

**MOCK TRIAL: CROSS EXAMINATION AND IMPEACHMENT OF EXPERT WITNESSES--  
EVERYTHING YOU SAID (AND E-MAILED) CAN AND WILL BE USED AGAINST YOU**

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This is a mock trial that will focus on trial basics such as the leading nature of cross examination and the steps for admitting evidence, and the more complex but common situation where a witness gives testimony that appears to contradict prior out-of-court statements. These out-of-court statements can come in many forms, including but not limited to deposition testimony, the witness's publications, correspondence, damaging e-mails, and even marketing materials from the expert's firm. This mock trial will examine the typical methodologies and issues that arise in the court room for environmental experts. It should also serve as a valuable tool addressing the issues that arise when environmental scientists prepare reports, literature, e-mails and marketing material outside of the court room.

The mock trial involves the hypothetical case Agency v. Bravo Petroleum Inc. In this litigation, a state or federal government agency ("Agency") seeks to recover the cost of remediating petroleum beneath a tank farm at an abandoned petroleum terminal ("Terminal"). The Agency is seeking to recover the future costs of light non-aqueous phase liquid ("LNAPL") remediation from former owners of the Terminal, including the defendant Bravo Petroleum. The Terminal sits on a 100-acre parcel that was used for 30 years by Bravo. This court is presumed to have already heard compelling expert testimony that a 10 acre plume of crude and diesel LNAPL is floating on groundwater that lies 20 feet below ground level in a fine-grained sandstone.

It is presumed that as a matter of law, the Agency cannot recover the future costs of its remediation if removal of the LNAPL is not "practicable." This court has also determined that, for this case, a "practicable" remediation of LNAPL is defined as a clean up in 30 years at a cost less than \$30 million.

The court is prepared to hear expert testimony on whether the selected remedial technology can meet this standard. We will hear from the Agency's expert, Dr. Will Work, who is an LNAPL removal technology expert. We will also hear from the defendant's expert, Dr. Kent B. Dunne, who is an expert in LNAPL removal impracticability determinations.

Technical issues that will be addressed as part of the mock trial through expert testimony will include:

- The technical and economic practicability of removing LNAPL from the groundwater to levels that are protective of human health and the environment.
- The time frame for LNAPL remediation and cost of remediation.
- The chemical and physical characteristics of LNAPL. Testimony will focus on the viscosity of crude oil, Bunker C and diesel.

- The affects on LNAPL remediation posed by different environmental matrices such as grain size, porosity, organic carbon content, etc.
- The efficacy of pilot scale and bench scale remediation tests.
- Different LNAPL remediation technologies. Witnesses will examine an LNAPL removal system that consists of three parts, an air sparging system, a soil vapor extraction system, and a groundwater extraction system. Witnesses will also address monitored natural attenuation.
- Rehabilitating damaging cross examination testimony during redirect examination.
- The implications of omitting information from expert reports on the scope of trial testimony.
- The effect of deposition testimony on the scope of direct and cross examination.
- Effective use of trial exhibits.
- The impact on witness credibility during cross examination due to:
  - The different charecteristics of allegedly comparable projects
  - The differences between bench scale testing with pilot scale testing
  - Prior inconsistent deposition and trial testimony.
  - Prior inconstant statements in articles written by the same witness.
  - Inconstant statements in marketing material.
  - Damaging e-mails with employees, clients and legal counsel.

#### PANEL MEMBERS:

Bravo's lawyer is played by Neal Weinfield a Shareholder with Greenberg Traurig. Neal H. Weinfield is a Shareholder in Greenberg Traurig's Environmental and Energy and Natural Resources Departments, and the Climate Change Task Force. Neal represents industrial clients on the full range of environmental compliance, permitting, transactional and enforcement matters. His practice includes extensive experience on the full range of environmental regulatory programs including the Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and CERCLA, as well as natural resource damages claims and defense of toxic tort lawsuits. With a solid understanding of industry and highly scientific matters, he assists clients in the most technical areas of environmental law. A member of the Federal Trial Bar, he regularly goes to court, argues motions and tries cases. He first chaired the defense of the Apco Oil Corporation Liquidating Trust in the nationally significant environmental cost recovery case, City of Wichita v. Trustees of the Apco Oil Corporation Liquidating Trust, where after an eight-week trial, the court found the Trust liable for only 1.72 percent of the \$33 million cleanup, millions less than sought at trial. He currently defends a large Nebraska agricultural equipment manufacturer in a large multi-party toxic tort suit originally brought by Masry & Vititoe (the plaintiff's firm in the movie Erin Brockovich) as well as related claims brought by U.S. EPA. He is currently defending the former owners of an oil refinery in Oklahoma where U.S. EPA, the state environmental protection agency and the Natural Resources Trustee are seeking recovery of \$65 million for past and future response costs and alleged natural resource damages.

The Agency's lawyer is played by Matt Prewitt, a Shareholder with Greenberg Traurig. Mathew Prewitt is a trial lawyer with broad experience in complex environmental, toxic tort, and commercial litigation across the United States. A shareholder in Greenberg Traurig's litigation department, Matt frequently represents

industrial clients in disputes arising from alleged environmental contamination, litigating issues ranging from US EPA cost recovery claims, to tort claims for personal injury and property damage, to corporate successor liability and bankruptcy claims. Matt is an adjunct professor of law at Chicago-Kent College of Law, where he teaches in the areas of complex business litigation, bankruptcy, and environmental law. He is an editor of the American Bar Association quarterly journal *The Environmental Litigator* and co-chair of the American Bar Association Section of Litigation Subcommittee for Bankruptcy Environmental Claims. He is the co-author of a forthcoming reference work on expert testimony to be published by the American Bar Association in 2010.

Dr. Kent B. Dunne is played by Doug Soutter, also a consultant with Conestoga Rovers and Associates. Douglas Soutter is a senior hydrogeologist with over 15 years experience in environmental hydrogeology, with a focus on quantitative hydrogeology, site characterization, source identification, and remediation. Mr. Soutter's primary responsibilities include the design, implementation, analysis, and reporting of subsurface investigations for environmental projects. He has experience and training in hydrogeology, remediation technologies, geochemistry, fate and transport modeling, geographical information systems (GIS), programming, and environmental statistics. He has extensive experience with commonly encountered environmental contaminants such as chlorinated solvents, petroleum, coal derivatives, heavy metals, pesticides, and PCBs. Mr. Soutter's responsibilities also include the evaluation of remedial alternatives, the application of environmental risk systems, and the development of site-specific remedial objectives.

Dr. Will Work is played by Ron Frehner, a consultant with Conestoga Rovers and Associates. Ron Frehner is a Shareholder with CRA and co manages the St. Paul Minnesota office. He holds Bachelor and Masters degrees in Civil Engineering and has professional engineering licenses in a number of States. Mr. Frehner has worked his entire 27 year professional career with CRA working extensively in the area of soil and groundwater remediation throughout North America. Areas of professional practice include: LNAPL remediation, voluntary cleanup programs, UST removals, regulatory permitting, expert testimony, remedy selection, and Brownfield development. Mr. Frehner has completed over 50 VOC and petroleum investigation and remediation projects from New Jersey to California involving, dual phase extraction, air sparging, SVE, vacuum enhanced recovery, slurry walls, excavation, in-situ chemical oxidation, passive collection, active collection as well as MNA.

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