

# **REGFORM**

## **2018 Missouri Water Seminar**

### **Ethical Issues in Environmental Litigation**

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## Ethical Issues in Environmental Litigation

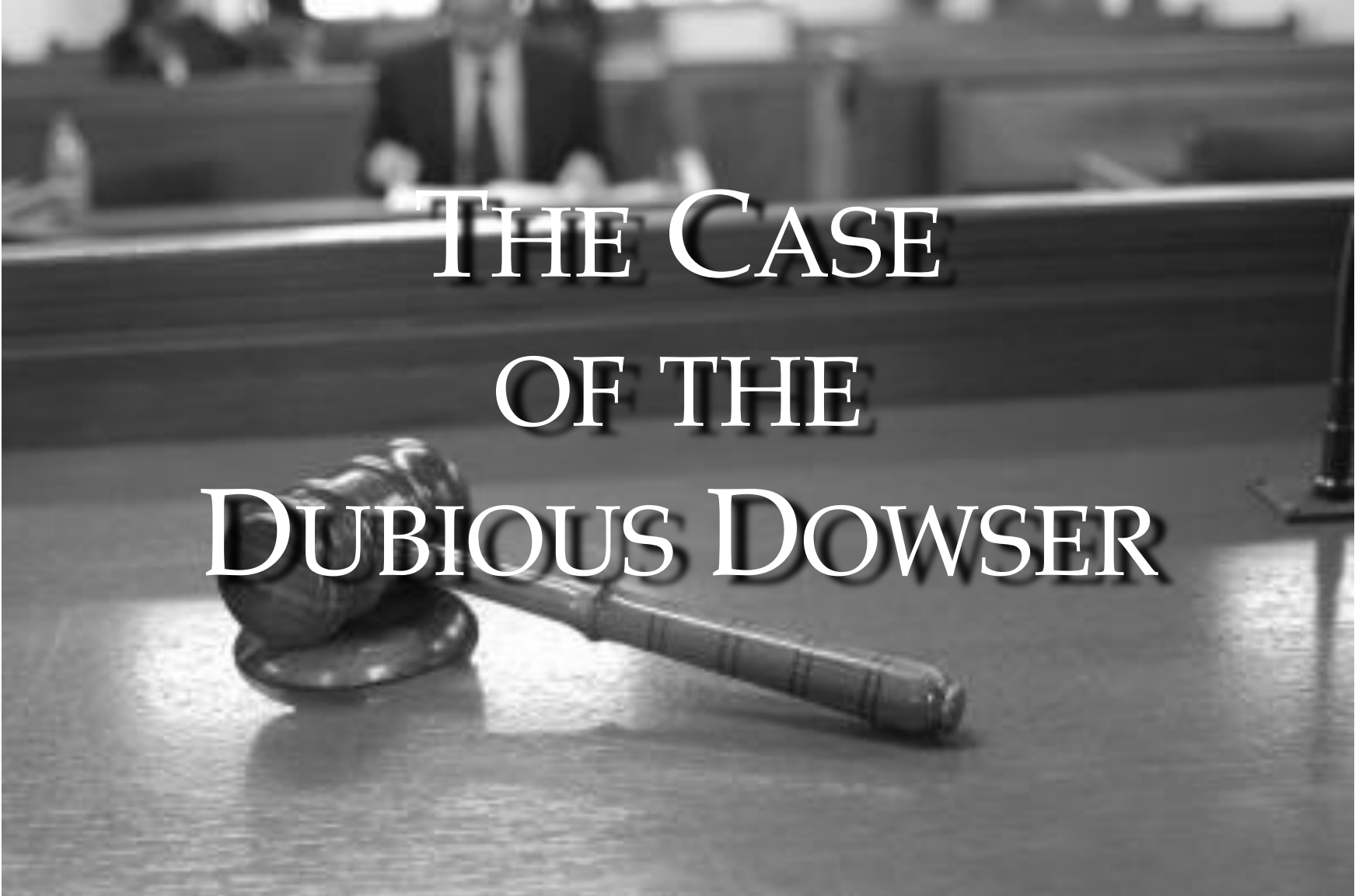
### Topics Discussed:

Rule 1-1.8 – Prospective Clients

Rule 4-4.2 – Communications with Persons  
Represented by Counsel

§ 490.065, RSMo – new *Daubert* standard in Missouri

## Ethical Issues in Environmental Litigation



# THE CASE OF THE DUBIOUS DOWSER

## Ethical Issues in Environmental Litigation

On his website, Perry Mason states,

**Perry Mason, Attorney-at-Law**

**40 Years of Legal Experience**

**Environmental Law & Litigation**

**Address: Brent Building, Suite 904**

**Phone: MAdison 5-1190**

## Ethical Issues in Environmental Litigation

One evening at his office, Mason is reading the day's mail. He had received a large manila envelope that contained several documents concerning the Got Rocks Chemical Company in Salem, Missouri.

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## Ethical Issues in Environmental Litigation

The envelope included a copy of a hand-written report from a local dowsing company that described a buried pipe connecting a floor drain from the Got Rocks Chemical Company to a nearby creek.

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The envelope also included a copy of an internal Got Rocks Chemical Company memo containing a handwritten note stating “Wait until it’s dark to dump the stuff into the creek.”



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The next day the phone rings and Mason's secretary,  
Della Street answers.

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## Ethical Issues in Environmental Litigation

She hands the phone to Mason, and the caller says,  
“Mr. Mason, my name is Murl Huggard. I live near the  
chemical plant and I want you to sue them for me.  
Their chemicals caused me to lose my singing voice. I  
sent you the envelope with all those papers.”

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The caller also says, “The people at the chemical plant don’t care about anyone – only money. I am willing to do anything to stop them. Anything. Mr. Mason, will you help me?”

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Mason pauses and then says, “Mr. Huggard, thank you for calling and sending the envelope and documents.

However, I cannot represent you because I have previously represented the chemical company.”

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Several weeks later, Mason is having lunch at the club when he is approached by his old friend, Hamilton Burger.

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Burger, who had recently retired as the district attorney, had joined a prominent plaintiff's firm – Dewey, Cheatem & Howe - to lead its litigation practice group.



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Burger told Perry that they had just filed a new environmental case against the Got Rocks Chemical Company. Burger said, “We are really going to ring the bell on this one!”

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In his workup of the case, Burger sends his trusted lead investigator, retired police lieutenant Arthur Tragg, to locate and interview people in the area who used to work at the chemical plant.

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## Ethical Issues in Environmental Litigation

Lieutenant Tragg (he loves using his former title and flashing his badge) takes statements from several former employees, including a retired shift manager, who admitted to shoddy housekeeping practices at the plant.

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Shortly after the lawsuit has been filed, the court schedules a pre-trial hearing. Burger arrives early and takes his seat along with his client, Mr. Huggard, and his investigator, Lieutenant Tragg.

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Suddenly, a loud commotion occurs in the back of the courtroom. Turning their heads, Burger, Huggard, and Tragg all see the president of the chemical company, Mr. Got Rocks, walking into the courtroom along with his new attorney ... Perry Mason!

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## Ethical Issues in Environmental Litigation

After the Judge opens the hearing, Burger approaches the Judge.



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## Ethical Issues in Environmental Litigation

“Your Honor, we must object. Mr. Mason’s appearance here today is highly irregular. In fact, Mr. Mason is disqualified because he previously consulted with the plaintiff as a ‘prospective client.’”

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The Judge leans forward on the bench and says, “Hmm, Mr. Burger appears to raise an interesting legal point here. Mr. Mason, what is your response?”

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### Issue:

By reading the documents and having a phone discussion with Mr. Huggard, has Perry formed an attorney-client relationship?

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### **RULE 4-1.18: DUTIES TO PROSPECTIVE CLIENT**

(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

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(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 4-1.9 would permit with respect to information of a former client.

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### Comment 2.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

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### Comment 2.

... a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response.



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### Comment 2.

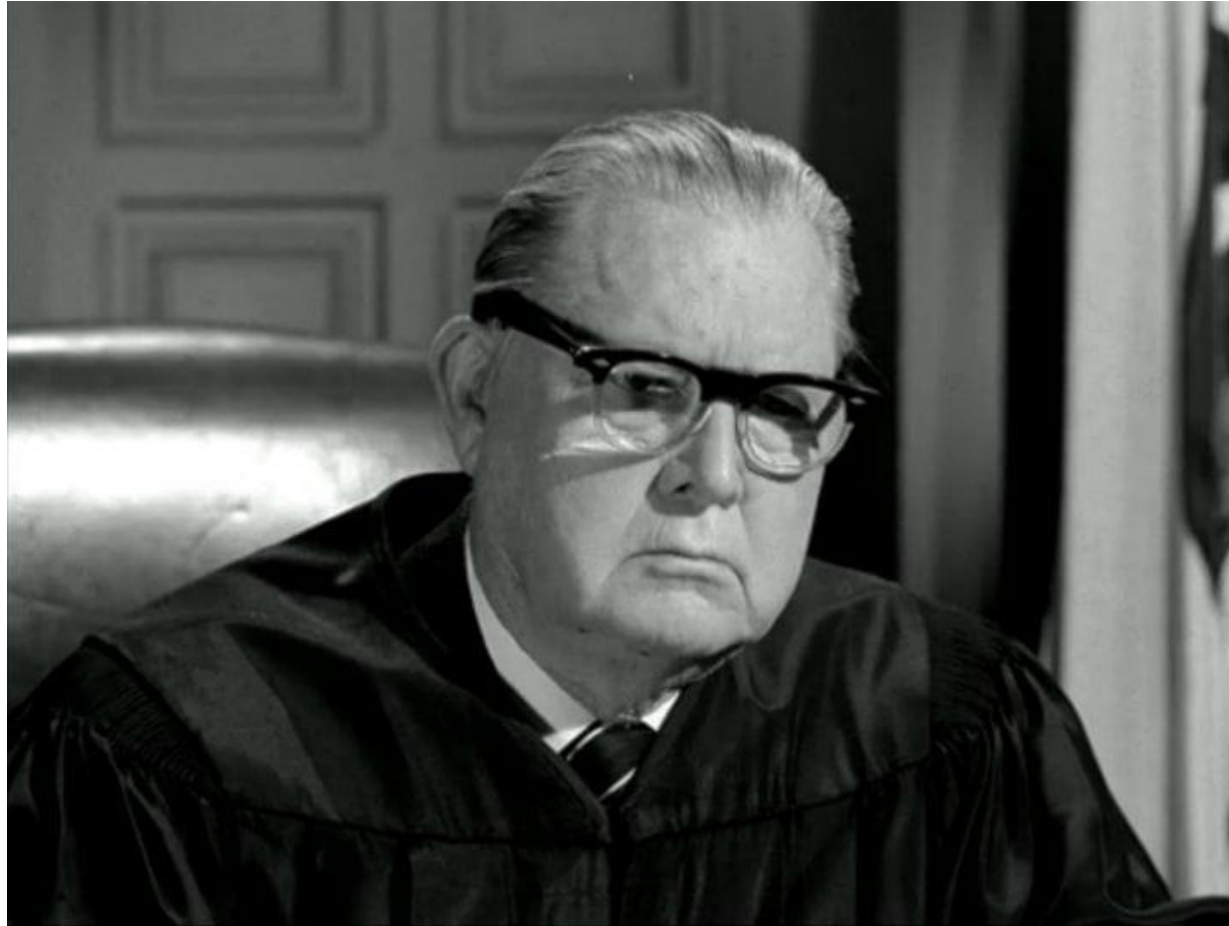
In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest.

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### Comment 2.

Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

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## Ethical Issues in Environmental Litigation

The Judge says, “Well, based on Rule 4-1.18, I find that Mr. Mason is not disqualified. The plaintiff unilaterally provided this information to Mr. Mason. Mr. Mason never solicited any information. Mr. Burger, your objection is overruled.

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## Ethical Issues in Environmental Litigation

Mason then stands.

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## Ethical Issues in Environmental Litigation

“Your Honor, at this time the defense moves to exclude the statements obtained by Lieutenant Tragg at Mr. Burger’s direction. These statements were obtained in violation of the ethical rules.



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## Ethical Issues in Environmental Litigation

Burger exclaims, “Your Honor, Mr. Mason’s request in simply absurd. This is just another example of Mr. Mason’s well-known efforts at confusion and obfuscation.”

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The Judge asks, “Mr. Mason, what is the specific basis for your objection to the admissibility of this evidence?”

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### Issue:

Is it appropriate for Burger to direct Tragg to interview former management employees of the chemical company knowing that the company was likely represented by counsel?

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### **RULE 4-4.2: COMMUNICATION WITH PERSONS REPRESENTED BY COUNSEL**

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

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### Comment 4.

... A lawyer may not make a communication prohibited by this Rule 4-4.2 through the acts of another....

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### Comment 5.

In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter ...

## Ethical Issues in Environmental Litigation

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## Ethical Issues in Environmental Litigation

### Comment 5.

In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

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### Comment 8.

The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed.

## Ethical Issues in Environmental Litigation

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The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances.

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The Judge say, “Counsel, please approach.”

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## Ethical Issues in Environmental Litigation



## Ethical Issues in Environmental Litigation

The Judge leans forward on the bench and says, “It appears to the Court that these statements were made by former management personnel who could bind the company.”

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“Further, it appears to the Court that it was reasonable to conclude the Defendant likely had legal representation at the time these statements were obtained.”



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The Judge continued, “Accordingly, the Court concurs with Mr. Mason’s analysis of Rule 4-4.2. Mr. Burger, the Court assumes you will not offer this evidence otherwise the Court will be compelled to initiate an appropriate inquiry with the bar association. The objection is sustained.”

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## Ethical Issues in Environmental Litigation

The Judge then states, “Are there any other preliminary matters to take up today?”

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## Ethical Issues in Environmental Litigation

Mason stands and states, “Your Honor, the defense has serious reservation concerning the admissibility of Plaintiff’s environmental reports. Specifically, the findings in these reports do not meet the *Daubert* standard under 490.065, RSMo.”

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“What in particular is objectionable, Mr. Mason?” asks  
the Judge.

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## Ethical Issues in Environmental Litigation

Mason states, “The conclusions regarding the location of the pipe running to the creek are predicated on the use of a so-called dowser or ‘witching stick.’ The use of ‘witching sticks’ does not meet the *Daubert* standard for admissibility and we ask that it be excluded.”



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## Ethical Issues in Environmental Litigation

“Your Honor,” Burger says. “This is ludicrous. Mr. Mason knows full well that all the contents of these reports comply with necessary legal requirements for admissibility. This is just more showmanship on Mr. Mason’s part.”

## Ethical Issues in Environmental Litigation

### Issue:

What are the necessary requirements under § 490.065, RSMo for the admissibility of scientific and technical evidence?

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### Section 490.065.2, RSMo

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

## Ethical Issues in Environmental Litigation

### Section 490.065.2, RSMo

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

## Ethical Issues in Environmental Litigation

### Section 490.065.2, RSMo

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(b) The testimony is based on sufficient facts or data;

## Ethical Issues in Environmental Litigation

### Section 490.065.2, RSMo

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(c) The testimony is the product of reliable principles and methods;

## Ethical Issues in Environmental Litigation

### Section 490.065.2, RSMo

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(d) The expert has reliably applied the principles and methods to the facts of the case;



## Ethical Issues in Environmental Litigation

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony ...

*Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 141 (1999).

## Ethical Issues in Environmental Litigation

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable ...

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## Ethical Issues in Environmental Litigation

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U. S. 579 (1993), this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable. And it held that the Federal Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.*, at 597.

*Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 141 (1999).

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The Court also discussed certain more specific factors, such as testing, peer review, error rates, and "acceptability" in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific "theory or technique." *Id.*, at 593-594.

*Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 141 (1999).

## Ethical Issues in Environmental Litigation



## Ethical Issues in Environmental Litigation

Looking puzzled, the Judge said, “Counsel, what exactly is dowsing and what is a witching stick?”

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Mason stood up and presented two photographs to the Court.

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Mason explained, “According to the U.S. Geological Survey, . . .”

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"Water dowsing" refers in general to the practice of using a forked stick, rod, pendulum, or similar device to locate underground water, minerals, or other hidden or lost substances, and has been a subject of discussion and controversy for hundreds, if not thousands, of years.

*<https://water.usgs.gov/edu/dowsing.html>*

## Ethical Issues in Environmental Litigation

Although tools and methods vary widely, most dowzers (also called diviners or water witches) probably still use the traditional forked stick, which may come from a variety of trees, including the willow, peach, and witchhazel ...

*<https://water.usgs.gov/edu/dowsing.html>*

## Ethical Issues in Environmental Litigation

Although tools and methods vary widely, most dowsers (also called diviners or water witches) probably still use the traditional forked stick, which may come from a variety of trees, including the willow, peach, and witchhazel. Other dowsers may use keys, wire coathangers, pliers, wire rods, pendulums, or various kinds of elaborate boxes and electrical instruments.

*<https://water.usgs.gov/edu/dowsing.html>*

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In the classic method of using a forked stick, one fork is held in each hand with the palms upward ...

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In the classic method of using a forked stick, one fork is held in each hand with the palms upward. The bottom or butt end of the "Y" is pointed skyward at an angle of about 45 degrees ...

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In the classic method of using a forked stick, one fork is held in each hand with the palms upward. The bottom or butt end of the "Y" is pointed skyward at an angle of about 45 degrees. The dowser then walks back and forth over the area to be tested. When she/he passes over a source of water, the butt end of the stick is supposed to rotate or be attracted downward.

*<https://water.usgs.gov/edu/dowsing.html>*

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Water dowers practice mainly in rural or suburban communities where residents are uncertain as to how to locate the best and cheapest supply of groundwater ...

*<https://water.usgs.gov/edu/dowsing.html>*

## Ethical Issues in Environmental Litigation

Water dowsers practice mainly in rural or suburban communities where residents are uncertain as to how to locate the best and cheapest supply of groundwater. Because the drilling and development of a well often costs more than a thousand dollars, homeowners are understandably reluctant to gamble on a dry hole and turn to the water dowser for advice.

*<https://water.usgs.gov/edu/dowsing.html>*

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## Ethical Issues in Environmental Litigation

“Based on the lack of any scientific predicate for the use of dowzing or witching sticks in this State,” said the Judge, “this Court is compelled to sustain Mr. Mason’s motion. The evidence consisting of the location of the buried pipe leading to the creek is excluded.”

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## Ethical Issues in Environmental Litigation

“Any other preliminary matters?” asked the Judge.

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## Ethical Issues in Environmental Litigation

“Yes, your Honor,” said Burger. “The Plaintiff would like to offer the hand-written note on the internal company memo. The handwritten notation stating, ‘Wait until it’s dark to dump the stuff into the creek.’”

## Ethical Issues in Environmental Litigation

“Mr. Mason?” asked the Judge.

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## Ethical Issues in Environmental Litigation

Mason stood and said, “Your Honor, we would reserve any objection pending our *voir dire* of the Plaintiff concerning this point.”

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“Mr. Huggard will take the stand,” directed the Judge.

The Plaintiff slowly shuffled his way to the witness stand.

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“Mr. Huggard, isn’t it true that when you and I spoke on the phone several months ago, you said you would do ‘Anything’ to stop my Client?” asked Mason.

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Mr. Huggard replied, “Yes.”



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“Mr. Huggard, let me hand you the company memo with the handwritten note on it,” said Mason. “Please observe the various swirls on the hand writing.”

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Mr. Huggard replied, “Yes.”

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## Ethical Issues in Environmental Litigation

Mason leaned into the witness and asked, “Mr. Huggard, let me hand you the handwritten dowser report that you previously mailed to me. Wouldn’t you agree that the writing is very similar to the writing on the company memo?”

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## Ethical Issues in Environmental Litigation

“Mr. Huggard, isn’t it also true that you entered into a engagement letter with Mr. Burger,” asked Mason. “And this is your hand writing on that engagement letter?”

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## Ethical Issues in Environmental Litigation

“Mr. Huggard, isn’t it also true that you have a very distinctive style of handwriting as shown on the engagement letter?” asked Mason.

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Huggard sighed and replied, “Yes.”

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## Ethical Issues in Environmental Litigation

“And Mr. Huggard, isn’t it true that the handwriting on the dowsing report and the internal company memo is really your handwriting?” exclaimed Mason.

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## Ethical Issues in Environmental Litigation

Mason added, “And isn’t it true you obtained a copy of that memo, and you wrote ‘Wait until it’s dark to dump the stuff into the creek’ in an effort to do ‘Anything’ to stop my Client?”

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Huggard slumped in the witness chair.

Burger put his hand to his head.

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## Ethical Issues in Environmental Litigation



## Ethical Issues in Environmental Litigation

“Well, Mr. Huggard, I am waiting for an answer,” said  
Mason.

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“Yes, yes, it’s my hand writing. I wrote the report and the note,” said Huggard. “They have the money. They could have paid me. Mr. Got Rocks could have paid me  
....”

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There was a loud commotion in the gallery. In an effort to quiet the noise from the gallery, the Judge banged his gavel.

“Counsel. Please approach,” said the Judge.

## Ethical Issues in Environmental Litigation



## Ethical Issues in Environmental Litigation



## Ethical Issues in Environmental Litigation

“In light of these developments,” said the Judge, “do you have a motion, Mr. Mason?”

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“Yes, Your Honor, said Mason, “the defense moves for an immediate dismissal of this case.”



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“Under the circumstances,” said the Judge, “this case is dismissed.”

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# Ethical Issues in Environmental Litigation

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