



## Sample Answer to Essay Question #5

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**By PASS Law Professors Sara Berman-Barrett, Steven Bracci, Craig Gold, and Bruce Landau, creators of PASS the Performance Test On-line. (PASS, Practical Academic Support Services, offers state-of-the-art on-line Bar Review and Academic Support. To learn more about PASS, the PASS faculty, and PASS Bar Review courses, go to [www.passlaw.com](http://www.passlaw.com), or call (310) 288-4374.)**

### 1. Ethical Issues Arising When Smith Asks to Meet with and Speaks to Lawyer

#### A. Smith's Request to Meet with Lawyer

Lawyer here is “in-house counsel” for ChemCorp, thus Lawyer may not accept the representation of Smith *if* doing so would create an improper *conflict of interest*.

The question is, what did Smith’s request to meet with Lawyer about a “confidential matter” indicate? It may be that very use of the word “confidential” should have alerted Lawyer to the idea that there was at least *a potential* conflict of interest. And, if the interests of Smith were to be in conflict with, or potential conflict with those of ChemCorp, then Lawyer had an ethical obligation to let Smith know, before Smith even began talking about the substance of this so-called “confidential” matter:

- that Lawyer represents ChemCorp and not Smith,
- that Smith may want to speak with an independent lawyer, not one who represents ChemCorp, and
- that if what Smith has to say is adverse to the interest of ChemCorp, Lawyer may not be able to keep what Smith says confidential (that conversations between the ChemCorp’s lawyers and individual ChemCorp employees may not be privileged.)

#### B. Smith's and Lawyer's Conversation

Smith is an employee whose job is to see that ChemCorp complies with government safety regulations, and what Smith told Lawyer, once he began talking, is that:

- Smith witnessed a safety violation the previous year,

—Smith covered up that safety violation at the direction of Smith’s supervisor, violating both internal corporate policies and government regulations, and

—The safety violation, namely dumping of potentially toxic chemicals is ongoing and poses health risks to those current being exposed to the chemicals.

To begin with, it appears that Smith’s interest are potentially adverse to those of Chemcorp in that, because Smith violated internal policies, Smith risks personal exposure and possibly his job if the information is disclosed to higher ChemCorp officials or governmental officials. On the other hand, Smith seems to be coming to Lawyer in order to get the dumping stopped, because Smith says he is concerned about the health threats. Therefore, Smith may not have a problem with the disclosure of his “cover-up” and may either be able to arrange some sort of internal immunity or seek independent counsel as a “whistle blower.” At the very least, it appears that Lawyer has an ethical duty to tell Smith to obtain independent counsel.

But Lawyer has other ethical obligations as well. What Smith told Lawyer raises issues that indicate that ChemCorp may be injured by the ongoing dumping (and the failure of those employees responsible for disclosure to comply with the law.) Because of this, ChemCorp faces possible “injury” in the form of fines, liability exposure, etc. Lawyer is therefore under an ethical obligation to take the following steps:

1. Lawyer should urge Smith to correct the problem himself, internally, filing perhaps an amended disclosure report fully reporting all that he is required to disclose.

2. If Smith refuses, or such action does not occur for some other reason, or if Lawyer deems that the cover-up/failure to report something as serious as chemical dumping near private residences and potable water sources threatens the health of those living near the dumping, then Lawyer may be obligation to take the matter to some higher ChemCorp authority —well above the head of Smith’s supervisor, perhaps to the Board of Directors, President or CEO of ChemCorp. In order to take such steps of going up the chain of corporate command, however, Lawyer needs clear justification, and here it appears Lawyer has this in that the very employee responsible for ensuring compliance violated internal and government requirements, at the direction of his superior, exposing the corporation to great risks.

Note that Lawyer should determine whether internal policies exist for how to handle internal reviews of employee actions (or inaction), and should follow those procedures if any that exist. Even if ChemCorp does not have policies for reporting up the chain of command, here, because as stated above, Smith himself violated law and procedure and therefore may have a motive to blame his supervisor (putting Smith’s and the corporations interests at even further odds with each other), Lawyer must take the matter to higher corporate authorities for review.

It should be noted that the duty of confidentiality would not prevent Lawyer from disclosing the information learned from Smith to ChemCorp.'s higher authority. Since Smith was an employee of Chemcorp., his communication with Lawyer would be covered by the duty of confidentiality owed to ChemCorp. However such communications can be revealed within the organization to those who are expressly or impliedly authorized to receive such information.

## 2. Lawyer's Disclosures to Governmental Authorities

It is unclear, as stated above, whether or not Lawyer's and Smith's conversation is privileged. On the one hand, Smith spoke to Lawyer about a "confidential" matter, and Lawyer allowed Smith to tell Lawyer about potential violations of law—the very sort of information a Lawyer representing Smith would be duty bound to keep in confidence. Lawyer, however, is in-house counsel for ChemCorp and as such ChemCorp is the client, and Lawyer should have (as stated above) informed Smith directly that anything Smith discusses with Lawyer may not be confidential from ChemCorp.

All of these confidentiality rules, however, are subject to an exception for public health and safety. Lawyers may reveal even privileged information if the lawyer reasonably believes it is necessary to do so to prevent the client from committing some action that is likely to result in imminent death or substantial bodily harm. Here, Smith, the employee whose job it is to ensure safety compliance is reporting to Lawyer that ChemCorp's dumping actions are causing Smith to be concerned about health threats to people and their water supply. It seems amply reasonable for Lawyer to conclude from this that his client ChemCorp is committing a criminal act (illegal chemical dumping) that may result in substantial bodily harm. If Lawyer has so reasonably concluded, Lawyer may be allowed to disclose the problem to government authorities.