SpencerFane®

Kathleen M. (Kate) Whitby

Of Counsel

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Overview

Kate Whitby focuses her practice on environmental law, the environmental aspects of real estate transactions, and complex environmental litigation and dispute resolution.

For over 30 years, Kate has helped big and small companies, non-profits, municipalities, and individuals manage or resolve environmental problems so that they can run their businesses, pursue their missions, serve their citizens, and live their lives. She combines her expertise in federal and state environmental laws with her experience as a third party neutral to come up with cost-effective, workable solutions that meet her clients' needs.

Kate began her career representing companies at federal CERCLA (a/k/a the Superfund law) sites and she continues that concentration, helping her clients negotiate fair settlements which allow the appropriate level of site remediation with funding from multiple responsible parties, if appropriate. She handles Brownfield properties and state-lead sites with the same goal, allowing businesses to continue operating as investigation or cleanup work goes forward. If a particular project involves federal or state laws other than Superfund, she helps the client navigate through the permitting or enforcement process with clear explanations of options, timing, and likely results.

Kate also supports the environmental aspects of real estate transactions, including All Appropriate Inquiry compliance – Phase I environmental site investigations, Phase II invasive sampling, and post-closing "due care" obligations – and the myriad of contract issues that accompany a real estate deal on formerly-used commercial or industrial property. Kate's knowledge about typical contaminants, environmental contractors, and remediation technologies allows her to help focus the investigation, the contract terms, and the cleanup requirements on those items most likely to impact the client's needs, whether the client is the buyer, seller, lender, a non-profit, or municipal entity.

Finally, Kate serves as a third party neutral, committee chair, or informal mediator at many sites and projects, and teaches as an adjunct professor at Washington University School of Law. Her experience as a mediator, arbitrator, allocator, trainer, and teacher allows her to work with client teams to clarify their goals and interests, develop insights about why the other side is doing whatever they are doing, and make suggestions for how to steer a path toward resolution, all of which leads to faster, more satisfying solutions for everyone involved.

Education

- Saint Louis University School of Law, 1987 (J.D.)
- Benedictine College

Bar Admissions

- Illinois, 1988
- Missouri, 1987

Court Admissions

- U.S. District Court for the Southern District of Illinois
- U.S. District Court for the Eastern District of Missouri

Distinctions

- *Best Lawyers in America,* 2022-2027
  - Lawyer of the Year, Environmental Law, 2025
- *Chambers USA*, Environment, 2020-2025
- Martindale-Hubbell, Peer Review AV Preeminent, 2013
- *Missouri Lawyer's Weekly*, 13th Annual Women's Justice Awards, Business Practioner, April 2011
- Roster neutral for the U.S. District Court, Eastern District of Missouri, 2004-present
- Roster neutral for the National Roster of Environmental Dispute Resolution and Consensus Building Professionals compiled by the Morris K. Udall Foundation's U.S. Institute for Environmental Conflict Resolution, 1999-present
- Roster neutral for U.S. Arbitration and Mediation – Midwest, a regional dispute resolution provider based in St. Louis, Missouri, 2004-present

Memberships

- American Bar Association (ABA)
  - Chair of the Section of Environment, Energy and Resources (SEER) ADR Committee (2003-05); Vice-Chair (2012-14, 2002-03, and 1997-99)
- Bar Association of Metropolitan St. Louis (BAMSL)

Presentations and Publications

- "Potentially Irresponsible Parties: Forming, Managing, and Enduring PRP Groups," American Bar Association Webinar, January 2023
- "35 Years in Superfund Practice: New Challenges / Emerging Solutions," ABA SEER 44th Spring Conference, March 2015
- "Environmental Issues Impacting Lenders," Missouri Bankers Association, October 2014
- "Learn How to Succeed in Government Contracts," Spencer Fane Client Seminar, August 2014
- "Allocating CERCLA Liability: Divisibility or Section 113 Equitable Contribution," Strafford Publications Webinar, March 2014
- "Multi-Party Negotiation and Public Policy Dispute Resolution, " Adjunct Professor, Washington University School of Law, Fall 2013-present
- "Navigating Uncertain Waters: Regulatory Developments in Clean Water Act Enforcement," Stormwater Permitting, and Fracking, Spencer Fane Webinar, February 2013

- "Surviving (and Perhaps Even Thriving) on Boards, Committees and in Multi-Party Negotiations," USA&M "Best Practices" CLE Series, April 2012
- "ADR & Mediation Practice and Theory," Adjunct Professor, Washington University School of Law, 2004-2012
- "So You Want to be a Mediator," ABA SEER 19th Annual Meeting, October 2011
- "10 Myths of Government Contracting," Spencer Fane Client Seminar, June 2007
- "Pro-Active Methods of Managing Conflict When Time, Money and Relationships Count," USA&M Best Practices CLE Series, April 2006
- "Alternative Dispute Resolution – Facilitation, Mediation, Arbitration: A Basic Overview," Spencer Fane Seminar, June 2005
- "Civil and Family Mediation Training," Washington University School of Law, June 2004
- "Master Class on Civil Mediation," Washington University School of Law, February 2004
- "Permission Granted! Positive Results in Siting and Permitting Projects," ABA SEER 33rd Annual Keystone Environmental Conference, March 2004
- "Negotiation, Conflict Management and Dispute Resolution," U.S. Army Corps of Engineers, 1999, 2001-2003
- "Environmental ADR," BAMSL, March 2000
- "A Mock Allocation of Liability at a Municipal Solid Waste Site," ABA SONREEL (now SEER) 18th Annual RCRA/CERCLA and Private Litigation Update, December 1998
- "Alternatives to Litigation: Arbitration, Mediation, and Allocation," Eastern Mineral Law Foundation (EMLF) 19th Annual Institute, May 1998
- "Complex Allocation Issues," ABA SONREEL 5th Annual Meeting, October 1997
- "A Practical Demonstration of Direct and Cross Examination of an Allocation Expert," ABA SONREEL 26th Annual Keystone Conference, March 1997
- "Allocation Roundtable," ABA SONREEL 4th Annual Meeting, October 1996
- "Environmental ADR," Virginia Center for Innovative Technology (CIT), September and November 1996
- "Key Principles for an Allocation," Association of State and Territorial Solid Waste Management Officials (ASTSWMO) Annual Conference, August 1996
- Worked in a two-person team to pilot an RD/RA Negotiation training for U.S. EPA Region V
- Served as a trainer on the use of ADR in Enforcement Cases for U.S. EPA Regions III and VII
- Prepared and conducted training sessions for U.S. EPA regional and headquarters personnel, as well as staff from the U.S. Department of Justice and several state regulatory agencies, concerning Superfund allocations under EPA's Pilot Allocation project

Related Experience

- Served as chair of the legal committee and informal coordinating counsel for an Illinois Superfund site, and orchestrated PRP outreach efforts, initial allocation shares, and administrative settlement negotiations allowing the PRP Group to expand from 39 to 162 member companies, all of whom signed the RI/FS ASAOC for the site. Continues to represent the client's interests as a member of the group's steering and allocation committees, and is using her allocation database experience to advance the group's efforts to retrieve electronic information from a legacy WANG computer database and translate it into a modern format that can be used in assigning fair shares of cleanup costs.
- Provided environmental regulatory, Missouri law, and settlement negotiation support as local counsel in a breach of lease and toxic tort case involving property previously used as a retail sale and warehouse distribution facility.
- Assisting numerous real estate clients with environmental due diligence assessments, investigative sampling, and remediation efforts, with a particular focus on the environmental consultants' contract terms, the future use of the property, and cost-efficient, timely methods to determine if the property is appropriate for the clients' intended uses.
- Currently a member of the environmental group located in the Spencer Fane St. Louis office, with a mixed practice that includes continuing to act as a third party neutral as well as representing business clients on environmental and

real estate projects.

- Sole practioner in the Washington, D.C. metropolitan area offering convening, facilitation, mediation, settlement, conflict assessment and management, and training services for a variety of clients, including federal and state agencies and private business entities, June 1999-August 2002.
- Program Manager and Senior Mediator for CDR Associates, a collaborative decision making and dispute resolution non-profit based in Boulder, Colorado, January-May, 1999. Provided facilitation, mediation, allocation and training services.
- Director of Settlement Services for Clean Sites, Inc., a national non-profit organization dedicated to improved environmental cleanup, communication and stewardship, September 1995-December 1998. Served as a third party neutral for multi-party disputes by providing convening, conflict assessment, mediation, facilitation, allocation, arbitration and training, and lead the alternative dispute resolution (ADR) division until Clean Sites closed.
- Member of the environmental practice group at a regional law firm based in St. Louis, Missouri, Partner, 1995; Associate, 1987-1994. Served as counsel for potentially responsible parties (PRPs) and other clients dealing with state and federal regulatory requirements; maintained a national Superfund and environmental law practice.
- Represented clients in litigation, allocation, settlement, and cleanup efforts for environmental and enforcement projects ranging from two-party or low cost ($25,000) disputes to multi-party (up to 1,200 entities) and multi-million dollar ($100+ million) sites.
- Acted as national CERCLA counsel for a telecommunications company providing representation at numerous "legacy" sites and plants.
- Represented small businesses in response to environmental enforcement actions, including notices of violation associated with: lead-based paint; lead-safe renovations and repair; underground storage tanks; refrigerant recycling and removal; stormwater; and universal waste.
- Provided environmental support for real estate transactions, including environmental investigations and assessments, reviewing due diligence documentation, negotiating appropriate transactional terms and conditions, and advising on waste management and disposal needs.
- Offered a level of expertise with the environmental issues common to the telecommunications, electrical and chemical manufacturing, solid waste and recycling, government contracting, ordnance / munitions / explosives, agricultural, and petrochemical industries. Represent clients in environmental enforcement, cost recovery, contribution, allocation, toxic tort, regulatory, citizen suit, and common law actions.
- Served as coordinating counsel for PRP outreach, initial allocation and administrative settlement negotiation at Illinois CERCLA site – efforts expanded the group from 39 to 162 member companies and resulted in a signed RI/FS ASAOC for the site.
- Provided environmental regulatory, Missouri law, and settlement negotiation support as local counsel for litigation involving property used as a retail sales and warehouse distribution facility.
- Assisted with cost cap and pollution legal liability insurance coverage and claims issues for a state-lead site, and coordinate cleanup and dispute resolution concerns between client and fixed price remediation contractor.
- Reviewed and identified environmental issues to be addressed during the due diligence period for a potential acquisition of eleven operating facilities in two countries.
- Assist numerous real estate clients with Phase I and Phase II environmental due diligence assessments, investigative sampling, and remediation efforts, with particular focus on the environmental consultants' contract terms, the future use of the property, and cost-efficient, timely methods to determine if the property is appropriate for the clients' intended uses.
- Represented three potentially responsible party (PRP) plaintiffs in a Southern District of Illinois multi-million dollar contribution case involving a secondary lead smelter; pre-litigation settlement offer process resulted in approximately $4.3 million in proceeds from several dozen PRPs in return for $600,000 investment of transaction costs (7:1 rate of return for costs recovered).
- Defended client against cost recovery claims from the U.S. and contribution claims from a co-defendant; when pre-litigation settlement efforts were unsuccessful, encouraged the parties to participate in a post-answer, pre-discovery

settlement conference with a federal magistrate that produced a full settlement.

- Defended three third party PRPs in an Eastern District of Missouri contribution case concerning a former drum reclamation operation; obtained a dismissal with prejudice for one company, a de minimis settlement for another, and a private settlement with contribution protection for the third.
- Defended a former manufacturing plant owner from CERCLA contribution and RCRA citizen's suit claims in the Middle District of North Carolina asserted by the facility's current owner and settled the case.
- Negotiated an early settlement with a co-party at a waste disposal site which allowed the co-party to pay property sale proceeds over to the other parties who used the disposal site and thereby created an immediate tax deduction, which allowed the co-party to use the sale proceeds for site cleanup instead of tax liabilities. Retained as common counsel for cost recovery and contribution cases, focusing on pre-litigation and post-litigation settlement processes to create cost-effective options for resolving liabilities.
- Mediator for a dispute between the successor owner of a Superfund site and the owner of an adjacent property.
- Mediator between the U.S. and several Superfund defendants concerning a former electrical transformer repair facility.
- Acted as a volunteer arbitrator for attorney-client fee disputes referred by the local bar association.
- Appointed Special Master for a U.S. District Court in Pennsylvania; assisted with allocation and settlement issues and provided mediation upon request for a $10-15 million co-disposal landfill.
- Issued a non-binding arbitration decision, then served as mediator, for an Ohio contribution liability case; dispute involved owner, operator, generator and transporter CERCLA responsibilities.
- Co-mediated and ultimately issued an advisory allocation opinion for use by several federal entities and a private manufacturer in negotiating responsibility for contamination at multiple plants used for war production activities.
- Mediated, then issued an advisory allocation opinion, in a dispute involving cost recovery and scope of cleanup issues between a landlord and a tenant concerning former industrial property in the Chicago area.
- Completed an accelerated mediation resolving a $5.5 million, eight year dispute between the absentee owners and the customer-arrangers of a bankrupt metal plating operation.
- Arbitrated the allocation of responsibility between two customers of an Ohio battery reclamation business; issues included economic benefits and procedures for missing transaction records.
- Prepared an advisory allocation for a phased mediation/arbitration process between six parties litigating responsibility for a $15 million junkyard site in Ohio.
- Conducted a combined arbitration and mediation process between an owner/operator and two dozen generators at a former New York landfill site; release of an interim decision about allocation factors allowed the parties to reach settlement.
- Mediated a cost recovery action between the U.S. and the last group of unsettled PRPs.
- Designed neutral communication and settlement mechanisms for use by the U.S. Environmental Protection Agency (U.S. EPA) at a former waste oil recycling site in Massachusetts with more than 2,700 PRPs; structured and facilitated a 200+ person meeting with larger-volume PRPs.
- Assisted U.S. EPA with communication and settlement mechanisms for a New York mercury reclamation site with 400+ PRPs.
- Co-mediated with a manufacturer and a federal entity to determine shares of contribution responsibility arising out of historical manufacturing – settled initial test plants.
- Served as an expert witness for allocation in a contribution action between performing and nonperforming PRPs at a California waste disposal site.
- Mediated a court-ordered ADR effort for a leaking underground storage tank case in West Virginia; the dispute involved overlapping contaminant plumes from two adjoining gas stations.
- Conducted a peer-review evaluation of an allocated settlement between a state environmental regulator and some, but not all, of the site's PRPs.
- Mediated a settlement for two dozen litigating parties at an $8 million Superfund site in New York.

- Mediated cost recovery discussions among the U.S. and a dozen PRPs at a $22 million Colorado site; issues included geographic divisibility and inability to pay.
- Convened and mediated a settlement between the U.S. and private parties at a $30 million Pennsylvania Superfund site.
- Allocated among sixty parties in cost recovery litigation concerning the cleanup of a mixed-use disposal site in New Jersey; last in a series of allocations for this site.
- Served as the facilitator for an environmental advisory panel convened by a regional energy supplier.
- Facilitated a “Sustainable Development Initiative Listening Project” for the ABA SEER Annual Keystone Environmental Conference.
- Served as co-convenor and facilitator for a public dialogue process between state and federal representatives, tribal interests, and local citizens as they prepared an advisory report on the cleanup and closure of a nuclear fuel reprocessing facility.
- Structured and facilitated dialogue sessions concerning the U.S. EPA’s use of probabilistic uncertainty analysis under a revised Superfund Risk Assessment Guidance.
- Assessed communication barriers, and facilitated a public meeting between the operators of a cement kiln and local community members to discuss concerns about air emissions associated with conversion from a standard coal fuel source to a reclaimed fuel source consisting of coal and recycled tires.
- Designed and managed an arbitration panel process to resolve technical and legal disputes concerning the environmental operations of several Texas manufacturing plants. Provided similar services for a technical arbitration concerning a New Jersey remedy dispute.