26(a)(2)(B) 'trump[s]' any assertion of work product or privilege."), quoting *Karn v. Ingersoll Rand*, 168 F.R.D. 633, 639 (N.D.Ind. 1996); *Sparks v. Seltzer*, No. 05-CV-1061, 2007 U.S.Dist. LEXIS 6234 at *4 (E.D.N.Y. Jan. 29. 2007) (Rule 26(a)(2)(B) trumps privilege and work-product doctrine); *American Fidelity Assurance Co. v. Boyer*, 225 F.R.D. 520, 521 – 522 (D.S.C. 2004) (same). There is, however, a small minority of courts who have determined that Rule 26(a)(2)(B) should not be read to override the protection for an attorney's theories, opinions, or mental impressions. *See, e.g.*,

Magee v. Paul Revere Life Insurance Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (holding that "Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert"). Yet, this minority is dwindling, and the likely outcome in using an environmental consultant as an expert is that all documents considered by the expert, including reports, drafts, e-mails, letters, etc., regardless of whether they are privileged and regardless of whether they include the attorney's or consultant's opinions and thoughts, will be discoverable.

Taking steps to protect the attorney-client privilege and work-product doctrine when the testimony of an expert is at issue is a bit more difficult, given the courts' interpretation of the federal discovery rules. Disclosure seems an unavoidable consequence of putting an expert on the stand. Attorneys must simply exercise care when dealing with their consultants, expecting from the beginning that a consultant will likely be called on as an expert. Counsel should show or provide to the consultant only those documents deemed absolutely necessary for review and should be sensitive as to what he or she is communicating to the consultant; an attorney can effectively relay the facts of a case to a consultant without laying open his or her particular theories or speculations. Counsel should also make efforts to communicate with the consultant in person or by telephone, thereby limiting written documents that are likely to be discovered. Most importantly, the attorney should warn the consultant at the very beginning of the relationship to take care in drafting reports, letters, and memoranda. A poorly or carelessly worded draft can, and likely will, be discovered should the consultant become an expert; these drafts can cause needless worry to and difficulty for the client.

An alternative to designating the consultant who worked on a transaction as an expert would be to retain an entirely new consultant-expert for litigation. Hiring a new consultant-expert may be a bit more expensive and time-consuming, but with a lawsuit pending, an attorney might have a better picture of what documents are truly necessary for the litigation and, therefore, truly necessary for the consultant-expert to review. A decision to hire a new consultant-expert might, in the end, provide protection to at least a few more documents than what would have otherwise been protected if the transactional consultant turned expert.

To avoid the worry and potential discovery difficulties in designating any consultant as an expert, an attorney might, in certain situations, simply choose to use the transactional consultant as a lay witness. Under Fed.R.Evid. 701, such a lay witness may still provide opinion testimony, as long as this testimony is "rationally based on the perception of the witness" and is "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Ultimately, Rule 701 allows lay witnesses to offer opinions based on particularized knowledge developed from years of experience within a specific field. *See, e.g., Research Systems Corp. v. Ipsos Publicite*, 276 F.3d 914, 924 (7th Cir. 2002) (holding that executive of defendant's subsidiary company could offer opinion testimony as lay witness because opinion was rationally based on 20 years of experience); *Medforms, Inc. v. Healthcare Management Solutions, Inc.*, 290 F.3d 98, 110 – 111 (2d Cir. 2002) (allowing computer programmer's testimony about his work on two programs underlying suit and as to meaning of "program" as used in copyright registrations "based on his everyday experience as a computer programmer"); *Allied Systems, Ltd. v. Teamsters Automobile Transport Chauffeurs, Demonstrators & Helpers, Local 604*, 304 F.3d 785, 792 (8th Cir. 2002) (allowing testimony about damages by defendant's vice president, who relied on accounting principles and methods). Thus, a consultant acting as lay witness should still be able to testify about work performed at the subject property, industry experience, etc.

III. [13.6] ADMISSIBLE EVIDENCE FOR ENVIRONMENTAL DEFENSES

The environmental terms contained within a purchase or merger agreement are, of course, not the only source giving rise to litigation in the environmental context. Perhaps the most recognizable source of environmental litigation is that relating to liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §9601, *et seq.*, and its Illinois equivalent, which is set forth in the Illinois Environmental Protection Act, 415 ILCS 5/22.2(f), and adopts the language of CERCLA almost exactly. CERCLA has been amended to provide some protection from liability for landowners who qualify as (a) an innocent landowner (*i.e.*, a person who acquired property without knowledge of contamination) (42 U.S.C. §§9601(35), 9607(b)(3)), (b) a contiguous property owner (*i.e.*, a person who owns property that is "contiguous" or otherwise similarly situated to a facility that is the only source of contamination found on his or her property) (42 U.S.C. §9607(q)), or (c) a bona fide prospective purchaser (BFPP) (*i.e.*, a person who acquires ownership of a facility after January 11, 2002, with knowledge of contamination and who meets certain CERCLA requirements) (42 U.S.C. §§9601(40), 9607(r)). To gain the protection of any one of these categories, a landowner must satisfy certain statutory criteria and certain continuing obligations.

A. [13.7] Elements of the CERCLA Liability Defenses

The innocent landowner, contiguous property owner, and bona fide prospective purchaser (BFPP) defenses to liability under CERCLA each share a number of common elements, all of which must be proved by a preponderance of the evidence. The initial step toward gaining the protection of any of the defenses, regardless of which landowner protection may eventually apply, includes conducting "all appropriate inquiries" (AAI) before the acquisition of property. See 42 U.S.C. §§9601(35)(B)(i), 9601(40)(B), 9607(q)(1)(A)(viii). The term "all appropriate inquiries" refers generally to a number of criteria that together constitute the means by which a client assesses the environmental conditions of a property prior to acquisition. See 42 U.S.C. §9601(35)(B). To satisfy the AAI requirement, a client must follow those procedures and standards developed by ASTM International (ASTM) and that have been set forth in *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-05. *See Comparison of the Final All Appropriate Inquiries Standard and the ASTM E-1527-00 Environmental Site Assessment Standard* (Oct. 2005), available at www.epa.gov/brownfields/regneg.htm. Standard E1527-05 requires, among many other things, specific investigations into the current and past uses of the property; an inquiry into federal, state, and local records concerning past contamination and environmental liens; visual inspections of the subject property and adjoining properties; an inquiry as to the relationship of the purchase price to the fair market value of the property if it was not contaminated; and interviews with current and past owners, operators, and occupants of the property. See Standard E1527-05 §6-10. The AAI investigation must be performed by an environmental professional who meets the strict education or experience requirements set forth in the standard. See Standard E1527-05 §3.3.29. See also the discussion of AAI investigations in Chapter 1 of this handbook.

Once the AAI investigation has been conducted, the attorney and client will have a better understanding of what landowner defense might be most appropriate for the client's particular situation should CERCLA litigation arise at some point in the future — knowledge of

contamination gleaned from the AAI investigation defeats eligibility for the protection of both the contiguous property owner or innocent landowner defenses, while the BFPP defense remains available to those who purchase property with knowledge of contamination. After establishing the applicable CERCLA defense, the client and attorney must take steps to ensure that the remaining elements of the particular defense are met.

Besides the AAI investigation, the defenses do have a number of other elements in common, which include that the landowner (1) provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the site (42 U.S.C. §§9601(35)(A), 9601(40)(E), 9607(q)(1)(A)(iv)); (2) is in compliance with any land use restrictions and institutional controls (42 U.S.C. §§9601(35)(A), 9601(40)(F), 9607(q)(1)(A)(v)); and (3) takes reasonable steps to conduct response actions or natural resource restoration (42 U.S.C. §§9601(35)(B)(i)(II), 9601(40)(D), 9607(q)(1)(A)(iii)). In addition to these elements, the contiguous property owner and BFPP must also take measures to ensure that (1) they are not "affiliated" with anyone who is potentially liable for response costs through a direct or indirect familial relationship, any contractual, corporate, or financial relationship (excluding relationships created by instruments conveying or financing title or by contracts for sale of goods or services), or by any reorganization of a business entity that was potentially liable (42 U.S.C. §§9601(40)(H), 9607(q)(1)(A)(ii)); (2) they comply with information requests and administrative subpoenas (42 U.S.C. §§9601(40)(G), 9607(q)(1)(A)(vi)); and (3) they provide "all legally required notices with respect to the discovery or release of any hazardous substances at the facility" (42 U.S.C. §§9601(40)(C), 9607(q)(1)(A)(vii)).

Beyond these common elements, each CERCLA liability defense bears its own unique requirements. The innocent landowner must establish that the act or omission that caused a release or threat of a release of hazardous substances, along with any resulting damages, was caused by a third party with whom the innocent landowner does not have an employment, agency, or contractual relationship. 42 U.S.C. §9607(b)(3). The contiguous property owner must prove that he or she "did not cause, contribute, or consent to the release or threatened release" of hazardous substances. 42 U.S.C. §9607(q)(1)(A)(i). And finally, the BFPP must demonstrate that all disposal of hazardous substances at the property occurred before the BFPP acquired the property. 42 U.S.C. §9601(40)(A).

While many of the elements set forth in the paragraphs above seem fairly self-explanatory, the "reasonable steps" and "legally required notices" elements certainly merit some further attention. Any person seeking innocent landowner, contiguous property owner, or BFPP status must take "reasonable steps" with respect to any contamination found on the property to stop any continuing releases, prevent any threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases. 42 U.S.C. §§9601(35)(B)(i)(II), 9601(40)(D), 9607(q)(1)(A)(iii). This "reasonable steps" requirement was created, in effect, to balance a desire to protect human health and the environment with the need to shield certain landowners from CERCLA liability in order to promote redevelopment. S.Rep. No. 2, 107th Cong., 1st Sess. 2 – 4 (2001). This requirement was not intended, however, to create the same response obligations that may exist for a party liable under CERCLA. See *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on*

CERCLA Liability ("Common Elements") (Mar. 6, 2003), available at www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf. The reasonable steps determination is ultimately a site-specific, fact-based inquiry, but some examples of reasonable steps include (1) providing notice of contamination to governmental authorities, even if not legally required to do so; (2) imposing certain site restrictions, such as erecting fences or signs; (3) segregating and appropriately identifying drums of waste; (4) repairing a breach in any containment system or at least providing notice of the breach to a governmental authority; (4) making repairs in asphalt paving if the pavement is used to prevent human exposures; (5) conducting at least basic site investigation if there is a suspicion of a release; and (6) conducting an active investigation of a known hazard, even in cases in which the government has already been notified of the hazard. *See Interim Guidance, supra*, Attachment B, Reasonable Steps Questions and Answers.

The second element meriting some explanation, providing all "legally required notices," applies only to contiguous property owners and BFPPs (42 U.S.C. §§9601(40)(C), 9607(q)(1)(A)(vii)) and depends entirely on the results of an AAI. Indeed, the "legally required notices" requirement is very site-specific and depends on gaining an understanding of which hazardous substances, if any, are on the property (by making an AAI). See *Bona Fide Prospective Purchasers and the New Amendments to CERCLA*, p. 2 n.2 (May 31, 2002), available at www.epa.gov/brownfields/liab.htm (click on "Prospective Purchasers Agreements Guidance"). Once the nature of any contamination is fully evaluated and understood, then any required notices, which could include federal, state, and local notices, should become apparent.

B. [13.8] The Environmental Attorney's Role in Preparing the CERCLA Liability Defense

Preparing for the future CERCLA defense presents a challenge for any environmental attorney working on today's transactions. The newest defenses — the contiguous property owner and bona fide prospective purchaser (BFPP) defenses — have not been substantially litigated, leaving questions as to the proof necessary to meet the preponderance of the evidence standard set for these defenses. *See, e.g., AMCAL Multi-Housing, Inc. v. Pacific Clay Products.*, 457 F.Supp.2d 1016, 1029 (C.D.Cal. 2006) (plaintiffs could not bring cost recovery claim under 42 U.S.C. §9607 as plaintiff failed to allege sufficient facts to bring it within BFPP defense to "potentially responsible party" designation status). The lack of practical example creates ambiguity as to the nature and form of evidence required to successfully present these CERLCA defenses and makes it necessary, for the time being, to err on the side of caution. Consequently, to protect a client's use of a particular defense, it is important that the environmental attorney, from the outset of an environmental transaction, ensure documentation and retention of all materials related to any of the defense elements such as "all appropriate inquiries," any reporting requirements, any reasonable steps taken, any cooperation and assistance provided to persons that are authorized to conduct response actions at the site, etc.

Moreover, if the occasion arises for use of a CERCLA defense, it may not be until several years, or even decades, after the purchase of the target property. The lapse in time between purchase and litigation not only makes documentation and retention even more important, but it also makes it necessary for the environmental attorney to be mindful of evidentiary rules and

standards at the start of a client's involvement in a particular transaction. Indeed, in order to present a successful CERLCA liability defense, the attorney certainly must not only have available those documents that represent fulfillment of each element of the defense but also must have the ability to obtain admittance of these materials into evidence.

The first step to obtaining admittance of materials into evidence is to ensure that all evidence is relevant to the matter at hand. *Jones v. Greer,* 627 F.Supp. 1481, 1486 (C.D.Ill. 1986) ("Under both [the Federal Rules of Evidence] and Illinois law, the basic test for the admissibility of evidence is the relevance of that evidence to a material issue in the case."). Ultimately, relevancy is the foundation on which the federal and state rules of evidence rest. An item must be relevant, or, rather, related to the fact to be proved, to be evidence at all. The relevancy concept seems basic but is in fact more complicated than it appears and should be reviewed by any attorney approaching trial. The proponent of an item as evidence may not take relevancy for granted, but rather he or she must satisfy this basic requirement before moving forward.

Relevance is discussed in Fed.R.Evid. 401 and includes within its definition the concepts of probative value and materiality. *See id.* Rule 401 provides that relevant evidence is evidence having

> **any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.**

Illinois' definition of relevancy is similar to that of Rule 401. In Illinois, "the test for relevancy … is whether the fact offered tends to prove a disputed fact or render the matter in issue more or less probable in light of logic, experience, and accepted assumptions of human behavior." *Jones, supra,* 627 F.Supp. at 1486, citing *Mueller v. Yellow Cab Co.,* 110 Ill.App.3d 504, 442 N.E.2d 595, 66 Ill.Dec. 169 (1st Dist. 1982), and *People v. Gardner,* 47 Ill.App.3d 529, 362 N.E.2d 14, 5 Ill.Dec. 701 (5th Dist. 1977).

One component of relevancy is "authentication." Authentication or identification is a condition precedent to admissibility and "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed.R.Evid. 901(a). *See also Kimble v. Earle M. Jorgenson Co.,* 358 Ill.App.3d 400, 830 N.E.2d 814, 828, 294 Ill.Dec. 402 (1st Dist. 2005) ("In civil cases in Illinois, the basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence."), quoting *Anderson v. Human Rights Commission,* 314 Ill.App.3d 35, 731 N.E.2d 371, 377, 246 Ill.Dec. 843 (1st Dist. 2000). "The rationale behind this Rule is that absent a showing that the evidence is what the proponent alleges, it has no relevance." *Bruther v. General Electric Co.,* 818 F.Supp. 1238, 1240 (S.D.Ind. 1993). Certainly, procedures such as requests to admit and pretrial conferences often eliminate much of the need to authenticate documents at trial. Moreover, many federal courts have found that production of documents by a defendant from its own files is often sufficient to justify a finding of authentication. *Brown & Williamson Tobacco Corp. v. Jacobson,* 644 F.Supp. 1240, 1253 (N.D.Ill. 1986) (citing *Burgess v. Premier Corp.,* 727 F.2d 826, 835 (9th Cir. 1984)), *aff'd in part, rev'd in part on other grounds,* 827 F.2d 1119 (7th Cir. 1987). Nonetheless, the rule remains important and deserves some consideration.

The simplest way to authenticate a document such as an AAI report, an e-mail, or a memorandum to be used in a CERCLA defense would to be to have its author testify that the document is what it is claimed to be. See Fed.R.Evid. 901(b)(1) (testimony of witness with knowledge). See also ILLINOIS CIVIL TRIAL EVIDENCE §6.38 (IICLE, 2004). However, should the author be unavailable, which may very well be the case in a CERCLA defense matter taking place years after the documents are created, there are other methods of authentication that may be used. Generally speaking, Rule 901(b)(1) contemplates a grand spectrum of testimony of a witness with knowledge. The term "knowledge" itself is construed broadly to include anything from, for example, testimony by others present at the signing of an offered document (see Notes of Advisory Committee on Rules, Fed.R.Evid. 901(b)) to testimony of someone who, by virtue of his or her position of employment, can account for and support the authenticity of a document (*see Research Systems Corp. v. IPSOS Publicite,* 276 F.3d 914, 924 (7th Cir. 2002) (because witness was executive in charge of marketing and sale of product, court could infer that he had personal knowledge to support his testimony that exhibit was, as proffering party claimed it to be, report created for product)).

Beyond testimony of a witness with knowledge, Fed.R.Evid. 901(b)(2) allows for authentication of a document by a nonexpert familiar with the author's handwriting or signature. See also ILLINOIS CIVIL TRIAL EVIDENCE §6.38 (IICLE, 2004). Therefore, anyone who has sufficient familiarity (through exchange of correspondence or other means) with, for example, the signature of the author of a memorandum may be able to properly authenticate the memorandum at trial. Also, Rule 901(b)(2) suggests that the characteristics of offered evidence might themselves secure its authentication. Indeed, a document, such as a memorandum or letter, can potentially be authenticated merely by its content and surrounding circumstances. *See, e.g., United States v. Harvey,* 117 F.3d 1044, 1049 (7th Cir. 1997) (diaries and notebooks were authenticated in action involving defendant charged with manufacturing marijuana because they were found at his campsite, referred to marijuana plants growing around campsite, and made numerous references to defendant's dog). An e-mail might also be authenticated or identified by its unique characteristics such as the e-mail address of the sender, the e-mail addresses of those to whom the email is sent, the "signature" of the sender, or the contents of the e-mail that relate to identifiable matters. *See United States v. Safavian,* 435 F.Supp.2d 36, 40 (D.D.C. 2006). In all, Rule 901(b) provides ten illustrative examples of how to properly authenticate an exhibit offered at trial. These examples are not exhaustive, and other methods can and often do suffice. See Fed.R.Evid. 901(b) ("*By way of illustration only, and not by way of limitation,* the following are examples of authentication or identification conforming with the requirements of this rule." [Emphasis added.]). An attorney may simply have to be creative. However, it will undoubtedly save much time and energy if the issue of authentication and identification is discussed at the beginning of the relationship with a client and consultant. An attorney might suggest, for example, that the client and consultant "sign" each e-mail with a "formal" electronic signature or that the consultant sign reports and memoranda in "doubles" so that, in case one consultant is unavailable to testify at trial, there is a potential alternative.

Once a document is authenticated, it is not necessarily admissible as evidence. Again, authentication is merely a condition precedent to admissibility. See Fed.R.Evid. 901(a). Indeed, even though a document might be authenticated, other bars to admissibility, such as hearsay, may nonetheless remain. See Notes of Advisory Committee on Rules, Fed.R.Evid. 901(b) ("It should

be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain."). *See also Nemecek v. Karamacoski*, No. 2:03 CV 346, 2005 WL 1185282 at *3 (N.D.Ind. May 19, 2005).

The hearsay issue may be especially relevant in relation to the AAI report, which is, perhaps, the most important element of each of the CERCLA defenses. Fed.R.Evid. 801(c) defines "hearsay" as a

> **statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.**

According to this rule, an AAI report would be hearsay if trying to prove the truth of the matters asserted within that report. However, in a CERCLA defense action, there could exist an argument that an AAI report is not offered for the truth of the matters asserted therein and is *not* therefore hearsay. See *United States v. Bursey*, 85 F.3d 293, 296 (7th Cir. 1996) (statement is *not* hearsay if it is offered to prove something other than truth of matter asserted). *See also Waechter v. Carson Pirie Scott & Co.*, 170 Ill.App.3d 370, 523 N.E.2d 1348, 1352, 120 Ill.Dec. 437 (2d Dist. 1988) ("Hearsay does not encompass all extrajudicial statements, but only those offered for the purpose of proving the truth of matters asserted in the statement."); ILLINOIS CIVIL TRIAL EVIDENCE §4.2 (IICLE, 2004, Supp. 2006) (describing hearsay as "testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter"), quoting Charles Tilford McCormick, HANDBOOK OF THE LAW OF EVIDENCE §225, p. 460 (1954).

To satisfy the AAI requirement of the CERCLA defense, it is necessary to demonstrate that a client followed the procedures and standards set forth in ASTM International, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, E1527-05. See *Comparison of the Final All Appropriate Inquiries Standard and the ASTM E-1527-00 Environmental Site Assessment Standard* (Oct. 2005), available at www.epa.gov/brownfields/regneg.htm. Thus, counsel could argue that it is not the truth of the actual findings of the AAI report that is necessarily important to the defense, but, rather, it is the simple fact that an AAI was conducted (and memorialized by the existence of a report) that is essential to the CERCLA case. While such an argument theoretically exists, it is perhaps not very practical. The court may find that even though the truth of the actual findings of the report are not particularly crucial to any CERCLA defense, the truth of the general content of the report is critical. Ultimately, the truth of whether the elements of the ASTM were performed is ascertained from the content of an AAI report, making it necessary, on some level, to offer an AAI report for the truth of the matter asserted therein.

In any event, should the AAI report be deemed hearsay, it may nonetheless qualify for one of the great number of exceptions to the hearsay rule. Out of these many exceptions, Fed.R.Evid. 803(6), commonly called the "business records exception," is the most applicable to an AAI report. Rule 803(6) excludes the following as hearsay:

> **A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902(11) [**or**] Rule 902(12).**

See also Ill.S.Ct. Rule 236(a) (discussing admissibility of business records into evidence). See also ILLINOIS CIVIL TRIAL EVIDENCE §4.23 (IICLE, 2004, Supp. 2006) (discussing and elaborating on Rule 236(a)). Given the circumstances of a particular case, there may certainly be other hearsay exemptions or exceptions beyond Fed.R.Evid. 803(6) under which an AAI report or portions of the report may be admitted into evidence, but it is the business records exception that appears to be the most practical and acceptable in relation to an AAI report. Nonetheless, all exceptions should be reviewed by an attorney when seeking to have a document admitted into evidence. Furthermore, it should be noted that exceptions to the federal and Illinois hearsay rules, while the same general exceptions, do contain some minimal, substantive differences and, therefore, should be reviewed separately and carefully.

If the consulting firm that performed the AAI is available at the time of trial, then it is likely that a consultant or other person from this consulting firm could both authenticate the report and testify to the elements set forth in Fed.R.Evid. 803(6), therefore demonstrating that the AAI report is precisely the type of record that falls within the ambit of the business records exception. However, to ensure the best chance of obtaining the admissibility of an AAI report, the attorney might draft and seek to have the consultant include in his or her report, or even as an exhibit to the report, a certification as provided for in Fed.R.Evid. 902(11). Such a certification "self-authenticates" the document and, pursuant to Fed.R.Evid. 803(6), provides a guarantee of sorts that the document is a business record and therefore likely admissible. If a certification is not obtained from the consultant (or if it is somehow deemed deficient) and if the consulting firm who authored the report is no longer available to testify at trial, it may then become necessary to hire another consulting firm to serve as an expert witness to testify that the AAI report is indeed the sort of report created and "kept in the course of a regularly conducted business activity" among consulting firms, that the report follows the ASTM standard in effect at the time it was written, etc.

As an extra precaution to preserving the admissibility of an AAI report as a business record, the attorney might sit down with the consultant at the outset of a transaction and request information on the consultant's practice of record-keeping. Does the consulting firm have a written policy in relation to record-keeping? Where and how are reports kept (hard copy, electronically)? Who has responsibility for maintaining reports and other records? The answers to these questions may not only help the attorney to set the stage for the admission in some future litigation of an AAI report (or even other documents) based on the business records exception, but also has the added bonus of being generally helpful during discovery. For example, with a consulting firm's record-keeping policies in hand, an attorney can more easily prove that a document is no longer available because the consulting firm's policy (as it stood however many years before the current litigation) was to destroy these documents after a certain period of time.

An AAI report typically is not the only document that an attorney will seek to have admitted in CERCLA defense litigation. There may be e-mails, memoranda, and letters important to the case as well. There also may be certain laboratory results or data that are critical to the client's defense. These documents, results, and data have to be authenticated and deemed admissible just as any other evidence. With respect to laboratory results and data, it is important to maintain the proper chain of custody, to document this chain, and to be able to access this documentation without difficulty. Consequently, an attorney may require that any analytical results be accompanied as a matter of course by a chain of custody. It might also be beneficial, although not required by any evidentiary rule or industry standard, to have the consultant attach to any analytical results a quality assurance and quality control (QA/QC) report. Not only will a QA/QC report aid in securing the authenticity of data, but it also has the added benefit of potentially limiting challenges to the data even after the data is admitted as evidence. Beyond taking steps to ensure a proper chain of custody and quality assurance, the attorney should be generally familiar not only with the consultant and its sampling practices, but also with the subcontractors or laboratories with whom the environmental consultant performing the AAI investigation or other investigations will be working. Subcontractors and laboratories who are established or well-known in the industry are often better equipped to ensure and support the quality of their work, and they are likely to have staying power and therefore still be available at the time of litigation.

These are only some of the evidentiary issues to be considered by the environmental attorney in relation to preparing the CERCLA liability defenses. As is evident from the above discussion, evidentiary issues can become complicated and confusing and may be even moreso when the documents to be used at trial were created long before trial and are no longer fresh in the memory of the persons who created them (*i.e.,* if the persons who created them are still available). In a case in which obtaining admission of evidence seems interminably complicated and time-consuming, an attorney might wish to hire an expert in evidentiary issues. These experts do exist and often are found at a local law school. In any event, it is ultimately important that an attorney take time to reflect on evidentiary issues that may arise in the future in relation to an environmental transaction and attempt to address these issues at the outset of a transaction so as to avoid scrambling for evidence (that may no longer exist) in the future.

This chapter was first published in the 2007 edition of *Environmental Law in Illinois: Corporate and Real Estate Transcations* by the Illinois Institute for Continuing Legal Education (IICLE).