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Panel: Legal Ethics and the Environmental/Natural Resources Lawyer's Practices

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Panel: Legal Ethics and the Environmental/Natural Resources Lawyer's Practices

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EIGHTH ANNUAL
CURRENT ENVIRONMENTAL AND NATURAL RESOURCE
ISSUES SEMINAR

LEGAL ETHICS AND THE ENVIRONMENTAL/NATURAL RESOURCES LAWYER'S PRACTICE*

PRESENTED BY:
Mineral Law Center, College of Law
University of Kentucky, Lexington, Kentucky
April 19, 1991

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MODERATORS:

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I. INTRODUCTION OF PANEL

MR. DAVID C. SHORT**: The moderator is John R. Leathers from Frost & Jacobs. John was a professor at the University of Kentucky College of Law for a number of years and is recognized nationally as an expert in legal ethics. He is assisted today by Professor Rick Underwood, who is a colleague of mine here on the faculty at the University of Kentucky. He has published a book on legal ethics[1] and is Chairman of the Legal Ethics Committee for the Kentucky Bar Association. I think you are in for an interesting presentation and I am looking forward to it myself. John?

MR. LEATHERS: Good morning. This is kind of a repeat of something that we did back in the fall for the Mineral Law Seminar. We have not changed the basic issues; we just changed our way of presenting them a little bit.

We have a panel today of people from various areas of the practice. Rick Underwood has already been introduced. Next to him we have the Honorable Hank Graddy of Reeves & Graddy in Versailles, Kentucky. He does a good deal of environmental work—in particular, environmental concerns from the plaintiffs' point of view.

Next to him we have Skip Stigger from Henderson, Kentucky. He and his partner, Ben Cubbage, have an oil and gas practice. And, let us see. . . . Who is missing over there?

MR. UNDERWOOD: Tom FitzGerald has not made it yet.

MR. LEATHERS: My friend, Donald Vish, from Brown, Todd & Heyburn will be here directly.

And then next to him, we have Joe Zaluski from Wyatt, Tarrant & Combs' Frankfort office.

And then, finally, we have Mr. Frank Dickerson from the Department of Law for the Natural Resources & Environmental Protection Cabinet.

These people will be commenting on the various problems that we have put together.

The other thing about this method of presentation is that it bears a good resemblance to what you do in law school. You

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[1] R. UNDERWOOD & W. FORTUNE, TRIAL ETHICS (1988) (updated annually).

put together hypothetical problems; you walk people through hypothetical changes to explore the various facets of the problems. That has always seemed to me to be better than lecturing, which, particularly in the area of ethics, sounds a good bit like preaching. So we are going to start off with a problem that I have prepared.

II. HYPOTHETICAL ETHICS PROBLEMS BASED ON MOVIE *CLASS ACTION*

I had occasion in the last three weeks to see a movie that is currently playing in the movie theaters, a movie called *Class Action*.[2] We were a little short of materials so I thought that perhaps we might start with the scenario from the movie. If you go see it, it is sort of ethical-violation-of-the-minute cinematography. For those of you who are not familiar with the movie, it is a variant of the Pinto litigation.[3] If you will remember, in the Ford Pinto litigation there was a very famous memo that was discovered concerning the location of the gas tank in Ford Pintos. The memo was to the effect that the location of the gas tank was likely to cause an explosion in rear-end collisions.[4]

During the course of the Pinto litigation the memo was uncovered.[5] It made a computation of the dollar amount that would be required to relocate the gas tank, but then computed the number of explosions that would occur as a result of not relocating the gas tank, including the computation of what the wrongful death damages would be and what the physical injury, pain and suffering damages would be, and concluded that it was cheaper to leave the gas tank where it was than to relocate it.[6] Instead, they would just pay off the claims.

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[2] *Class Action* (20th Century Fox 1990).

[3] There were many lawsuits throughout the United States in the 1970s regarding a design defect in the Ford Pinto. The defect made the cars susceptible to fire if involved in a rear-end collision. R. GOODMAN, AUTOMOBILE DESIGN LIABILITY § 3:5 (2d ed. 1983). There was not a single class action suit against Ford, however, in regard to defects in the Pinto fuel tank. *See Id.*

[4] In 1977, *Mother Jones* published an expose of Ford's knowledge regarding fuel system safety in the Pinto. Citing internal company documents, the article revealed Ford knew not only that a rear-end collision would rupture the fuel tank easily, but that the problem could be prevented for less than $11 per vehicle. Dowie, *Pinto Madness*, 2 MOTHER JONES 18, 24 (Sept./Oct. 1977). Lee Iacocca, then a top executive at Ford, was also quoted as saying "safety doesn't sell." *Id.* at 22.

[5] *See supra* note 4.

[6] *See supra* note 4.

The movie *Class Action* is a soap opera version of that in which Gene Hackman plays the central character. He is a plaintiffs' lawyer representing a class of persons regarding explosions in a fictitious automobile. They believe that the gas tank has caused the explosion of these automobiles, so it is a products liability kind of thing. On the defense side is a large corporate law firm that represents the manufacturer. Included on the defense team is an associate who is Gene Hackman's daughter[7] and they have all this dramatic confrontation in the family context.

But putting aside the soap opera ramifications of it, some really incredible things happen in the course of this movie, all of which point up ethical problems that occur in litigation generally. And certainly you can see it happening in environmental litigation. So what I thought we would do is walk through this scenario.

What happens here is that you have the plaintiffs, whose theory is that the location of the gas tank is inherently dangerous, and they are seeking proof to that effect. They make a request for production of documents related to that particular vehicle. In the course of her investigation, the young associate [for the defense] talks to one of the people who worked on the design team. He, in the course of talking to her, says, "Well, if you want to know about the gas tank, why don't you read my memo? I called it the 'depth charge.'" He discovered in the course of experimentation that when making a left turn so that the left turn signal was illuminated, if the vehicle was hit from the rear, it would explode. They did a computation of how many explosions they would likely have over the life of that vehicle. I think they computed 158 or 159 such explosions. Coincidentally, there are 156 people in the class, in the class action that is involved in this movie.

What happens is the young woman discovered from the scientist that such a memo exists. She then goes through the files and finds it and reads it. It says exactly what he told her. Among the people who would have seen that memo at that point

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[7] *Compare* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.8(i) (1991) [hereinafter MODEL RULES], which provides: "A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship."

in time is the mid-level partner in her law firm, who has been the billing partner on this corporate account for a long period of time. He was the billing partner at the time this was going on, so he was in the consultation chain as this was happening.

She removes the memo from the files of the corporation and takes it back to her office. She makes a copy, which she puts in a desk drawer. She then takes the other copy and goes to see the mid-level partner. They then go to see a senior-level partner.[8] They are, of course, disturbed by the memo, as you can imagine. What then happens is they discuss what to do about the memo. And what they ultimately conclude is that they will produce documents which have been requested by the plaintiffs in the case and they will produce the document, the one that has been prepared by the scientist, but they will bury it in 50 zillion documents that have related to all the work that that guy has done in the 30-odd years that he worked for the company; and it would be like hunting, literally, for a needle in a haystack for the plaintiffs' team.[9] And so you see them, then, getting ready to produce all those documents.

Let us begin with that particular topic. Is that something that can ethically be done by an attorney in that particular context? The decision is made by the young woman, the mid-level partner, and the senior-level partner in the law firm.

So let us start, perhaps, with Mr. Stigger. Mr. Stigger, what do you think about that particular tactic of producing the documents in that fashion?

MR. STIGGER: Well, John, without getting into what the moral issue is, I do not see that there has been a violation of the professional responsibility of the lawyers or the law firm involved on that. Certainly, all those documents are going to be presented and that is among the documents to be produced. I do not see that they have breached their obligation.

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[8] *Compare* MODEL RULES, Rule 5.2, which provides:

(a) A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person. (b) A subordinate lawyer does not violate the rules of professional conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

[9] This is called a "file dump." Other terms from around the country include "shuffling," "concentration," and the "mixed cocktail." *See* UNDERWOOD & FORTUNE *supra* note 1, § 6.5.4.

MR. LEATHERS: All right. Let us think about this. How does this interplay with the Rules of Civil Procedure that relate to production of documents? You have a production request that is specifically directed towards any memorandum prepared by any of the design team, including this guy, on this vehicle. Do you sufficiently comply with the Rules of Civil Procedure when you produce, in that particular fashion, his documents going back 30-plus years?

What do you think about that, Mr. Zaluski?

. . . .

MR. ZALUSKI: I would say that the intention is obviously to hide the memo. If the expectation of the people producing them is it is so well buried that they are not going to find it, then I think we have a problem. I think they have technically complied with our rules of conduct in that they have produced it. But, again, having not seen the movie, John, if it is so well buried that there is no expectation of someone actually finding it, I think we have a problem.

MR. LEATHERS: In the movie, they have delivered to plaintiffs' counsel bankers' boxes full of documents that fill a medium-sized U-Haul truck. So there would be in the tens of thousands of documents in there. And what they have done, rather cleverly, it seems to me, is change the way those would normally be indexed. They eventually generate a manifest, but they have changed the way that would be done, and that also confuses things. They have not produced them in a chronological fashion. So what about that? Hank, what do you think about that?

MR. GRADDY: The matter that I would add is, while I would look for ways to find that the defense firm violated a rule, I would have to agree with the answers that have been provided. It seems like that there is literal compliance, but it does seem like plaintiffs' counsel also has the opportunity to seek some assistance from the court to get a more meaningful or direct answer. If I received a U-Haul-It, I think my first response would be to request assistance of the court to get a direct answer to my question: Do you have a memo, concerning this particular vehicle, by this witness? If so, help me find it.

I think this is a burdensome response and hopefully the court will be sympathetic in recognizing it is a burdensome delivery by the defendant.

MR. LEATHERS: Now, as a matter of civil procedure, one may produce documents either in a form responsive to the request which has been received, organized in that particular fashion, or in the manner in which they are kept in the ordinary course of business. So I think one should ask at the outset of looking at this particular document production, whether or not it even complies with that particular provision of the rules.[10] And they would be very hard pressed, it seems to me, to say that their own, the law firm's, organization of those documents is in the manner in which they were kept in the ordinary course of business. So they have got a problem, I think, at the outset of that.

Let us go on from there, though, and talk about the ethical considerations of it. When the boxes, a huge number of boxes, come to the plaintiffs' firm, they instantly say, "They're hiding something." They do not know what. . . . They do not know which of their production requests has triggered this particular response. And so it is very hard for them to figure out exactly what to look for or what to request. They do not know which ones to hit out of that.

Let us take up Rule 3.2,[11] however, of the Rules of Professional Conduct, which is: "Expediting Litigation: A lawyer shall make reasonable efforts to expedite litigation consistent with the interest of the client." Now, in those particular circumstances, is the lawyer who is making the production expediting the litigation? What do you think about that? Mr. Vish?

MR. VISH: No.

MR. LEATHERS: Why not?

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[10] *See* FED. R. CIV. P. 34(b); UNDERWOOD & FORTUNE *supra* note 1, at 249: "All too frequently, counsel for the party aggrieved by these tactics is simply unaware that the rules condemn such practices and contain blackletter authority for a remedy."

[11] *See also* MODEL RULES, Rules 3.4(c) and (d), which provide:

> [A lawyer shall not] (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; (d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

MR. VISH: Well, an over-compliance like that, John, is no compliance at all.

. . . .

MR. LEATHERS: Why do you think that is not consistent with the duty of expediting litigation?

MR. VISH: Well, there is no compliance at all with the request to produce documents if one arranges affairs in such a way that no meaningful transmission of information can occur.

MR. LEATHERS: What do you make of the provision that says, "consistent with the interests of the client?" Now, if I produced that memo in such a way that they instantly know what it is, is that consistent with protecting the interests of the client?

MR. VISH: If the rules say that they are entitled to that, then you must hand it over.[12] I do not think that you can construe the interests of the client so broadly as to withhold documents, certainly. And I think that presenting documents in such a way as to conceal their contents or even conceal their identity is not complying with the rules.

MR. LEATHERS: I will tell you what the comment says on this particular aspect of the Rules. It says: "Dilatory practices bring the administration of justice into disrepute." It goes on to say: "The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay."[13] Put against that particular backdrop, this particular production technique seems to me to be somewhat dubious. Now, on the other hand, those sort of dragnet requests for production of documents suit themselves to these kinds of responses.[14] And so it may say something to those who make those document production requests, as well, to be more particularized. One of the things that certainly does not expedite litigation is the huge amount of needless discovery that

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[12] *See* MODEL RULES, Rule 3.4(d).

[13] MODEL RULES, Rule 3.2 comment.

[14] *See* UNDERWOOD & FORTUNE *supra* note 1, §§ 6.4 [Excessive demands] and 6.5.2 [Insufficient and artful responses].

goes on in very many cases. And so all of that seems to me to play into this.

Now, what happens in this scenario next, having watched them load this huge group of documents, is that this young woman looks at the manifest and realizes that, despite the agreement among herself, the senior partner and the mid-level partner that this document will be produced and buried in the voluminous production but that, in point of fact, this document is not in there at all. She confirms from the boxes that it is not in there. She confirms from the manifest that it is not in there. And now she has a very difficult problem, does she not, concerning what she is to do about the fact that the document apparently has disappeared in this particular process? Now, what do you think, Mr. Dickerson, ought to be her course of conduct at that point in time?

MR. DICKERSON: I think she would have the obligation to— she was a participant, though, with the supervisor.[15]

MR. LEATHERS: She was a participant in the agreement to produce the document in a particular way. She has no knowledge that anybody has decided to destroy the document, but now she knows it is missing. What to do?

MR. DICKERSON: Was it intentionally withdrawn from the package?

MR. LEATHERS: One would infer that because the manifest is computer-generated and there is a blank where that particular document should have been. So one would infer that, in the computer run-out of the manifest, somebody had not only pulled the document, they had deleted it from the computer run of the manifest.

MR. DICKERSON: I think her initial responsibility, assuming that she is in the firm, is that she needs to contact her supervisor and report that back to him. That may exculpate her from that point forward. But to carry it on, if it is missing and she has knowledge that it was intentionally withheld, then, I think she needs to bring that to the attention of the other members of the

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[15] MODEL RULES, Rules 5.1 and 5.2.

firm so they may take appropriate action. It would be a clear violation to be withholding evidence that was obtainable.

MR. LEATHERS: Okay. Let us begin with what is wrong with the document being missing. Is that the beginning problem to be analyzed? What is it that is wrong about that? Let us start with that. Joe, what do you think?

MR. ZALUSKI: It is clearly in violation of the discovery rules. I mean, it is covered by the request for documents, I assume, clearly. This is a document generated concerning the gas tank. So we have a problem there. They certainly have knowledge of the document, which makes it even worse. This is not an oversight.[16] They know the document and they have excluded it from the discovery process.

MR. LEATHERS: She knows that she did not do it, but something has happened.

MR. ZALUSKI: I do not think it makes any difference if she knows it is supposed to be there. She knows of its existence. It is not there. She needs to take steps under Rule 5.2.[17] And she has the same responsibility as the senior counsel to comply with the rules. And she has got to take steps to find out why it is not there, if indeed it was an oversight, which would be hard to believe in this scenario, and produce it.

MR. LEATHERS: What the Rules of Conduct say on this is that—and this is Rule 3.4(a)—a lawyer shall not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value." Now, that is a good deal broader than what we are talking about here. Here you have something that certainly has potential evidentiary value and it is already subject to a production of documents request. So that if somebody has done this, if a lawyer has violated that particular provision of this rule, in addition to having problems under the discovery

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[16] *See* MODEL RULES, Rules 3.4(c) and (d) cited in note 11, *supra*.

[17] MODEL RULES, Rule 5.2(a) provides: "A lawyer is bound by the rules of professional conduct notwithstanding that the lawyer acted at the direction of another person."

rules, concerning the response to the document production request, which they are ultimately going to have to sign and file as well. So that is the problem from her point of view. What about her going back to her office and getting her copy of the document and putting it into the materials? What do you think about that, Fitz?

MR. FITZGERALD: That is part of her problem. Part of the problem is that she is a junior attorney in a firm and the first thing she is going to do is prepare the letter of resignation and put it on the desk before she goes and talks to the senior partner and says, "By the way, this is missing." The senior partner says, "I know it's missing; keep your mouth shut." What do you do then? There is no Nuremberg defense to being just a junior subordinate in a law firm.[18] You have an independent obligation, I would think, to raise it with the client because the client may not be aware of the fact that it's been concealed. And, then, you have an obligation to inform the opposing counsel and the court if you can't internally resolve it.[19]

MR. LEATHERS: Okay. So at this point in time, you think she has an obligation to do something. Would it satisfy you if she simply goes and gets her own document and puts it into the documents to be produced so that now it is in the same scenario as before? Is it going to be produced?

MR. FITZGERALD: That is obviously an alternative. It will have practical ramifications with the firm, any of these things. And the question is whether the firm is wise enough to realize that this kind of ploy puts them in great jeopardy, not only in the instant situation, but in terms of their reputation. Hopefully it would be resolved internally just by going to the senior partner and saying, "This is a really high risk, a very foolish gamble."

MR. LEATHERS: All right. Now, let us take it a step further, then, because I think the things that you are saying are quite correct. Let us go up a step. She goes back to her office and

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[18] MODEL RULES, Rule 5.2(a) Comment [1]. Numbering for Comments to the Model Rules follows T. MORGAN AND R. ROTUNDA, SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY (1990).

[19] *Compare* A.B.A. Comm. on Ethics and Professional Responsibility, Informal Op. 1458 (1980); New York City Op. 1990-2; Pennsylvania Op. 89-249 (1989).

her copy is gone, taken from her desk. Then she goes to the mid-level partner, who has been the billing partner on this large corporate account for a very long period of time, and he does indeed say, "Shut up. Sit down. Now, if you want to have a career in this law firm, this is what we're going to do." Because that client accounted for, I think they say in the movie, 25 or 26 percent of the firm's income during the prior year. Now, where does she go from there? What do you think about that, Don? Remember, there is another level in this partnership. She was originally in a meeting and with a senior-level partner who knew about this. What do you think?

MR. VISH: I think eventually, John, she is headed toward the court if she cannot get relief within the organization herself, then, that is ultimately where she is headed. But I think until she has exhausted all remedies within the organization, she's still within the organization.

MR. LEATHERS: Can she simply obey his order? She wants to be a partner in a "skin them, catch them, lynch them" law firm. And she knows this is a bad career move for her to do anything about it. Can she just say "no"? What do the rules say about that? What do you think, Hank?

MR. GRADDY: She is bound by the rules and she has an obligation not to violate 3.4[20] and ultimately 3.3, Candor Toward the Tribunal, and not to assist in fraudulent activities. So she cannot hide behind her mid-level, low-level ranking and say, "They're in charge. They will take the heat." In 5.2, it clearly obligates her to comply with all the rules.[21]

MR. LEATHERS: The Rules do say in Rule 5.2 that following orders is not a defense for violation of the Rules. So she has her own independent responsibility now. She knows the document has been withheld and destroyed by a mid-level partner. She cannot simply obey his order safely. She is now on the hook as well.

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[20] MODEL RULES, Rule 3.4(c) and (d) cited in note 11, *supra*.

[21] *See supra* note 8.

Now, you could have had still another problem, of course, if you are in a jurisdiction, I take it, that has a "squeal rule,"[22] which requires you to disclose violations of the Rules and so forth. But in Kentucky, as you may know, we do not have that particular version in our rule.

So she goes now to the senior-level partner in the law firm. And let us suppose that what he says is, "I don't want to hear about that. Don't tell me anything that's going on there." Now, what is she going to do, Joe?

MR. ZALUSKI: I think, again, all the rules apply to her. I would head over to the corporate body itself and meet with the highest officer I could start with, I assume. And as a part of the conspiracy your next scenario is, the president of the company says, "I've dealt with senior partners. We have to figure it out. Go home." I suspect then she could certainly try to see the board. Barring that, to get back to what Don said, she should head to the courthouse. She goes through the same progression as senior management would.

MR. LEATHERS: What do you think about it, Rick? What is her obligation to the court at this point?

MR. UNDERWOOD: Well, I think you have her going through the law firm which, as Tom says, is the logical thing. And then I think that if her firm is not going to comply, her response should be to terminate her relationship with the firm. The interesting question now is, does she have an obligation to make some disclosure to the court or the other party or all of that? And I would think that this would be something that should be brought to the attention of the client—go through the client

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[22] The "squeal rule" is also known as the "snitch rule." MODEL RULES, Rule 8.3(a) and (c) provide:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority. (c)This rule does not require disclosure of information otherwise protected by Rule 1.6.

This provision was deleted by the Supreme Court of Kentucky when it approved the adoption of the Commonwealth's version of the Model Rules. *See* KY. RULES OF PROFESSIONAL CONDUCT Rule 3.130 of RULES OF THE SUPREME COURT, contained within KY. RULES OF COURT (West 1991).

before disclosures are made and you can walk the client up through the 1.13 chain.[23] I am not sure once you are out of the representation and have left that with the firm, that you do have a disclosure obligation, unless it flows from the fact that you were somehow still before the court and would be subject to the obligation to disclose under the discovery rules. What I am saying is that once the lawyer is no longer representing the client, she does not know for sure that fraud is going to be committed or does not know—has not offered the evidence yet and has not responded, I am not sure there is a disclosure obligation.[24]

MR. VISH: There may not be.

MR. UNDERWOOD: I think it is a tough question.

MR. VISH: That is the toughest question. There may be an obligation to withdraw from employment and not say anything.

MR. LEATHERS: It is a pretty strong career move. She is, in this movie, five, six years deep and has been told that she is probably going to become the youngest partner in this big corporate law firm. It was a real honor to be named to this corporate team. . . . So she is in a tough spot. Don, what do you think about the scenario of up through the corporate chain? Rick said a minute ago, up through the corporate chain in accordance with Rule 1.13.[25] What Rick, I think, is getting at there is that it is the corporation that is the client. Not even the president of that corporation—when he says, go up through the corporate chain, it would be, first, your contact—whoever is running the litigation on that end. Above that, to whoever is his

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[23] *See* MODEL RULES, Rule 1.6, Comment [15] [Withdrawal]. Model Rule 1.13(b) provides:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of law which reasonably might be imputed to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. . . . Such measures may include . . . referring the matter to higher authority in the organization including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization. . . .

[24] *See* New York City Op. 1990-2; A.B.A. Comm. on Ethics and Professional Responsibility Informal Op. 1458 (1980).

[25] *See supra* note 23.

supervisor. Then maybe to the president or CEO and finally to the board, looking to make the client conscious of what the ramifications may be of this, should that be disclosed. Now, that is pretty strong too because she is not the billing partner or anything else. She is in a tough spot. What do you think about that scenario, Don?

MR. VISH: I agree with that scenario. I think if you exhaust remedies in the firm, then I think you go to the client. Then if you do not get satisfactory results there, then you have reached a very difficult point, which Rick identifies. I am sure you must resign if you are on the pleadings. I am not so sure you must disclose. But I endorse going through the client hoops.

From the standpoint of the government, there is a very interesting wrinkle to this, John, and that is, government employees, let us say, working for the executive branch, after they have exhausted their remedies, can they go over to the legislative branch and talk to Congress? Under the Code, the model rules that Kentucky has adopted, that is indeed the obligation, because the Code defines the attorney for the government as the government as a whole. The D.C. bar rejected that test and said that a government lawyer's client is the specific agency;[26] but in the case of a corporation, it is ultimately the board of directors.

MR. LEATHERS: Now, what happens in the scenario in the movie is that she basically takes to her bed in a depression for several days and, ultimately, she finds herself at trial. And so this huge piece of litigation has moved quickly. And among the things that she has been assigned to do by the corporate law firm in the course of this litigation is what we will call a hatchet job on opposing witnesses. They have a couple of times tested her stomach for doing something really bad. And early on, you see her totally dismember a witness in a deposition, calling back to mind the psychic trauma of the loss of his wife and children, all of which leaves him in tears and not willing to go forward with anything. So you know that she has the stomach, truly, for whatever it is that needs to be done. When the senior partner says to her, "Can you do what needs to be done with the scientist in this litigation when he takes the stand," and she says, "Yes, I can do it," you know that she is going to do it.

[26] *See also* Federal Bar Assoc. Op. 73-1 (1973); D. C. Bar Op. 148 (1985).

What is interesting is that, on the witness stand in the litigation, testifying for the plaintiff, is the scientist. And he testifies about what he called the "depth charge," and says that, yes, it was brought to the attention of persons in the company through a memo which he wrote, but there is no such memo now known to exist. She now takes him on, on the witness stand, knowing that he is testifying truthfully that there is such a memo and that the company was aware of it, by attacking his credibility: "Did you write a memo on the 1991 Pup Mobile," or whatever other project. She just selectively picked projects back through his 30-year history, to say, "Did you do this? Did you do that?" She finally gets him to the point that he has said, yes, he remembers this project number very well. She gets him to the point he does not remember his telephone number and he does not remember his birthday. She does, really, an excellent job of doing exactly what it was that senior counsel wanted her to do. And they are all beaming at her pridefully from the defense table in this particular instance.

Let us comment upon that particular tactic on her part, knowing that his testimony is truthful. Can she legitimately attack him on those grounds, leaving with the court and the jury the suggestion that he is not testifying truthfully?[27] Is that a fair tactic on her particular part? What do you think about that?

Hank, what do you think?

MR. GRADDY: Well, I think that goes back to 3.3, Candor Toward the Tribunal. It seems to me that there is an overarching obligation of a lawyer to reach toward truthfulness. And I think that she is violating the requirements of that rule.

MR. LEATHERS: Look at the specific provisions, though. It is very interesting. Here, you need to make a fine legal argument. It says "The lawyer shall not knowingly make a false statement of material fact or law."[28] She did not make any statements. She asked the guy questions, which leave you with a particular impression. "[The lawyer shall not knowingly] . . . fail to disclose a material fact to a tribunal when disclosure is necessary

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[27] *See* UNDERWOOD & FORTUNE *supra* note 1, § 12.3 [Cross-examining the truthful witness].

[28] MODEL RULES, Rule 3.3(a)(1).

to avoid a fraud being perpetrated upon the tribunal."[29] She never attacks the guy directly about the memo, to say to him, "Aren't you wrong? Isn't it true there, really, wasn't any such memo? You just imagined that." She simply leaves you with that impression, based upon her skillful examination of him. "[The lawyer shall not knowingly] . . . offer evidence that the lawyer knows to be false."[30] She has not offered any evidence. She cross-examined the witness. She asked him questions, and it is true, he does not remember his birthday, he does not remember his telephone number. What about that? Is she being candid to tribunal under those circumstances when she does that with the witness? What do you think, Joe?

MR. ZALUSKI: I think this is a matter of degree. I think we all do this sort of thing to witnesses on the stand to some extent to test their knowledge or how competent they are, how well qualified they are, et cetera. So, again, I think it is a matter of degree. You used the term "repugnant," which is used in 1.16.[31] I don't know if you are headed in that direction or not. If she being forced to do something to destroy somebody, and I suppose the extent—here, according to Rick—is it personally repugnant, not repugnant to the firm? Apparently, nothing is repugnant to this particular firm. She could bow out from her representation. But this testing this fellow in a trial this big, this many witnesses, I suppose, this many dollars, testing this guy as far as she can test him is reasonable. If the court let it go and there is not an objection to badgering this witness or a violation of the court's rules, I would let her go. I do not have a problem with it.

MR. LEATHERS: Fitz, what do you think?

MR. FITZGERALD: Are we assuming that the other side has the memo?

MR. LEATHERS: They do not.

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[29] MODEL RULES, Rule 3.3(a)(2).

[30] MODEL RULES, Rule 3.3(a)(4).

[31] MODEL RULES, Rule 1.16(b)(3) provides: "[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent."

. . . .

MR. FITZGERALD: Do they know of its existence?

MR. LEATHERS: We do not know that at this point in time. They have been told of its existence and the witness has testified that it exists, but no one has a copy. And they are making—as you would imagine, the plaintiffs' lawyer is making a big deal out of: This guy is right; there is a memo and they have destroyed it or something has happened to it. They are getting the mileage that they can out of it, but it is not the same. We know, from the contents of the memo, that really having that document would be a killer.

MR. FITZGERALD: What happened during discovery? Have they asked for the memo and the memo has not been produced? I am just trying to think what scenario we're working under.

MR. LEATHERS: They were going to bury it up, and then ultimately it was not even produced in that fashion, so that the plaintiffs' team has never seen it.

MR. FITZGERALD: Well, assuming that—and we have kind of assumed that she has gotten past the hurdle of not having unlawfully failed to disclose or hidden evidence, destroyed, concealed, which is her obligation, you know, in the first instance before you can get to trial, under [Model Rule] 3.4.[32] Assuming all of that, if she is not making a false statement[33] or alluding to facts that are not in evidence[34] or some of the other things

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[32] MODEL RULES, Rule 3.4(a) provides: "A lawyer shall not . . . unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

[33] *See supra* notes 28-30 and accompanying text. *See also* MODEL RULES, Rule 4.1 Comment [1] which provides:

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act.

[34] MODEL RULES, Rule 3.4(e). The rule provides:

> A lawyer shall not . . . in trial allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

that are prohibited, I think the credibility, the memory of the witness is fair game, as distasteful as that may be. I mean, there is a line that you cross where you actually, intentionally mislead the tribunal by assuming facts that are not going to be presented, or that you knowingly allude to matters that are not relevant. But beyond that, I think that testing his credibility—if what is at issue is his memory of the memo and the circumstances surrounding either the testing or the production of the memo, then, I think that is fair game.

MR. LEATHERS: She wants to leave the tribunal with the inference that this guy is wrong and that he did never write any such memo. A guy who cannot remember his own telephone number or his own birthday could easily be mistaken and think that he put something in writing when, in fact, he did not. That is the inference she wants to leave with the tribunal. Is that a meritorious position for her to take? Is there anything under the [Model] Rules that prevents her from doing that? In that regard, consider [Model] Rule 3.1, which has to do with meritorious claims and contentions. Focus on this language: "The lawyer shall not"—we will skip a section—"controvert an issue therein, unless there is a basis for doing so that is not frivolous." Has she knowingly controverted something when she knows there is not a good faith basis to controvert it? When I saw that, that is what occurred to me.

As you see, I think there is a divergence of opinion here, but what I wanted to do with this particular hypothetical was differentiate between her conduct in the pretrial discovery sort of setting—and even pre-deposition setting may be different from when you actually get into depositions—and then finally when you get in front of the trier of fact. There are shadings of the degree to which she may or may not be misleading the tribunal as you shade off from early discovery, down through the jury in the box ready to be deciding this particular case. So she does her job. This guy is hurt very badly by this, but the focus has begun to be, was there or was there not such a memo?

Now, plaintiffs' counsel does a very interesting thing. He calls mid-level partner as a witness. Mid-level partner is on the defense team. He is seated at defense table. And the reason he wants to call him is to ask him: "Was there or was there not such a memo? You were the billing partner during that era. You would have been consulted if there was anything big like this

going on. Do you know whether or not there was such a memo?" What about calling that guy as a witness? What do you think about that, Rick?

MR. UNDERWOOD: Well, you should not call someone simply for tactical reasons or to unfairly force them to assert a privilege, but it seems to me that your clever plaintiffs' lawyer now knows that there has been wrongdoing and has justification for calling the witness, and it is brilliant. The bad guys are now in a terrible position. The problem the plaintiffs' lawyer is going to have—I think they could probably justify it in this case—but they are going to have to convince the court. The court is going to be shocked: "What do you mean, call the lawyer as a witness in the case?" The other side is going to blow all kinds of smoke. But I think this case is getting real interesting.

And if I were the judge, I would insist that the plaintiffs' lawyer explain to me and make a showing: number one, why it is not tactical; number two, that they have a good faith basis for believing that there is an exception to the attorney/client privilege.[35] And if they make a convincing showing, I believe if I were the judge—of course, thank God, I am not—I think I'd have some fun with this.

MR. LEATHERS: What do you think about that, Don, a defense lawyer on the defense team called as a witness by the plaintiff?

MR. VISH: I do not think he can testify without the showing that Rick has just mentioned.

. . . .

MR. LEATHERS: If the guy serves as a witness, Rick, do you think he is thereafter disqualified from serving as counsel on the defense team?

MR. UNDERWOOD: Well, you have two issues here. One point is, if the showing is made—and I would insist it be made—I think we are all on the same wavelength. First of all, assuming you get over attorney/client privilege—and that could be com-

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[35] *Compare* Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986); UNDERWOOD & FORTUNE *supra* note 1, § 6.4.8 (Attorney depositions).

plicated in this case, but I assume we are over it and the evidence that the lawyer is competent. A lawyer's testimony is competent evidence, even if there is a violation of lawyer/witness rule.[36] Now, I suppose your technical question is since the lawyer is in the case as a witness, should the firm withdraw from the case? And, of course, we all know that is the rule.[37] But so many things have now happened in this case. The defense has now lost miserably. The plaintiffs' lawyer should be jubilant—that the business of whether the lawyer ought to continue is so technical—the point is that it would no longer be interesting compared to some of the other things that are happening.

MR. LEATHERS: That may not be a great difficulty, because mid-level partner has been sort of sitting on the sidelines in the defense.

MR. UNDERWOOD: Yes.

MR LEATHERS: Primarily, the associate has been carrying the ball. They are getting good mileage out of her in this particular instance. Senior counsel is at counsel table with them. And so the loss of one lawyer might not make a significant difference.

MR. UNDERWOOD: Yes. I think the question is not so much should that lawyer continue to play a dual role, which again we are in the middle of a case that is somewhat academic, but: Can the other people in the firm continue? And we have a modification in the new rule that, theoretically, allows a member of the firm to testify and allows other people to play the game. But here that might not work. You might not be able to escape theoretical imputed disqualification because I gather the witness' testimony will at least be perceived to be in conflict with the client. So that's what, 3.7? You tell me, 3.7(b) or something like that?[38]

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[36] Waltzer v. Transidyne Gen. Corp., 697 F.2d 130 (6th Cir. 1983).

[37] MODEL RULES, Rule 3.7 provides: "A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 [Conflict of Interest] or Rule 1.9 [Imputed Disqualification]."

[38] *Id.*

MR. LEATHERS: Well, the guy takes the witness stand. The court says, "Yes, on this particular narrow question, I will allow him to testify. Was there or was there not such a memo?" The plaintiffs' lawyer does a terrible job examining this witness. The witness is evasive. He never really says, "Was there or was there not a memo?" What he says is, "Why would there have been such a thing?" He evades every way in the world there is. And you keep waiting for somebody to say: "Judge, would you instruct the witness to answer yes or no, was there or was there not a memo?" And so he has testified and you are left unresolved. I am waiting for the guy to perjure himself. Right?

What happens then is the most amazing thing, however. The young woman cross examines him and she gives him a big smile and says, "Just so the jury will understand fully that we are not trying to conceal anything, would you please tell them, was there or was there not a memo?"

Whereupon, mid-level partner takes it like a fish to the bait and says, "No, there was not." Now, he has just perjured himself. Right? Now, what are her obligations under those particular circumstances? He has perjured himself on what has become the central focus of the case: A memo which disclosed to them the danger of this particular automobile.

What does she do under that particular circumstance, Mr. Dickerson?

MR. DICKERSON: She probably needs to get hold of you [her own defense counsel] at that point. I think I would, if I were her. . . . [S]he probably needs to call a recess and she needs to get with that witness and say, "Look, we've got to rehabilitate you in some fashion here. You've just committed perjury." If he refuses, then I think she has to take the matter to the court.

MR. LEATHERS: It is interesting. The problem now is that she has knowingly offered false evidence to the court, specifically perjured evidence. Right? She has knowledge of the commission of a crime that occurred right there in the courtroom, for one thing. She has probably committed it. She may have suborned perjury herself. What is she to do under these circumstances? The rules are very interesting concerning what to do about false evidence.[39] And as Mr. Dickerson suggested, her starting place

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[39] MODEL RULES, Rule 3.3(a)(4) provides: "A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

is probably to talk to the witness. But will that be effective in this particular instance? She and the witness have exchanged glances on the witness stand that tells they both know very well what it was that just happened. He understood what answer he was to give, that no, there was no such memo, and he does it.

So where to go from there? Where do you go from there, Mr. Stigger?

MR. STIGGER: Well, I think, John, that the first thing you do is you ask for a recess and you get the mid-level partner who was on the stand. And I think you tell him that he has committed perjury and that she is under an obligation to get that testimony corrected in the record. And if he is unwilling to do that, then she needs to let him know in no uncertain terms that she is going to fulfill her obligation and go to the court, if necessary.

Now, John, I think this gets back a little bit when they are talking about that memo that disappeared. I think had she gone to the law firm and gone to the mid-level or to the senior partner, if necessary, and said, "Furthermore, if that memo does not show up in those documents that are going to be produced, I am going to go to the court because I am not going to be a party to the fraud." And I think that would have stopped it effectively right there.

MR LEATHERS: I concur. This whole movie, in my view, as I saw it, should have ended when she realized the document had been destroyed. I think that sidetracks everything that occurs thereafter, if she does her duty. But the problem is, she has a tremendous amount of pressure on her. She is in a circumstance, quite frankly, where that is a career-terminating move on her part. It has been made clear to her that it is career terminating. So she is under tremendous stress to go the other way. That creates this dramatic scenario.

But, Mr. Stigger I think is entirely correct that that is what stops all of this early on.

Now, things have gone from bad to worse for her. Now, perjured testimony is in front of the court. She says to the guy, "Correct it." He is not going to correct it and she knew he was not going to correct it; she helped him to offer it. Now, what is she to do? Assume that she says, "Oh, gee, maybe I'd better try to get out of this scenario." What does she do under these

circumstances? To whom does she go after that? The senior partner sat right there when she asked the mid-level partner the question; and he, too, knows that the answer was false because he has discussed with mid-level partner the fact that the memo exists. He has obligations as well. What does she do under these circumstances?

What do you think about it, Don?

MR. VISH: Well, now, unlike earlier, where, as Rick had said, I could not determine whether she had an obligation to just withdraw or withdraw and disclose, here I am certain that she is headed toward a duty to disclose.

MR. LEATHERS: What can she do before she gets to that point? Because that is the final equivalent of nuclear ruin. Right? I mean, that is really a serious matter. Can she do anything short of that?

Joe, what do you think? She has remonstrated with the witness. No, nothing is going to happen. Okay? The senior partner is not going to bail her out of this. What is she going to do?

MR. ZALUSKI: I was going to comment as Don did. Comment 6 under [Model Rule] 3.3[40] has her disclosing to opposing party and then to the court. I am not sure what else she can do. I would assume at this point in time she cannot leave and go see the president or the board of the company, practically speaking. She must make some other disclosure.

MR. LEATHERS: She has got a real bad conflict herself now.[41] She is caught up in all of this. Her partner has been caught up

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[40] Comment [6] provides: "Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party."

[41] MODEL RULES, Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation.

See also UNDERWOOD & FORTUNE, *supra* note 1, § 14.3.5. [The Lawyer Target] (1991 Supp.).

as a witness. She is now caught up as almost a potential party to, at least, some sorts of other proceedings. Going to the client is one thing that the rules suggest.[42] We suggested that in this time frame, there is not really very much she can do about that.

. . . .

[Comment 6 to Model Rule 3.3] says: "[I]f necessary to rectify the situation . . . ," having gone through the witness/client scenario, "an advocate must disclose the existence of the client's deception to the court"—and I like this—"or to the other party."

Now, what difference do you see between disclosing to the court and to the other party, Hank? What do you think about that?

MR. GRADDY: I want to emphasize that I think the client has gotten lost a little bit in this scenario. I think she has an obligation. She is still representing the client and she has an obligation to have a long and frank discussion with the client about how to proceed. It may be that now is the time to cut a deal with the opposing party. And I think the record needs to be clarified, but it may be appropriate to go to the other side, settle the case, clear the record and prepare for criminal consequences.

MR. LEATHERS: The rule seems to me—the comments seem ambiguous on that point. They say if withdrawal will rectify the situation, then that can be done. If it will not, then you must do other kinds of things, which would include to go to the court, go to the other party. But let us distinguish between going to the other party and going to the court.

Do you see any difference between those two remedies? What about it, Don?

MR. VISH: I think, in the abstract, I can conceptualize some circumstances where there would be a distinction, but I cannot think of an example.

MR. LEATHERS: What bothers me about that, first of all, is that in a sense in disclosing to the court, one is disclosing to the

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[42] *See supra* notes 28-30 and accompanying text.

governmental authority that is responsible for the supervision of this particular matter. That is different to me than going to the other party and saying it. Does anybody else—what do you think, Frank?

MR. DICKERSON: I agree with that. It would be less offensive to me, I think, to disclose it to the court and kind of dump it on the court and let the court resolve the issue. And, in so doing, you steer away from the brink of any kind of adverse representation of your client. I think you can just take that out of this whole scenario, this whole picture. Then there is nothing to question the misrepresentation of your client. You have gone to the court and the court is going to decide the issue, which takes the burden off of you. I would feel more comfortable with that.

MR. LEATHERS: Yes, I was curious about that part of the comment, about disclosing it to the opposing party. I think probably I would feel more comfortable with disclosing it to the court, under those circumstances. It has a little bit too much of a disclosure of confidential information dimension to it, to me, to simply do it with the other party. To the court—and clearly under the rule requiring you to do something—that appeals to me more than disclosing to the other party.

Fitz?

MR. FITZGERALD: I think there is also, while it tends to get lost in the adversary process, that there was an independent obligation that there has been a fraud perpetrated on the court, I mean on the system. And I think there is an independent obligation of candor to the court that you have to disclose. You know, merely brushing it under the rug and settling it between the parties does not cure the fact that the system itself has been violated. And I am not sure—I cannot envision a circumstance, other than possibly before the fact, of where you could withdraw or just notify the opposing counsel once the fraud has occurred in which perjury has been committed, I think you have an obligation that arises independently under this rule to disclose it to the court.

MR. DICKERSON: That is a good point. If you had just gone to the party, that may generate a resolution of the whole case.

But if the Judge is sitting there, the fraud has still been perpetrated on the court and you have not rectified that. And so I think if you go to the other party, you are still under an obligation, assuming that the court is not going to be advised. You would still be under an obligation to disclose it to the court.

MR. STIGGER: John, it seems to me that once you go to the court—now, I think, you would certainly need to go to the court before this matter is disposed of—but once you go to the court with that perjured testimony, then I think the court is almost obligated to declare a mistrial right then and there.[43]

MR. LEATHERS: It would be hard to imagine how they could not.

MR. STIGGER: And your lawsuit is over. Now, you may have some—there may be something to be gained by going to the opposing counsel and saying, "Hey, we've just found out that there's been perjured testimony and here's what it was. Based upon that, is there some way we can resolve this thing and settle this thing?" And, then, if you do settle it, you are still under an obligation, I believe, to go to the court and make the court aware of the perjured testimony.

MR. LEATHERS: What happens in the movie, for a dramatic conclusion, is this young woman does not do any of those things. Mid-level partner gets off the witness stand. They have hit a home run and they figure that they have "slam dunked" the scientist. He has not only been discredited by her cross, but by the direct evidence of the mid-level partner and everything is great, except the plaintiffs' lawyer now calls, as a witness, an accountant. The accountant is the guy who did the analysis for the finances of what it would cost to move the gas tank. He is an independent person who knows that the report existed and he knows the contents of the report and he knows to whom it

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[43] *Compare* MODEL RULES, Rule 3.3, Comment [11]. Comment [11] provides:
If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

was circulated. He had been on a witness list with 5,000 other names that the plaintiff had submitted. They call him. They put him on the witness stand and he now says, "Yes, there was such a memo and yes, I saw it. It said such-and-such and it went to such-and-such." Everybody now realizes that they have just heard perjured testimony and that the document probably has been destroyed.

And at this particular point in time, the judge calls a conference in chambers, whereupon senior counsel, in chambers, moves for a mistrial. On what grounds? Can you guess, Hank?

MR. GRADDY: Well, he asserts that there is perjured testimony.

MR. LEATHERS: Unfortunately, he offered it.

MR. GRADDY: Right, but that his client will not get a fair trial. So he asks for a mistrial in order for his client to get a fair trial.

MR. LEATHERS: No. His motion for a mistrial was based on the testimony of the accountant. Why? Because it is obvious to him that if the plaintiff has called the accountant, somebody leaked them the information of the collateral source on the document. And, indeed, it is the young woman on the defense team who did leak this to plaintiffs' counsel. That is how they knew to get the guy on the witness stand. Now, what ethical violation does that raise for the young woman who is defense counsel? How about it? What do you think, Joe?

. . . .

MR. ZALUSKI: Well, she has obviously over and over and over again violated the rules, the discovery rules, and any rule I can think of, I suspect. Her obligation at this point—he has moved for a mistrial. I would assume that she would certainly not argue against the motion.

MR. LEATHERS: This is the senior partner in her firm that says, "We've got to get a mistrial. She leaked that information. That is the only way they could possibly have known it." And, indeed, that is the truth as plaintiffs' lawyer readily admits. You [the senior partner] destroyed the document and she cured it by disclosing something else to me [the plaintiffs' lawyer]. She did

not tell me the document has been destroyed, but she did say, "Maybe you ought to talk to so-and-so," and gives them the name. What is that? That is why, a minute ago, I was focusing on her possibility of curing by disclosing to the other side. Remember the section of rules that I commented on, that one thing you could do to cure was not just to disclose to the court, but disclose to the other side? She chose to disclose something to the other side that ultimately would let them save themselves from the dilemma that they otherwise had. Has she disclosed confidential information? Has she breached her duty of confidentiality under the rules to her client?[44]

MR. ZALUSKI: I do not think so. It was certainly subject to the original request for production. She produced it. I am not sure she breached confidentiality. They asked for it and she knew where it was and she gave it to them, maybe not in the proper way, but she only did it after middle and senior management put this scheme together to keep the other side from getting it. I assume that is when she gave it to them, after she found out that it was not in the stack or in the U-Haul.

MR. LEATHERS: Apparently so.

MR. ZALUSKI: I do not know that she has breached confidentiality. I am not sure that is a charge—

MR. LEATHERS: What do you think, Fitz?

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[44] *Compare* Meyerhofer v. Empire Fire & Marine Ins. Co., 497 F.2d 1190 (2d Cir. 1974); MODEL RULES, Rule 1.6(b)(2), which states:

> A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

See also MODEL RULES, Rule 1.6, Comment [15], which states:

> After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this Rule nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

MR. FITZGERALD: Well, if you look at Rule 1.6 that talks about confidentiality,[45] if that were the only rule governing the situation, then, the disclosure would have been premature, because at some point in the process, there would potentially be a controversy—if the perjury were to come out, there would be a potential controversy between the client and attorney. Then, at that point, you can use information in order to establish a defense. But 1.6 is not the only thing that applies here, because there is authority under, I think it is Rule 3.3, that allows you to take reasonable remedial measures.[46]

MR. LEATHERS: Was this a reasonable remedial measure?

MR. FITZGERALD: Apparently the disclosure accomplished the purpose where the disclosure to the other side, as opposed to the court, which we discussed earlier, is authorized; a somewhat sagacious way of getting this information.

MR. LEATHERS: Yes. Does anybody have a problem with that, the sagacious fashion of that? Rather than facing up to it directly from the outset, "There has been a document destroyed," in essence, she has found a way, her own way, to cure it. And she has wired around, never facing it directly until this dramatic moment in the courtroom.

MR. STIGGER: Well, she sure is not expediting the litigation.

. . . .

MR LEATHERS: That is well taken. All this has cost a terrific amount of money to get down to this point. Well, what is the judge's ruling on the motion for a mistrial? He says to senior counsel, "No, you're not getting a mistrial. I suggest that you sit down and try to settle this case and save whatever is left of your reputation and your client's business." Whereupon, they get drilled for $100 million in this scenario. And, indeed, that

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[45] MODEL RULES, Rule 1.6(a) provides: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. . . ."

[46] MODEL RULES, Rule 3.3(a)(4) provides: "A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

is very close to the kind of result, if you know, that happened in the Pinto litigation.[47]

Well, I thought that the movie presented, really, significant problems, ethically, as you watched the thing. And it was so similar to the second problem that I had prepared, already, which, in an environmental context, dealt with getting reports that were unfavorable or getting a report that sounded like it was going to be unfavorable, and saying to a witness, "No, don't tell me any more. I don't want to know any more." Destroying memos, offering perjured evidence—I thought the movie maybe was a little bit better scenario for us to put forward.

III. HYPOTHETICAL ETHICS PROBLEMS ARISING IN ENVIRONMENTAL PRACTICE

Let us take up now with the problems that I actually did prepare for this morning in which I try to raise some of the ethical issues, primarily in the context of CERCLA [Comprehensive Environmental Response, Compensation, and Liability Act],[48] Superfund,[49] and RCRA [Resource Conservation Recovery Act][50] litigation. And as I talked to other lawyers here in town who do that sort of work, what I was struck by is that the most common question that they were always asking me had to do with conflicts of interest. And so the first problem is designed to raise significant problems of conflict of interest in CERCLA context.

I noticed the other day on a circulation list of the PRPs[51] up at Maxie Flats,[52] there were something like 550 or 600 potentially responsible parties at Maxie Flats. And, obviously, when

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[47] *See supra* note 3.

[48] 42 U.S.C. §§ 9601-57 (1982), *amended by* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613-1782 (1986) (codified throughout 42 U.S.C. §§ 9601-75 (1982 & Supp. IV 1986)).

[49] *Id.*

[50] 16 U.S.C. §§ 3411-3473 (1981).

[51] A PRP is a potentially responsible party.

[52] Maxie Flats is a Superfund site located in Fleming County, Ky. There are currently 3 separate actions pending regarding Maxie Flats in Federal District Court, Frankfort Division. Commonwealth of Kentucky, Dept. of Natural Resources and Environmental Protection Cabinet v. U.S. Ecology Inc., No. 88-55 (E.D.Ky. filed June 30, 1988); U.S. Ecology Inc. v. Commonwealth of Kentucky, Dept. of Natural Resources and Environmental Protection Cabinet, No. 88-56 (E.D.Ky. filed June 30, 1988); U.S. Ecology Inc. v. Bradley, No. 88-72 (E.D.Ky. filed August 29, 1988).

you have that number of potentially responsible parties, there just are not many lawyers around who do that kind of work. And so there is going to be a tendency for one law firm or one lawyer to want to, at least, represent more than one of the parties.

The first scenario that we have here to put forward today is Superfund litigation relating to [the hypothetical] Blackacre. They have a hazardous waste site there, hazardous substances involved. We have an Owner. We have Generators One, Two and Three. We have Transporters One and Two. And in this particular context, we take up with the government out to enforce the Superfund obligations against the potential responsible parties at this site. You represent Owner, already, in corporate kinds of business. Can you represent the Owner in this Superfund litigation?

Don, what do you think about that?

MR. VISH: I would not do it.

MR. LEATHERS: Why not?

MR. VISH: I think there is a good possibility for conflicting interests to develop and I think that is foreseeable.

MR. LEATHERS: At this point, the bare question: Just Owner, nobody else. You already represent them on corporate business. What conflict do you see if you represent them on the Superfund part of this?

MR. VISH: Well, the conflict with the corporation.

MR. LEATHERS: All right. Explain how that would work.

MR. VISH: Well, the duty to the corporation runs to it as an entity, as a whole,[53] which is different from the Owner of the site. The penalties or the liabilities are different for each. And I think there may be even the possibility of indemnity or of cross claims that could arise.[54]

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[53] MODEL RULES, Rule 1.13(a) provides: "A lawyer employed or retained by any organization represents the organization acting through its duly authorized constituents."

[54] MODEL RULES, Rule 1.7(a) and (b), and Comments [7]-[9] [Conflicts in Litigation].

MR. LEATHERS: Given your prior representation of the corporation on corporate sorts of matters, do you feel that that potentially presents a conflict, then, in the handling of these liability issues at this phase of litigation?

MR. VISH: I think if you limit the laboratory and you limit the universe, to that scenario, no.

MR. LEATHERS: What about competence? Assume your corporate law firm does not do any Superfund litigation. Do you take it then?

MR. VISH: No.

MR. LEATHERS: Why not? What are the considerations in whether or not to take it? The first consideration for every law firm: The Owner is your corporate client, ongoing business. If you walk them out the door to be serviced by somebody else on this litigation, what may happen? You may lose them as a client. Is that everybody's first consideration? Long-standing relationship; you do not want to damage that. By the same token, handling anything for an existing paying client is always a fee generator. So what is the countervailing consideration? What do you think?

Hank?

MR. GRADDY: Well, Rule 1.1 governs and it does provide in comment four an opportunity for a lawyer to accept representation where the lawyer believes that the requisite level of competence can be achieved by reasonable preparation.[55] And I think this law firm—or we, or I need to make a decision about whether that opportunity permits me to accept the representation. But assuming that it is a specialized area of the law and outside of my expertise, the first obligation is client representation, pursuant to Rule 1.1, and putting him in the hands of somebody who knows what he is doing.

MR. LEATHERS: Okay. So you have a duty to competently represent your client and this is not in your normal bailiwick. It

[55] MODEL RULES, Rule 1.1 Comment [4] provides: "A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person."

is easily solved inside a big law firm if they do a variety of things. You just get another lawyer in the firm involved. Let us take a smaller law firm and you do not normally do this kind of business. Do you turn down that business and send that client to someone else, hoping that they will still be your client when it is all over? What do you think about that, Skip?

MR. STIGGER: John, I think the practical answer to that is, if you are a small law firm, such as we are down in Henderson, rather than turn them completely loose to another law firm, you say: Hey, I want to associate another lawyer with "XYZ" law firm in town. He has expertise in this area and he has handled two cases like that. I will make sure that he treats you fairly on the fee.

MR. LEATHERS: Keeps you always in the loop between. . . the client and the other lawyer who is going to be doing this, hoping to maintain control of this. Now, one thing you said, Skip, was, "I will make sure he treats you okay on the fee." What do you mean by that?

. . . .

MR. STIGGER: When I am involved in a situation like that, whether I am associating another lawyer or I have been associated, then it has been my routine and my practice for my billing to go to the lawyer who associated me, to go ahead and approve that bill as far as the hours that I have expended and the reasonableness of that fee and then submit it to the client. That is the way I prefer to do it.

MR. LEATHERS: So you have an obligation to be competent. You have an obligation to provide a reasonable fee in these particular circumstances. And one of the things I think Skip is getting at is that by associating another lawyer and keeping yourself in the loop, you may be doubling up in some points on the fees.[56] And clients are becoming increasingly resistant, certainly, to legal fees and increasingly conscious of legal fees. So that, even apart from the duty you have for a reasonable fee, you have to keep that in mind. What solution could you have

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[56] *Compare* MODEL RULES, Rule 1.5(e)(3). "A division of fee between lawyers who are not in the same firm may be made only if . . . the total fee is reasonable."

in that regard? How are you going to keep the fee reasonable? What do you think about that, Joe?

MR. ZALUSKI: Again, I agree this is the way to do it, by your association. You would certainly agree that you will do some of the work yourself, whatever your firm is competent to do. But your comment, though, I think is a good one. We see a lot, too, where a client is saying, "I'm not paying to educate you. I'm paying you to represent me and I'm not going to pay a second or a third firm, not to simply tag along." So I think it is more and more a very difficult matter to handle. You can certainly agree to reduce your rate with your co-counsel, with someone at depositions or trial or whatever else, but I think it all has to be done. I think it would all have to be done in writing with your client: "We've associated with so-and-so. You've been our client for 20 years; we'll take care of you." And, as he said, clients usually like that, but I think they are very sensitive to paying two lawyers to go do the same thing, very sensitive.

MR. LEATHERS: Yes. I think what you might consider doing, since what you are talking about here is normal counsel and you are trying to protect that relationship, is light loading your own fee, eating a certain amount of your own fee or maybe even nearly all of it in order to maintain that particular relationship. I think most people's billing systems . . . can deal with that sort of thing. Everybody in our business knows that . . . an established corporate client base is the key to a good, ongoing practice. There are ways to write off time you spend doing CLE work and other kinds of things. There might be a place, as well, to write off a particular portion of the fee. Thus, you are maintained . . . in the attorney-client relationship while, at the same time, seeing to it that your client is . . . competently represented at a reasonable fee. You can control that if you are in the loop.

One of the things that I sometimes do as well, when fees are not going to be very high from the other lawyer . . . I have them bill me. I pay those fees as an expense item. And I, then, bill my client directly. Thus, the other lawyers never get in the habit of billing anybody other than me.

MR. STIGGER: You do that without adding onto the amount of the bill?

MR. LEATHERS: That is correct.

MR. STIGGER: Okay.

MR. LEATHERS: I do not even charge for the time it takes to do the bill. Let us take up the problem of the Owner. To the Owner, you say, "Yeah, okay. We're a big law firm and we do Superfund stuff. I will get another partner in the office and we will do this kind of stuff for you." And the partner says, "Well, yeah, but you know, Generators One, Two and Three and Transporters One and Two have been to see me as well." Can you represent the Owner and those other people at the site as well? Now, what do you think under those circumstances, Fitz? You are on the other side, I guess, as someone said. You see people representing multiple clients, don't you?

MR. FITZGERALD: Somewhat. Although I have never done it, the closest I ever came was when I was working in legal aid and would end up with both sides in a divorce. And, of course, the cardinal rule is that there is no such thing as uncontested divorce unless one of the parties is deaf.

MR. FITZGERALD: And I think it is similar in this context: the potential for direct adversity of interest is so high in this circumstance that you are letting yourself in for significant headaches. Even if you could get the consent of all the parties, there are circumstances where, because of their lack of legal acumen, there is no informed consent that can be given. You may not even be able to give them all the information they need to make an informed judgment about whether you represent all their interests, because you are having to pigeonhole what you know about one party and another.[57] Under the CERCLA scenario, they're all jointly and severally liable. So whatever you do that helps to exculpate party "A" necessarily implicates party "B" when it comes to apportionment. So I think, you know, the standard is adversity of interest. In certain circumstances, you can get the consent of the parties to representation of the same

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[57] *See* MODEL RULES, Rule 1.7, Comment [5] [Consultation and Consent]; RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 202 and 209 (Tentative Draft No. 4, April 10, 1991).

issue where there are adverse interests. But, in this one, I would not touch it.[58]

MR. LEATHERS: Well, let us make it a little more concrete in terms of the various choices that you might have. Let us suppose, for instance that you want to represent a Transporter who did not transport for the Generator for whom you also would be involved; does that make a difference? What do you think under those circumstances, Don?

MR. VISH: I still would not take it, John. I think the potential is there for conflict of interest.

MR. LEATHERS: Do you think it is worse if you picked up the Transporter who did transport for your Generators?

MR. VISH: Yes.

MR. LEATHERS: How come? Why would you say that?

MR. VISH: Well, I think to do an adequate job, you would have to have the freedom to explore any discovery of all the various acts. I think you would have to have the unfettered ability to discover intentional wrongdoing and—

MR. LEATHERS: Falsification of records and documents?

MR. VISH: Exactly. Once you agree to represent both, you have a chilling effect on your ability to fully develop every conceivable type of defense.[59]

MR. LEATHERS: Now, Joe, does your firm not, from time to time, represent multiple parties in the Superfund litigation? Do you have multiple PRPs?

MR. ZALUSKI: We do. This is one of the things I wanted to comment on. This is, I think the knottiest problem: this particular type of litigation lends itself to these potential conflicts more than anything else, I think. We do—because the size of

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[58] *See* A.B.A. Informal Op. 1495 (1982).

[59] *See* UNDERWOOD & FORTUNE *supra* note 1, at § 3.5.3.

the defendants' group is typically ten to 20 to 50 and 500, we do it—we do it with written waivers. I can tell you that I still sometimes feel very uncomfortable because, obviously, in these, typically in Superfund litigation, there is not much in the way of defense that, "I didn't do it." It is almost strict—it is strict liability. The only argument is how much you pay and whether the Owner has a cap at, say, 25 percent in the case. Such a cap implies that you can get away with something less than 25 percent. You can do that if the Transporter or Generator pays a little bit more because they pay their caps. So I think what you are dóing in these litigations, typically, is negotiation of the dollar amount. And such negotiation is very difficult unless there is a de minimis party in there. . . . Typically, John, that is how we do it. We represent a major Generator or Owner as a de minimis party. The de minimis parties are a little bit different because they can cash out. But, still, we require a written consent in all cases.

Fitz's comment is a good one, too, though. I think that it is our belief that our clients understand when we explain to them the significance of the conflict and the legal aspect of the conflict. . . . I am not sure that they really appreciate the kinds of problems you can get into on down the road.

MR. LEATHERS: Given that the liability under Superfund is joint and several, the theory is that even a real de minimis person could be held liable, I take it, . . . for the entirety of the response cause, do you see that kind of litigation breaking into cross-claims? Is it common to have actions for indemnification filed subsequently? Do third party complaints occur from time to time as other PRPs get dragged in that might have been omitted? How do you see that as fitting into the conflicts that are involved in this?

MR. ZALUSKI: Well, there is no question that everything you said does happen. These are very real situations, not pieces of law school hypotheticals. And because of all that, I think it is very difficult to counsel with your client early on. You have the Owner and Generator coming to you on day one. You really do not know what is going to develop three months or a year down the line. The Generator may have gone. That may entitle the operator or the Owner to a lesser piece of the pie. So I think it is very difficult to convey every scenario to these people and

have them knowingly waive any conflict. But all those things, cross-claims, counterclaims, burying documents, do happen. Those are very real situations in Superfund litigation. Also, it is big dollars.

MR. LEATHERS: As I look at this, I distinguish it from a lot of massive litigation where you have multiple defendants and you could have a defense team on one side that wants to contend "X", that there is no liability. As I view this, both as an outsider and as someone who has not done such litigation in a long time, it looks to me as though the government has everybody on the hook, for starters. It is strict liability and it is joint and several [liability]. Once you round up all the suspects, from there on, it is up to the suspects to determine who is going to have what happen to them. The government does, in fact, settle with some people but, as I understand it, most allocation of liability occurs internally.

Is that correct, Joe?

MR. ZALUSKI: That is correct. I do not mean to offer my own problem, but I will set this problem maybe for Rick. A situation we found ourselves in recently was that in conducting discovery for third-party defendants, we found that on our list, a list suggested by one of our co-defendants, one of our major clients had not had discovery taken. It was believed they were a contributor. It put us in a very awkward position of what to do then. Do you participate in the deposition? And you have a real problem with consent in an adversarial situation. Having come to you for representation in advance, you have sued them. And now, have you sued yourself out of representing your first client? It is a very difficult and awkward problem.

MR. LEATHERS: Joe, do you see those things shifting as the litigation goes on? Do you monitor the litigation for developments that might change your conflict of interest situation from what you originally contemplated?

MR. ZALUSKI: Yes. I think it is a real disservice, though, to the client that brought you in for a piece of very expensive litigation. And all of a sudden, in the scenario I just gave you, your client has spent six figures for you to represent him in litigation. All of a sudden now you have sued one of your own clients or the group has sued one of your own clients. And you

have to go to your client and say, "I may have to step down." The client has to employ new counsel. There are not many people around who do it, as you said earlier. And all the money he has spent may have in fact gone . . . down the toilet, to use a technical term.

MR. LEATHERS: They, obviously, are not going to be happy about that in terms of future representations . . . nor is your client, whom you have helped to uncover, going to be happy about that, I take it, as well.

MR. ZALUSKI: Right—a very difficult situation.

MR. LEATHERS: Let us take the situation in which what you do is choose to go the route of waivers. What kinds of information have to go in the waivers? What kinds of discussions do you have to have in order to get waivers in this sort of situation?[60] What do you think about that, Hank?

MR. GRADDY: Well, I am going to beg off a little bit because I am not in Joe's position, frankly, to hammer out these waivers. My inclination in reading the problem was to avoid it by recognizing up front that there would not be a situation where a waiver would be adequate to protect against potential adverse effects on clients. Now, in one situation, I was willing to say that Transporter Two and Transporter One might be represented by the same attorney under the theory that their stream of waste does not interrelate to each other. Thus both of them would be looking back at the Generator saying, "We were given false information." I am not sure I can fashion a waiver that I would feel very comfortable with. My call is that everybody is fighting everybody and everybody needs independent counsel.

MR. LEATHERS: The clear solution, I guess, from the point of view of the defendants who are involved in something like this is, in an ideal world, everybody would truly have independent counsel. But, as a practical matter, that may not be available. If you take into consideration the limited number of attorneys who are available to do this particular kind of work, some clients are going to be with raw beginners. Conversely, some people are

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[60] *See* UNDERWOOD & FORTUNE *supra* note 1, at §§ 3.7.1 and 3.7.2.

going to have to be doubled up. From the viewpoint of the law firms, obviously, it is a money generator to have more clients involved in it. Can you help at all by representing multiple defendants and sharing some of the litigation costs? Does that benefit them? Is that a factor in considering whether or not to represent multiple defendants? If so, are there any things internally that you can do to make this better?

I have given you a scenario, Joe, in which you represent four or five of these people. How about the situation in which you parcel it out? George represents one and Vanessa represents somebody else; and everybody is picking a defendant. And as the attorneys, we all agree that we are not going to talk to each other. And you build a Chinese Wall. And two of you will stay in Frankfort and there will be others in Lexington. Does that add or detract from this thing? What do you think? What about the use of a Chinese Wall internally in the law firm? You have gotten waivers that say Wyatt, Tarrant & Combs can represent everybody. Internally, do you think you make things better or worse by having a Chinese Wall?

MR. ZALUSKI: Well, we do build the Wall. It is amusing, though, when, you know, George walks into the middle office and Vanessa walks into the middle office to compromise on an issue with respect to their clients. So, still, even though you have that separation, you still come to a point where you are representing your client as best you can. I think the clients expect that the Wall exists. I do not think they understand what it is fully, but it is the only way we can make it function. Vanessa certainly could not have access to George's files, such as what his client has located when, in what volume, in what toxicity, and all of those things that go into allocations. But, by the same token, when they begin bartering and trading off and seeing if they can settle up the allocation, information comes out, probably through awkward discovery. Then we have counsel in the same law firm representing the taker and the giver of the deposition, and we just came from the same office. Those are very awkward situations, but that is the only way that we find we can do it.

MR. LEATHERS: Do you send each other production of document requests, interrogatories?

MR. ZALUSKI: I think Vanessa is really good at that. On behalf of your clients, yes. I mean, you have to conduct yourself, I believe, as if that is your only client.

MR. LEATHERS: What do you think about that, Rick? Does that solve anything in conflicts of interest?

MR. UNDERWOOD: Well, this is a very practical problem. I get questions like this from time to time. My feeling is that I am probably more conservative than many and I can afford to be. My usual response to these kind of things as the Chairman of the Ethics Committee is, since I cannot decide the factual matters and make a judgment for the lawyer, I do not want to relieve them of the burden of making the judgment. Then I schmooze with them, but I do not give them opinions, positive or negative, unless it is clear. I think the Chinese Wall clearly is available in the limited circumstances of a former client conflict situation. It is not approved under the rules, but the Sixth Circuit has approved it in that context.[61] But my problem with it in the present client conflict is that it does not solve the loyalty problems.[62]

And going back to the waivers, too, I mean—I am not casting any stones or anything else. I just think it is extremely difficult. I think, though, that the Chinese Wall has a place in the sense that while it will not solve conflicts, it might facilitate obtaining the informed consent of the client. Thus the Wall might be useful in that sense. What I am saying is, the mere fact that you have a Wall will not protect you from discipline, a malpractice suit, or disqualification, because someone else might not be satisfied. But it is not out of the question to use it to facilitate the informed consent to clients.

MR. DICKERSON: What is the alternative? I guess, just to not represent these people?

MR. UNDERWOOD: Yes.

MR. DICKERSON: Very difficult problem.

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[61] Manning v. Waring, Cox, James, Sklar & Allen, 849 F.2d 222 (6th Cir. 1988).

[62] UNDERWOOD & FORTUNE *supra* note 1, at § 3.8.4. *See also Manning*, 849 F.2d at 228 (Merritt, J., dissenting).

MR. UNDERWOOD: Yeah, I think that is the problem.

MR. LEATHERS: You know, one of the things I think that has to be considered is that the ramifications of this problem actually go beyond just the ethical rules which might cause you problems with the bar association. One must also consider what, if any, liability problems your firm may have as a result of conflicts of interest. For example, one of these Generators gets a worse deal than he thinks he would have gotten had he had independent counsel. He then sues you for malpractice and for not adequately representing his interest. Now you have that problem and that is a downstream liability problem for everybody as well. What do you think about it? Really, I do not believe there is anything that you can do that would constitute a waiver or protection against malpractice possibilities down the road. You cannot make a client agree to that, can you?

MR. UNDERWOOD: Well, of course, informed consent, the client—all these clients always turn on their lawyer after the fact. That is what I tell my students, "Don't cut them too close, because they're always the first person to turn on you." There is an old "poem" on the back of an A.B.A. Journal in the criminal context. Often these days, even when you're advising so-called sophisticated clients, you ought to think about it. It goes something like, "When I get back on the street, there's one man whose ass I'll beat, my lawyer." They're going to turn on you. But, by the same token, if they sue you for malpractice, they have to have acted reasonably, too. The jury or the decision-maker can judge your conduct in light of the circumstances.

I think there are circumstances in which there can be consent. I think what you have to do with the client is to discuss the very things we are discussing. I doubt if very many people go into that amount of detail. It's hard to see them all coming. And while the Chinese Wall can be useful to you to get consent, it is not garlic before the vampire. It is not going to give you that degree of protection.

MR. LEATHERS: I guess one of the questions, as well, that I would point out, is that you get into a situation where there arguably is a conflict of interest and you solved it internally with waivers or whatever. You have considerations from the standpoint of bar discipline. You have considerations with regard to malpractice. You also have to consider whether or not the other

party involved in the litigation may turn that conflict of interest into grounds for disqualifying you. I have always had real problems with the notion that opposing parties could try to disqualify somebody because they have a conflict of interest. Obviously, if the argument is that I try to disqualify Cal Rozelle because he is adverse to somebody who used to be his client and that is my client in this litigation, that is one thing. But you will see circumstances in which it is almost like a vicious inner member. I see that Cal Rozelle's involved in a piece of litigation. I represent somebody who has never had any contact in the world with him, but I move to disqualify him, because I think he has a conflict with somebody else. I really do not understand why the rules provide this. For example, the final comment to Rule 1.7 is that in some circumstances, even an opposing party can raise conflict of interest, as I recall, where the conflict is clearly to call into question an affair or a deficiency in administration of justice.[63] What you are saying is, that somehow this is such an affront to the system of justice that I can call into question his representation of someone with whom I have no connection in the world.[64] The comment cautions that you have to be careful, because it will turn into harassment, satellite litigation, this type of thing. But that is one of the things that you have to be conscious of, as well.

So in looking at those conflicting situations, I see a lot of ramifications to be solved and consideration to be given as to how it is that you are going to go about this. Tom?

MR. FITZGERALD: Well, two minor points: one is the possibility of limiting your scope of representation. If you have multiple clients with both of their defenses as, "We did not do it," or they are asserting one of the defenses before you get to apportionment, there may be circumstances where you can limit the scope of representation to avoid the conflicts, although that is sometimes less efficient for the client.[65] If they go in and they

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[63] MODEL RULES, Rule 1.7, Comment [15] provides: "Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question."

[64] For one approach to this issue, see In re Appeal of Infotechnology, Inc., 582 A.2d 215 (S.Ct.Del. 1990), which is discussed in Tuite, *Ethics: Both Sides Now*, A.B.A. J. 92 (June 1991).

[65] *See* MODEL RULES, Rule 1.2(c): "A lawyer may limit the objectives of the representation if the client consents after consultation."

lose that step, then they can go into the apportionment stage and it will cost them more. The other point is where the lawyer acts as intermediary. For example, if you have representations of all of the de minimis parties and there is a common interest and they understand the limitations, and that your representation is not as an advocate but as an intermediary to attempt to negotiate the resolution jointly, you may be able to structure it to do that. And if there is a conflict and one of them becomes dissatisfied, you have to bow out.[66]

MR. LEATHERS: Might you almost treat this as different classes and that de minimis Generators, for instance, fall into one class in which you could fairly represent them, but when you get into a larger contributor of some sort, that that causes a different problem? What do you think about that, Joe? I think, when you were talking a minute ago, you said we represent one big Generator, maybe, and several de minimis parties.

MR. ZALUSKI: I think, though, that all these questions, John, turn on the facts of the case. We are involved in one right now where there are no records for anybody. If the Owner of the site, the municipality, has no records, none of your Generators or Transporters will have the records. So the standard formula does not work. We do not know who is going to pay what. It is almost like taking a dart board out and deciding what piece you should get. In that case, everybody hates everybody. We are all trying to keep our exposure at the lowest. Nobody can discover of me what I took there and I cannot discover of them. We all know it is toxic but we do not know how much we took. So in a case where I think the EPA [Environmental Protection Agency] guide is not going to work, i.e., de minimis, they are going to get a piece. Owner/operators are going to get a multiple of their Generators. It makes it a little bit easier. I think that is a part of your disclosure to your client, that I can represent you and your maximum exposure is blank under this document. Also, I can also represent a de minimis character in the deal. So it does make it a little bit easier, but it is pretty fact sensitive, I think. That is something we have not talked about much, that

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[66] MODEL RULES, Rule 2.2(c) provides: "A lawyer shall withdraw as intermediary if any of the clients so request, or if any of the conditions stated [above] . . . [are] no longer satisfied.

the facts could well dictate whether you can take on a second or third party.

MR. LEATHERS: Let us take on a slightly different variant of this. You represent, let us suppose, a Generator in some regard, not related to this particular site. The Owner says to you, "I want you to represent me. The Generators have lied. That Generator lied about what was in that stuff that got put on my place out there." Under those circumstances, can you represent the Owner? Let us put it another way. Let us suppose you turn down the Owner. You say, "No, I'm not going to represent you. I've previously represented a Generator." Now, the Generator says to you—remember, you did not represent him on this project before, in any respect—"I want you to represent me." You have heard from the Owner in the context in which he was trying to retain you as his counsel, that he believes the documents supplied by the Generator were false. Can you represent the Generator under those circumstances? Or has your consultation with the Owner already tainted you with confidential information related to him to the point that you cannot accept the employment?[67] What do you think about that, Mr. Dickerson?

MR. DICKERSON: I think that strikes me as, there is this competition between all the PRPs. Incidentally, if there are 832 PRPs, the competition exists. Of course, you can increase the other fellow's liability and reduce yours. But a bald allegation by an individual that somebody has falsified a certain kind of transmittal document or something to the site, does not seem to preclude you from going ahead and trying to conduct some kind of investigation of your own to verify that. But that statement, that allegation, in and of itself, is one of the defenses that you raise typically. This is what Joe tries to do by finding out if somebody falsified any documents and then, instead of being de minimis, they may all of a sudden turn into a major player. So the fact that the allegation has been made, does not automatically let you out of the ball game at that point. I think you can very well assume the representation of that individual. I am not

[67] For valuable and practical guidance, see A.B.A. Comm. on Ethics and Professional Responsibility Formal Op. 90-358 (1990).

sure that you have any duty of not disclosing that fact, because that is basically one of the primary arguments.

MR. LEATHERS: You always have that. So there is nothing confidential you see in that particular scene or information?

MR. DICKERSON: No.

MR. LEATHERS: Let me close with this question and put it on Vish. Let us suppose that you have been asked to be counsel for the Generator and that you have already been corporate counsel previously. I think you have said you see some conflict between being corporate counsel and being counsel in a Superfund litigation. Does that make it worse if you have held a corporate office of secretary, for instance? Does that give you a problem about representing them in that particular matter?

MR. VISH: Yes, it does, because as an officer, you are not only the alter ego of the client as counsel, but the client itself. You are a participant in the actual affairs that are being litigated, as opposed to mere disinterested counsel.

MR. LEATHERS: That may cause you a problem internally for yourself. Would you think that it disqualifies your firm? I, Don Vish, of Brown, Todd & Heyburn, am secretary of the corporation, but should Brown, Todd represent the corporation in this particular kind of litigation?

MR. VISH: Well, here is perhaps the only time that I think a Chinese Wall is acceptable, when there is a current and ongoing litigation. Like Rick, I have always regarded Chinese Walls as useful for successive employment. But here is a case where I do think that you could isolate effectively with the Chinese Wall. I think that it would work.

MR. LEATHERS: Well, that concludes our time for today. We did not get through all the problems that I prepared. You might glance through those things. I tried in those to construct a lot of questions that raised conflict of interest problems and so forth. We thank you very much for being here. Thank you.

(SESSION CONCLUDED)