CHAPTER 2

Environmental Ethics – A Panel Discussion(1)

Edited and Annotated by

Professor Richard H. Underwood
University of Kentucky College of Law
Lexington, Kentucky

and

John R. Leathers
Frost & Jacobs
Lexington, Kentucky

Moderator: John R. Leathers

Panel Members:

Joshua I. Barrett
Ditrapano & Jackson
Charleston, West Virginia

George Piper
West Virginia
Department of Energy
Charleston, West Virginia

Thomas E. Meng
Stites & Harbison
Lexington, Kentucky

Paul D. Ritter, Jr.
Emans, Hurd, Kegler & Ritter
Columbus, Ohio

Professor Richard H. Underwood

Synopsis

§ 2.01. Introduction.

§ 2.02. Obtaining Counsel.

§ 2.03. Disclosure of Adverse Information.

§ 2.04. Communications with Persons Represented by Counsel.

§ 2.05. Representating of Whom -- Entity or Employee?

§ 2.01. Introduction.

PROFESSOR DAVID C. SHORT, Director, Mineral Law Center, University of Kentucky College of Law,
Lexington, Kentucky: The Environmental Ethics Panel Discussion will now begin. We have a stenographer who's going to try to record the presentation, but the background noise makes it very difficult for her to do that. This presentation will be published in the Annual Institute Proceedings, so we will be of record.

The moderator this morning is John R. Leathers, who is a partner in the Lexington office of the Cincinnati based firm of Frost & Jacobs. John has an extensive practice in commercial litigation, mineral related litigation, and regulatory practice. He's a graduate of the University of Texas with a B.A. in Business Administration, a Juris Doctor from the University of New Mexico School of Law, and a Master's of Law from the Columbia University Law School in 1973. He's taught at the Columbia University Law School, the University of Houston, the University of Oklahoma, and the University of Kentucky. He has served as a hearing officer for the Commonwealth of Kentucky, was involved in the surface mine program that Kentucky has developed as counsel for the Department, and as Chief Hearing Officer for the Kentucky Department of Natural Resources. So he comes to us with a broad background in mineral law and he's nationally recognized as an expert in legal ethics. Without further ado, John Leathers.

MR. LEATHERS: Good morning. Thank you, David.

The basic idea for what we are doing here today comes from presentations that have previously been made at the University of Kentucky Mineral Law Center's Annual Mineral Law Seminar. Kentucky, like very many states, now requires ethics credits each year as part of its continuing legal education requirements, and those kinds of things have proven to be very difficult to teach. You know, when you've got an ethics presentation, it sounds as if you ought to get your soap box out or you ought to take to preaching on television.

Basically, what we have found is that, if we can present these kinds of problems in a different context rather than in some kind of lecture format, we, as presenters, get more out of it and the audience gets a good deal more out of it in terms of being able to perceive the problems as well.

This morning to help me with the hypothetical that we have developed, we have a panel of people drawn from different areas of the practice. First, on my far left is George Piper who is with the West Virginia Division of Energy. We're really fortunate to have George to give us the perceptions of a government lawyer in the representation of an agency in the kind of a problem that I'm going to present here this morning.

Next to him we have Josh Barrett, a partner in Ditrapano & Jackson from Charleston, West Virginia. He has very extensive experience in representing plaintiffs groups in environmental litigation, and those of you who follow the national litigation will certainly be familiar with his firm's role in that regard.

Next to him is Professor Rick Underwood of the University of Kentucky College of Law, a colleague of mine for many years when I was on that faculty. Rick is the Chairman of the Ethics Committee of the Kentucky Bar Association, and is sort of here to serve as an arbitrator and umpire in the discussions that you're going to hear in this particular problem.

Here on my immediate right is Tom Meng, a partner in the Lexington, Kentucky, based law firm of Stites & Harbison. He has a very extensive background in representing coal companies and mineral related interests.

Next to him is Dan Ritter of the Columbus, Ohio law firm of Emens, Hurd, Kegler & Ritter, who has primarily an oil and gas practice as I understand it.

What we're going to try to do today is take a basic hypothetical scenario based on a fact pattern that arose in the Kentucky, and move that on through the administrative litigation process looking at various ethical
problems that can arise in the course of the representation of the various clients. In truth, the problems that you are going to see are not unique to the mineral area, and they are not unique to the administrative area either. They pervade the litigation process and all areas of substantive law as well. We merely use this particular hypothetical as a vehicle to develop the kinds of issues that we'd like to discuss this morning.

Our basic hypothetical works like this. We have a mining company which is called MineCo. MineCo is the owner in fee simple of a large tract of unmined coal property. A portion of this tract breaks over a ridge line and into the drainage of an undisturbed area. An adjoining landowner in that undisturbed drainage is a large university, Megaversity. Downstream in this particular area, it is conducting baseline studies of water quality and has been for a very large number of years. It also is doing wildlife, and flora, and fauna studies in an area of forest which it owns adjoining the MineCo property.

Downstream still further are other streams that are receiving streams from this drainage. Those particular areas are used by environmental groups for camping, hiking, and so forth. So that what you see in this particular scenario is a mining company that would like to get from the state regulatory agency – Cabinet for Natural Resources and Environmental Protection in Kentucky – a permit to mine in this undisturbed watershed.

We're not going to put this into the context of a lands unsuitable petition, nor are we going to address any kinds of problems of valid existing rights. All we're going to do is have MineCo make a hypothetical permit application. What they encounter in the process is resistance from Megaversity and resistance from environmental groups. Our major players in this will be the mining company, the University, the environmental groups, and naturally, the state agency which will be taking its own position. We have panel members drawn from a cross section which will, we hope, allow us to discuss the various problems that arise throughout the process.

§ 2.02. Obtaining Counsel.

MR. LEATHERS: What I want to begin with, first of all, is the problem of everyone in this scenario securing counsel. Let us begin here with Mr. Ritter. What I want to talk to Dan about is that Megaversity comes to his firm, seeking to have his firm represent them in protesting the permit being sought by MineCo.

Now, Dan, as I understand it, your firm primarily does oil and gas work, so that you would not, let us suppose, ordinarily have had experience in the permitting of surface mining or surface effects of underground mining. What kinds of considerations do you give when Megaversity wants you to represent them in this context?

MR. RITTER: Well, obviously, the first thing to look at is competency, and the requirement, of course, is that to accept this employment, I have to be competent, my firm has to be competent to represent the client. Basically, competency goes not only to what you know, but to what you intend to learn in order to represent the client. If this came to our firm – and yes, we basically are an oil and gas firm – if it came to me specifically, and my practice is more related to taxation than anything else, I would have a severe problem as to competency in this area. I would have to look within my firm to see if there was someone whom I felt was competent to represent this client in this particular matter. If I felt that we had no one who was competent, didn't have the experience, the judgment, the education, any of those things to represent this client competently, then, of course, I'd have to look for an alternative.

Can we find someone within the firm who could become competent within a reasonable time to take on this representation? I think that would go to such things as how complex is the issue, how involved are the legal and factual issues? Is there time to get someone within my firm competent to do this? Could I take someone who is basically a litigator, and is able to learn things quickly, and pick up and present facts, and convert
that litigator into someone who could competently handle this matter? If not, then I would have to think
about going to outside counsel.

If I thought about going to outside counsel and getting someone who was indeed competent, then I, of
course, would have all the problems of going to the client, talking with the client saying, "I want to get co-
counsel in this matter." My feeling on this is that if it were presented to my firm under these circumstances,
depending on the time frame and the complexity of the issues, I believe that our firm would be looking to
bring in co-counsel because I think the issues are specific enough to demand experience and judgment in
matters that we don't practice in on a daily basis, that I would be looking for co-counsel.

MR. LEATHERS: Dan, let's make it a little more difficult from your point of view and let's say that
Megaversity is a land grant university with extensive real property holdings in this particular state, many of
which may have potential for development for oil and gas, so that you could see that if you could forge this
relationship at this particular time, you have the prospect of long-term connections with the University for
those things that are essentially within your normal area of expertise. How does that bear on the decision
that you're going to make and how you're going to handle it?

MR. RITTER: You're right, it makes it tough. I don't think it really bears on the ethical issue of representing
the client competently. Yeah, it would be nice to develop that relationship, but I don't think that that is the
determining factor. I think the determining factor is, can I represent this client in this matter competently?
And I think what I would try to do, of course, is to handle the matter, and explain to the client the ethical
problems, and tell them basically that what I'm doing is for their best interests, that we think the best way to
get this matter handled competently is to do it this way, and if you have any oil and gas matters that we do
feel comfortable with, we'd sure like to be able represent you.

MR. LEATHERS: In the course of trying to get, perhaps, someone in your firm up to speed to handle
something like this, what would you think about the way in which you're going to set the fees? A lot of
times, clients are going to say, "Gee, I really don't want to pay to educate you to do that. I'm expecting
someone who's got the ability to do these things already." How would your firm handle, internally, billing
matters on something like that?

MR. RITTER: Well, we would expect that if we could meet the ethical consideration of competency by
educating someone, we would have our people keep track of all their time, and charge everything, even their
learning time. The bill would be reviewed by the partner in charge of that matter, and we would fully expect
that what we would consider learning time would not be charged to the client, but we would look at the
overall – the factors that go into determining fair fee, such as complexity, time spent, a favorable result,
and all those things. And when it was the appropriate time to bill, we'd consider all those factors, and we
would reach what we think would be a reasonable bill. My personal feeling is that any time for starting
someone out and bring them up to competency level would not be an appropriate factor in that billing.

MR. LEATHERS: And I take it, that's something you'd be more willing to absorb if you could see a
prospect of a long-term relationship that might develop out of this than if you thought it was an one-shot
representation sort of thing? Would be that correct?

MR. RITTER: Well, I think that's reducing it pretty much to economics. I don't know that that factor of
continuing a future business would impact my determination of a fair fee on the job that I did. I think I
would have to look at the factors that go into a fee for that particular job, and I don't think that I would – I
would put any factor in there for the possibility of future business. In fact, if I reduced my fee more on the
expectation of future business, I think that may be subject to ethical questions because that's not a factor that
really goes into the consideration of a fee.
MR. LEATHERS: Before we move on to other parts of the hypo, let me observe that what you've just heard Dan Ritter say basically tracks exactly the comments to *Model Rules of Professional Conduct*, Rule 1.1, which deals with competence of representation. It talks about the ability to get prepared in advance, if you have something that's not normally within your expertise. It talks about the ability to get outside or co-counsel to help you if other areas are involved. And basically, the business about getting co-counsel as well, leads you into the business about a division of fees and how that would occur.

Dan, if you had to get outside counsel, how would your firm handle the division of fees in making that arrangement?

MR. RITTER: We would continue to maintain records of the time that we've spent in the matter, and I would expect that we would remain involved. It still is our client, and we'd still be involved in the matter. We would maintain records of our time, and we would expect co-counsel to maintain records of their time. When the total fee of the job is determined, we would only expect to be compensated for the services that we actually performed on the job. As far as we're concerned, fee splitting on any other basis would be inappropriate, and we would split that fee based solely on the contribution in the performance of the work by the two counsel.\(^6\)

MR. LEATHERS: Would you expect your co-counsel to bill the client directly, or would you prefer your co-counsel to bill through you to this client whom you are mutually going to represent?

MR. RITTER: I think that's a matter I'd discuss with the client, and I think I'd be guided by the client's wishes on that. If the client felt that he would like to see that the fees from the other counsel separately and my fees separately, I'd be happy to do it that way.

MR. LEATHERS: Once you've made some decision about how the fees are going to work in this particular case from talking to the client, what do you see memorializing that ultimately?

MR. RITTER: Well, I think it would be a good idea to have a representation letter as to that, and as to the scope of the services and all those various things. I think that the representation letter should cover how the fees will be billed.\(^7\)

MR. LEATHERS: Well, it actually is quite amazing if you look at the experience of bar associations across the country. Something in excess of half of the complaints filed with a typical bar association have to do with fee arrangements between a lawyer and a client. In large respect, those, I think, are generated typically because there appears to be no clear, or at least no written, understanding in advance of the way the fees are going to work.

The Model Rules at the current time basically recommend always that those fee arrangements be reduced to writing. I think that that would protect all of us if that were done. The rule now clearly requires that a contingent fee contract must be in writing.\(^8\) In some states in the past, it would have been possible to enforce a contingent fee contract on the basis of some sort of an oral understanding. At the current time, you certainly would want a written understanding as to way in which the fees are going to be handled. I also think Dan's observation about the scope of representation is well taken because that can clear up any misunderstandings at the beginning of that representation about what it is that you are expected to do. If there is going to be a division of work between you and co-counsel, there's an ability, by having that engagement letter up front, to set how that is to work.

Well, let's move past the Megaversity problem to the problem of other parties who are going to need counsel in this case. Let me ask Tom Meng, who is very experienced in representing persons in circumstances like this, to be counsel for MineCo There'll be no question about Mr. Meng's ability to
represent somebody in this particular circumstance because he'll be well qualified.

However, Tom, what happens to you when MineCo comes to you, and you have suddenly have a slight shooting pain in your heart because you realize that your partner, Judge X, represents Megaversity. Megaversity has a well developed sports program which has an unfortunate and lengthy history with violations of the NCAA, and they periodically have to, as we say in the business, bury the bodies. Your partner, Judge X, has been known as the pallbearer for the University for a number of years, has never represented the University in any other capacity, but on a regular basis, does have to investigate their unfortunate and continuing lapses of NCAA regulations. Now, this has resulted in you and your partners all having access to what we would call blue chip athletic tickets – all right – in addition to substantial fees.

But here is the situation. MineCo wants to mine near Megaversity's property. Your partner has never represented Megaversity in any regard like this, but he continues to represent them in their ongoing problems. What are you going to do about this? You'd like to represent MineCo This is in your area of expertise, totally blue chip client, great case, but by the same token, you’ve got the problem with Megaversity. What are you going to do about that?

MR. MENG: John, I guess I'd turn to Model Rule 1.7(9) which deals with a conflict of interest, and that particular rule, I think, of course, most clearly addresses the situation where the interests of the parties in a matter are adverse to each other.

The hypothetical has been presented as one where the firm does not represent the University in the matter which is at hand, but at the same time, would represent MineCo in a matter adverse to a client in another matter. Model Rule 1.7 addresses that situation. John, you know, in trying to cut through all this and determine what you do, your first inclination, I think, is to see if you can get a waiver from Megaversity. Sit down with them and explain the situation, and at the same time, talk to your client, MineCo, inform MineCo of your representation of the University. I take it in the hypothetical that you're still representing the University in matters, that they are not just a past client, but that they have current, ongoing matters?

MR. LEATHERS: Yes, and we anticipate that they always will.

MR. MENG: As do I. The matter is one, obviously, where their interests in this particular matter are going to adverse to each other, and the first thing, I guess, you have to consider is, can you adequately represent MineCo while at the same time knowing that your financial interests(10) are governed somewhat by a continuing relationship with Megaversity?

MR. LEATHERS: Okay. Now, if you want to set about analyzing this thing and ultimately, I think, Tom, you're going to get a waiver. Do you need a waiver from one or the other, or both? What do you contemplate coming out with on that?

MR. MENG: Well, clearly the Model Rule would require you to have a waiver from your client in the instant matter, which would be MineCo Assuming you have those ongoing, current matters with Megaversity, I contend that you would need one from them, also.(11)

MR. LEATHERS: The thing that I think is interesting about the scenario that I've placed to Tom is that I've excluded from that any possibility of a flow of confidential information that would be harmful to either client. A lot of times, it seems to me, if you look at the rule on conflicts of interest, that really needs to be fit together with the requirement of Model Rule 1.6 on confidentiality of information because, in part, what you're looking at is protecting confidential information from a prior or ongoing relationship with another client. The hypothetical sort of seals that off because the NCAA business has nothing really to do with mining in the proximity of the University's property. It becomes a great deal harder if you have represented
the University in the past, let us suppose, in regard to a title dispute, not an uncommon situation in our part of the country. Say that someone had contended that a part of the forest that they own was really their property, and you handled the boundary or title dispute. Now, you and your firm have some additional knowledge of this particular piece of property. What do you think happens if you run into that, Tom? What do you do about that?

MR. MENG: I think that if we have information about that particular piece of property, that would change the situation drastically. Of course, one avenue, I suppose, that is sometimes followed is to set up the so-called Chinese Wall, assure both clients that there will be no flow of information. At the same time, I think even though that is resorted to many times, it is not really an avenue that is approved by the rules for this particular situation. That is generally an avenue that's permissible when you have prior representation matters, but not specifically approved where you have a matter at hand that involves both clients where confidential information is involved.\(^\text{(12)}\) In that situation, you do have a duty of utmost good faith to both clients. If you have that confidential information, it conflicts with your duty to MineCo to explain to them and tell them everything you know, while at the same time, you're not permitted to disclose or divulge confidential information of your client, Megaversity.

There is, I suppose, the possibility of pursuing the waiver avenue again, but, at the same time, that avenue may be a little doubtful in this situation because the representations are such that you may not be allowed to ask the University to consent to your representation of MineCo where their interests are so diverse.

MR. LEATHERS: Now, that's what Tom just said, I think, is a very excellent point. You can reach places in terms of conflicts of interest that may not be waivable given the circumstances that he's describing, that you can get into such a terrible conflict that it may not be waivable.\(^\text{(13)}\)

Tom, in that kind of a situation, if you think you've approached that level, can you think of any ways that you might still salvage this, coming up, being able to represent them by them having a done a waiver, but without you being the one to advise either client in regard to a waiver? What would you think about sending both of them to get outside counsel opinions on the question of waiver?

MR. MENG: The Model Rules speak in terms of consent of the client after consultation, and the comments at least indicate that that contemplates consultation by an unbiased, independent, I guess, counsel. You're certainly not capable of performing that function. If they each went to consult independent counsel and then made a knowing waiver after having all the information available, then I suppose it would be permissible, but it's still -- I guess it's still fraught with dangers.

MR. LEATHERS: It certainly is. Although it seems to me it is a lot less dangerous than doing it yourself. What the Model Rule says and the comments indicate is that, when you've secured a waiver from both clients, that may be reviewed under the standard of whether or not a disinterested lawyer, viewing the particular circumstance would have concluded that the client should have given the waiver under those particular circumstances.\(^\text{(14)}\) So you, yourself, are going to be subject to being second guessed on the standard of a disinterested lawyer. If that's the standard on which you're going to be second guessed, and you're down to that close a question, maybe you ought to send them outside to a disinterested lawyer initially and have that done. Dan?

MR. RITTER: I'd like to make two points. Maybe you're going to get to one of them, but one point is if you're representing Megaversity, who is your client? In this circumstance in which the Judge has been representing it on athletic violations, is your client the Athletic Department or is your client Megaversity as a whole? If you go to get waivers on these kinds of things, the waivers are conditioned upon full disclosure.

Now, it might be that you could go to the Athletic Director, give him the circumstances, and go to the
mining company and give them the circumstances, and get the waivers. But if you went, instead, for example, to the President of the University, you'll have a broader scope of what the University operations are. He might very well say, because he knows more about the overall operation of the University, that no, he would not waive under the circumstances. I think the key – the point I'm trying to make is, who is your client in that matter? Is it the Athletic Department of Megaversity or is it Megaversity itself, and have you made a disclosure to the appropriate party and gotten the waiver from the appropriate party?

Now, the other point – and maybe you're going to get to this because it goes to the tickets. A valid waiver could only be based upon full disclosure. Do you disclose to the mining company that you really want to continue to represent Megaversity because you're getting blue chip tickets? If you don't disclose that, have you made full disclosure? MineCo might say under the circumstances, "No, we don't want any part of this deal." But I think those are two points. One, are you getting the waiver from the right people? And, two, have you made adequate, full disclosure?

MR. LEATHERS: For observations on the comments that Dan just made, let me refer to my colleague, Professor Underwood, who works for a university that has none of these kinds of problems, the University of Kentucky. What do you think? Who is the client, the Athletic Department or the President?

PROFESSOR UNDERWOOD: Well, of course, as a practical matter, you are probably going to be going first to the University counsel. That would be my experience. Then University counsel shares in the responsibility of figuring out who the appropriate consentor is. I suppose it may depend on the structure of the University. Depending on how politically charged these things have in been in the past, you might even have to go to the Board of Trustees. It's a real problem. I don't have a pat answer. The client is the entity, and you have to locate the appropriate decision-maker. The corporate model may not fit but, then again, it may. I don't think it's a major problem if you are forthcoming. By starting with the University counsel, you'll get to the right decision maker.

The tickets are an amusing thing. I guess if we wanted to be sticklers, there would be a real moral crisis here. It would be the Model Rule 1.7(b) conflict because the lawyers' own interests are to keep those tickets. In Kentucky, many divorces have ended in gun fire, not over the children, but over the basketball tickets. So that is an interesting side conflict that you've thrown in there.

This business of consent is really tough. I'd say fifty percent of the calls I get as an Ethics Chairman deal with conflicts, and I must say that the unfortunate truth is that lawyers usually do not call me not for "guidance." They know what these rules are as well as I do, and ultimately it doesn't matter what lawyers say the rules are. The clients are going to enforce their own version of conflict rules anyway. What the lawyers want is my approval. It's not for me to make their decisions for them.

With regard to screening, you know, in the Sixth Circuit – and I guess we're still in the Sixth Circuit in Nashville despite all of the times zone changes – screening is apparently the "bees' knees" as long as it's a former client conflict; but if you've got some problems with the present client, the Chinese Wall doesn't solve the loyalty problem. The big thing is that every time you think you've got one of these things schmoozed over, something will happen to cause a problem, and the risk is you will end up with two unhappy clients instead of one. It is a practical matter aside from the other ethical considerations. You can end up losing two clients instead of one. Clients do hold grudges and, in my experience, they turn on you like mad dogs. So you need to think about that.

MR. LEATHERS: Let's now turn to getting counsel for the rest of the people who are in my hypothetical. Natural Resources Department is going to have George Piper representing them, so we don't have a problem there. The environmentalists still need counsel, and they're going to go to Josh Barrett. Unfortunately, like a good many environmental groups, they don't have any money, and this particular thing can't be solved on a
Let us suppose that one of Mine Co's competitors, Strip Co., comes to you, Josh, and says, "You know, all those environmentalists are really after MineCo over there at the University watershed. Wouldn't it be too bad the environmentalists just did them in? We'd be happy to pay your fee to represent the environmentalists, Josh." And they say to you the greatest words that clients can ever say: "Take no prisoners. Price is no object." Okay. These words are music to your ears. Can you be paid by Strip Co. and represent the environmentalists against MineCo? What do you think?

MR. BARRETT: Well, the answer, as a practical matter, is probably not, although under the Model Rules, it is certainly possible to have someone else pay a client's fee. First, the client has to consent, and that consent needs to be after consultation. We discussed that some already.

MR. LEATHERS: So you're going to say to the Enviros, "Strip Co. wants to pay your bill. Won't it be okay if we do that? I'll really take care of MineCo for you, and Strip Co. will be paying the bill." What do you think about that?

MR. BARRETT: It's just highly unlikely that any of those clients are going to go for that and, as a practical matter, I think that in itself would probably rule out this representation, notwithstanding my assurances to the client. You have to keep in mind there are other issues besides legal ones – issues like publicity. You know, I think a situation like this, if the press got wind of the fact that some coal company was paying my fee to represent a group of environmentalists, it would be unpleasant for everyone. I don't think the environmentalists would even think of consenting to that type of arrangement. In addition, I have to be certain, and it has to be clearly understood if I am going to accept payment from a third party, that my duty is to the client. I'm going to represent the client without restriction and unimpaired. I will not disclose any of the client's confidences; I will not put my own desire to gain money from this coal company ahead of the interests of my client. As a practical matter, again, I think that this is one of the areas where it becomes so difficult for the attorney to enter into such an agreement, that it is a practical impossibility, though it may be technically permissible.

MR. LEATHERS: So that you might say to Strip Co., "Okay. All you'll get is the privilege of paying the bills. You're not going to know or have any say over any of the rest of this." You disclose this to the environmentalists. Let us suppose that they feel compromised by this, that they want to maintain their purity by not having any connection with an organization like this, that they are not going to be practical and say, "Well, the ends justify the means. We'll take money from one mining company to do in the other because we'll save that undisturbed watershed." Instead, what they say is, "No, no. We want to go forward. We'll have bake sales and cookie sales, and we'll take up collections from our children, and we want you to do this." You realize that the cookie sales will probably cover your first billable hour. The bake sales a couple more; the collections from the children a tenth or two here and there, but you don't see any real prospect of being paid out of that.

Let us suppose that they having maintained this extremely pure position here. You can see yourself as the champion of the oppressed and the downtrodden in all of this, and so you begin to perceive that you might have some other potential gain from this. You begin to see a book, "Josh Barrett, Protector of the Unspoiled Environment" – okay – in which you will tell the story. This is an Alan Dershowitz kind of thing in which one must always ask the question: How did he type the book and pat himself on the back at the same time?

But in any event, you can see yourself. You've been to see "Change of Fortune," the von Bulow story, and realized this has real potential for the future. You can see yourself surrounded by admiring environment groupies, saving large tracts of unspoiled environment. And so you say to them, "All right. I'll represent you.
Okay. But I want all the literary rights to this. Don't any of you write this story. I'm going to write this story, and let's sign a contract in advance, if that's the way we're going to do it." How about that, Mr. Barrett? What do you see, you and Alan Dershowitz, right?

MR. BARRETT: Well, I think that the requirement of asking the client to sign over literary rights conditioned to any representation is inappropriate. You can't do it. I think that lawyers who are engaged in this kind of practice also have to be aware of their own personal interests. Being seen as the champion of the downtrodden or being associated publicly with a certain issue is, I think, one that's fraught with difficulty for a lawyer because it places personal interests in something of a conflict with the client's interests, or it can. Certainly, if that translates into an agreement for publishing rights, I think it's absolutely prohibited. (18)

MR. LEATHERS: It is indeed one of the prohibited transactions under Model Rule 1.8. There was a time in this country when you could see people trying to line up those kinds of things as part of the fee arrangement.

Model Rule 1.8 (d) absolutely forbids that particular transaction at the present time. I think Josh's observation that it thrusts the lawyer into an inappropriate role is quite true. The lawyer, instead of now presenting and telling the client's story, is becoming the story. He becomes the focus of it. He sees himself in the role of witness and party, and everything else that goes along with that, and that's not going to allow, it seems to me, for the best kind of a presentation of the client's case. The reason that it's absolutely forbidden is because it leads to that conflicting role between the lawyer and the client in those circumstances.

Okay. Now, we've got everybody represented by counsel. Okay. The Natural Resources Department has its counsel. We've got Mr. Barrett representing the Enviros for bake sale kind of money, and we have Tom Meng who's representing MineCo. He's still going to get tickets, and he's going to get big bucks, and we have Mr. Ritter, who along with co-counsel who knows something about this particular process, is going to represent Megaversity, and now they're off and running.

§ 2.03. Disclosure of Adverse Information.

MR. LEATHERS: Now, what I want to put before you is a set of kind of hypothetical developments that can occur in almost any kind of litigation. One of the things that's going to happen in this particular process, as I'm sure all of you know, is that those who are protesting the issuance of the permit unquestionably are going to claim that the environment downstream cannot be protected by the mining plan that has been devised for that portion which is going to break into the new drainage area. They're going to want to know a lot of kinds of things in order to attack MineCo's permit application. Among the kinds of things that they're certainly going to want to know is if there are any facts that might bear on MineCo's ability to carry on that mining plan in that particular watershed. Typically, companies, of course, will have done development work, surveying work, maybe core drilling in that particular area before they make their permit application.

Additionally, you could easily envision that those who are protesting the issuance of the permit are going to be thinking in terms of what kind of mining company has MineCo been in other areas? Are we going to believe that, even if they have what on appears on to be an acceptable plan, that they are capable of carrying it out? Does their past pattern of conduct show that they are likely to carry that out? So you can see the environmental groups, perhaps the state agency, and certainly Megaversity, all wanting to have discovery of those kinds of facts.

Now what I want to set up in this scenario is here is Mr. Meng. He's got his firm representing MineCo, and inside his firm, he's going to organize this in the usual big firm, team effort. He's going have low level bag carriers. This is going to be like an aircraft assault group, and you're going to be in the middle of this group, Tom. There will be somebody senior to you who will be the big guy. All right. And in this particular
scenario, we'll have a junior level associate; we'll have Tom who will be a mid-level partner, and then we'll have a senior level partner who will be involved in all of this.

What we want to do now is we want to assume that the associate is put upon the path of tracking down anything that might be dangerous or harmful to this particular permit application. A young woman, who's been with the firm three or four years, is told to began investigating and interviewing people.

In the course of this, she learns that this is not the first thought that MineCo has given to mining this particular area. They've owned the property for many years and, indeed, at various times back into the 70's, they considered mining this area. They've done little bits of exploration and core drilling, and so forth.

She discovers in the course of this that they have a former employee, Old Engineer we'll call him, and Old Engineer knows a good deal about this property and the prior thoughts of mining that particular area. So she goes to see Old Engineer. Old Engineer says to her, "Gee, are they really going to try to mine that property? That's really a terrible idea." She says, "Well, why is that?" And he says, "We did some core drilling out there, and you know, they're going to strip down to one seam, and I've forgotten now which one it was, but there's a very odd geologic formation in that area right above that seam that they want to strip which is the doggonest formation that you've ever seen. When it's exposed to air or water, there is no question that it's going to form acid mine drainage, very unusual in this area of the country, common in other areas, but not something that we normally expect over there." Her eyes get big around. And he says, "But if you want to know about that, why don't you read my memo? I wrote a memo on it in 1978 or '79 saying `How in the world will we ever be able to do this because the minute that stuff gets exposed, my God, it's just going to be acid mine drainage from here to the Gulf of Mexico.'"

The young woman goes back to the firm. She is now really disturbed about what she knows. She goes to the client's warehouse where they maintain old filings, and finally finds in an old file "the memo" from Old Engineer. It says just what he said it did.

She comes back to your firm, Tom. You have represented this particular MineCo at various times, let us suppose, over the years, including during the time when this memo was written. She shows you the memo. She says, "Look at this. Acid mine drainage is going to happen out there." You say to her, "I know that. I saw that in 1978. Shut up."

Now that this document is known to exist, what do you see happening inside your firm about the handling of that particular document?

MR. MENG: Until somebody asks for it, I suppose you don't do anything with it, I suppose.

MR. LEATHERS: You know what's coming next, a document production request so broad that it catches everything from the Book of Genesis forward. And indeed, let's even suppose that the document production request is already outstanding and that you're in the process of responding to it, so you've got this document that ought to go into the document production response. What are you going to do about that? Deadly document, right? What are you going to do about it?

MR. MENG: John, I don't think I have any real choice in the matter in the sense that, assuming it's properly discoverable, and I have, say, gone back to the court to try to limit the scope of the discovery, but it is still a document that is called for, then I don't have any choice but to furnish it.

MR. LEATHERS: Okay. Is there anything that you can think of that you might do to limit the damage of this particular document in terms of producing it to the other side? They've got to drag that document production request. Everybody has seen, you know, a zillion documents. What do you think about that?
How could you handle it?

MR. MENG: Well, I mean, obviously, you have to deliver it, and if we assume that we are an ethical firm, then it is going to be delivered. The question, I suppose, is directed to the context in which you're going to deliver it.

MR. LEATHERS: Is there anybody here who has seen the movie "Class Action," the new movie with Gene Hackman and Mary Elizabeth Mastantonio? This is the scenario from that particular case which was a takeoff on the Pinto case, so this is not an original notion to me. I've just put it in this particular context.

What I want to ask you – and this is what happens in the movie – is let's suppose that you determine that there are thousands and thousands of documents that technically are responsive to the document production request. Can you simply reshuffle those documents in some way, Tom, and produce this damaging document buried up in all of that huge mass of documentation, thinking that that will be like a needle in a haystack, that nobody will find it? What do you think about that?

MR. MENG: John, under the rules, the civil procedure discovery rules, you would, I suppose, be required to furnish that document either in a form responsive to the request or in the form maintained by the client in the normal course of its business. And if in the normal course of the business, that file does exist and you have a request for every document that exists that MineCo has, then I guess, as John has phrased it, it is very broad and asks for everything, then in my personal opinion, it is legitimate to furnish everything. The fact that the other side has, in effect, done themselves in by asking for so many documents that they may never find the particular document that would help their case is not my problem. At least I don't consider it my problem at that point. I have complied with the rules. I've furnished the documents. They need to do their work.

MR. LEATHERS: Okay. Josh, you're going to be the one who requested the documents. Let's have it they come to you with a U-Haul van full of documents, literally thousands and thousands of documents, boxes of documents. What do you think about that? And in there is this one document. You don't know that there is such a document in the world, but it's in there somewhere. What do you think?

MR. BARRETT: Well, as an ethical matter, I think that I would certainly have concerns about whether this manner of presenting the documents violates their obligation to – or the prohibition against obstructing other parties' access to evidence or concealing evidence, but I think it's really a close question. I think the resort really is to the court to question whether this is a fair production under the discovery rules. I'm not sure that it's so certain an issue under the ethical rules as to whether that would constitute the type of concealment that would be punishable.

MR. LEATHERS: Rick, what do you think about this? This happens. I'm sure everyone has seen this happen.

PROFESSOR UNDERWOOD: Well, your facts have gotten a little beaten as we've gone on. If you were starting out with a document request and the lawyer takes the smoking gun and mingles it in with nonresponsive documents or changes the order, then you're not doing it the right way because the discovery rules require them to be produced in the manner in which they're kept in your company or in a reasonably useful form. I suppose there's always matters of degree to fight about under the rule. So you know, you shouldn't do what's called a "file dump." If you go to New York, they call it a "mixed cocktail." They like to talk in terms of alcohol there for some reason. But if you are, in fact, producing large numbers of documents in a manner that complies with the discovery rules and you are producing what was asked for, it seems to me that its the other side's problem for asking for the truckload. So I think you have to distinguish the two scenarios. I don't think there's any ethical obligation to tell the other lawyer, you know, "I'm going
to give you this, and notice I've got this 'smoking gun' label." You don't have to label anything. They ask and they shall receive. But I don't think you have to assist them in the handling of the case. So it's a matter of shading, but "mixing them up" is a bad thing.

MR. LEATHERS: Here, I think, in looking at the scenario we've put, you have to play off both against the discovery rule which governs how documents have to be produced in response to a document production request and you the ethical considerations, Model Rule 3.2, having to do with expediting litigation. Are you expediting litigation when you make that kind of a burial into a lot of documents that really are not relevant?

Another very interesting thing is that one of the ethical considerations, Model Rule 3.4, provides that a lawyer shall not unlawfully obstruct another party's access to evidence. Are you unlawfully obstructing their access to that evidence when you make what Rick's calling a "file dump" or a "mixed cocktail," that kind of huge document production response that buries it up in things that are nonresponsive or very marginal. Those are the ethical considerations that go into this thing.

Well, let's take it past that particular point. Here we've got this document. Now, the next thing that we want to do on our scenario, though, is that something worse than that happens. Not only has this huge document production occurred, but the young woman who's an associate in your firm, Tom, learns to her horror by looking a manifest of everything that went to the other law firm that that document was not in there. Now she is really concerned about it, goes back to her office where she had a copy in her own desk drawer, and finds that copy is gone. Now, beginning to feel very unhappy and paranoid about the situation, she comes to you and says, "I thought we were producing that document. I've learned that we haven't produced that document."

Now, what exactly are her rights or obligations under those circumstances as you view it? And let me put that to Dan. Dan, you kind of counsel this young woman who's an associate in this firm. Let's keep in mind that she wants to be a partner in the firm some day and get those blue chip basketball tickets like everybody else has.

MR. RITTER: I'm going to assume for my answer that failure to respond is clearly a violation of the discovery rules and everything else. I think the point here is, must disclosure be made; must the document be turned over? I think step one is to go to Tom, and tell him what has occurred. If Tom says, "No, we're not going to do it," and the young attorney feels it's still a violation, I think she should go to the senior partner in this case. If he says no, then I think that it's clearly in violation of the discovery rules. I think it's outside the boundary of zealous representation under the law, and I think at that point that she would be obligated, herself, to disclose it to opposing counsel.

MR. LEATHERS: Okay. In my hypothetical at this point in time, there's been a clear-cut violation of a disciplinary rule. Model Rule 3.4 says: "A lawyer shall not alter, destroy, or conceal a document." What has happened here in my scenario is that somebody inside the law firm, probably the mid-level partner, has destroyed that particular document. And the young woman, who's a junior associate, knows it. She goes to the mid-level partner and says, "Gee, you know, we're not going be able to do this. We're violating the disciplinary rules." What exactly are their respective roles in this circumstance? Let's begin with her situation. What do you see about that for her, Rick?

PROFESSOR UNDERWOOD: Well, the Model Rules, of course, provide us a little more guidance than the Model Code because we have a series of Model Rules from 5.1 through 5.3 that talk about one's obligations to others in the context of the law firm. So I would assume that she would have to look at Model Rule 5.2, the responsibilities of a subordinate lawyer, and immediately notice that she has no Nuremberg defense or anything. So she's going to have to do something.
Now, I think, the difficulty – first of all, she's going to have to – if the superior lawyer is giving some kind of a reasonable explanation, she can accept it. But here we've eliminated any reasonable explanation. She knows that it's been done and that its wrong. So she has to exhaust remedies within the firm. The next question is, what remedial steps is she going to take? The reality of the practice is that occasionally people have to resign and, of course, we all know nobody gets to be partner anymore anyway. So somebody needs to tell her that, and she'll feel better about quitting. The trickier question, and one which I tend to think about perhaps longer than many lawyers do, is whether you have this obligation to disclose to opposing counsel. I'm not totally convinced that I'm at that point right now. I think that there might be circumstances in which resignation is sufficient, and I think before I tell opposing counsel anything, there might be – it might be more plausible to go to the client rather than the opposing counsel. I think clients have a right to know how their cases are being handled. Hiding smoking guns may be a real stupid move by the lawyer and might do the client more harm than the revelation. Clients have rights, too. So those are the things that should be going through her mind.

MR. LEATHERS: Let's take it –

PROFESSOR UNDERWOOD: Well, she could go into teaching, too, by the way. It's good work if you can get it.

MR. LEATHERS: Let's take it up one level. She and the mid-level partner go to a senior level partner. What exactly is the obligation of the senior level partner under these circumstances? He hears from mid-level partner that the document was a killer. "I knew about that document from 1978. I'm sorry, but it just can't see the light of day. MineCo accounts for a very sizable amount of billing for this law firm. We cannot see them compromised in this particular circumstance." What's the senior partner going to do about it? What is his obligation under the circumstances? What do you think about it, Dan? Let's take it back to you. We're letting you play the senior partner in Tom's firm.

MR. RITTER: Well, again, on the assumption that failure to disclose is a violation of the discovery rules, I guess Rick has pointed toward the clients, but even if the clients say, "Don't do it," I think the senior partner still has the obligation to disclose because it's a clear violation otherwise. So I think it must be disclosed.

MR. LEATHERS: What we're setting up here is kind of a chain of vicarious responsibility; that is to say, the young woman, who's at the bottom of that chain cannot escape personal responsibility herself simply by relying on the fact that the mid-level guys tell her to do something, and that the people above that guy, once they learn about it, don't have an ability to deny and have no consequences flowed to them as well.

Normally, the way the rule would work is that everyone is responsible for his or her own violation of disciplinary rules, but Model Rules 5.1 and 5.2 do set up circumstances in which you may be responsible for the violations of others. And so in the scenario that I've put in front of you, at some point inside that organization, that matter should come to a halt and should be rectified. But let's suppose that it doesn't get rectified, that what happens is the senior level guy says to the young woman, "Those tickets are so good, and there's parking places that go with them. You really ought to be a partner in this law firm, and you know, we've been saying that you're probably going to be one of the youngest people ever to make partner. Can't we count on you to be on board with us in this?" Okay. And she can see it all in front of her, tickets, parking places, club memberships. Okay. So after some soul searching, she decides that she will get on board; she's going to get with the program.

Whereupon, we now have everybody proceed to the administrative hearing at which all of this is going to be discussed. We'll have a hearing officer who will be akin to an administrative law judge. We have present at this particular hearing, counsel for Natural Resources. We have Megaversity making its presentation. We
have the environmentalists putting on their presentation. We have MineCo putting on its presentation. And
in the course of all of this, prior to this administrative proceeding, some people on the other side from
MineCo have begun to suspect that something might really be amiss, that maybe this whole thing couldn't
be carried off very well. And indeed, let us suppose in our scenario that Josh has found Old Engineer –
okay – and Old Engineer has said to him, "Yeah, there's that acid forming formation out there that's going
to be exposed, and when they mine that, jeese, what a mess. It's just going to be awful. See my memo," at
which point Josh says, "What memo?" because he now realizes that in the zillion documents he's got, he
didn't get it. Okay. So they spar around for awhile.

Eventually in the course of the hearing, Old Engineer is called to the witness stand to testify, and the young
woman, who is the junior associate in the firm, is called upon to cross-examine this fellow. She's told in
advance by senior level guy, "The tickets are great, but you've really got to do a hatchet job on Old
Engineer." Okay. Now, let's take up with that particular point. Old Engineer is on the stand and he says,
"Yeah, we did some studies out there, and there's an acid bearing formation, and when they break it into
drainage, it's going to really cause a lot of problems, and I wrote a memo about it, and I recollect all of this
with a lot of clarity."

This young woman begins to examine him by what we would call testing his credibility. She asks him to
recollect other kinds of things that he may have done, and eventually in the course of her examination, she
manages to leave the impression that he doesn't really recall what his name is. She is able to get him so
befuddled that in the end, she is saying, "Well, that was Project 337, and do you recall everything about it?"
and she gives him other numbers, and he doesn't even recall his date of birth. By the time it's over, he's not
certain who he is or where he is. She has done a masterful job, and the tickets are looming closer all the
time as she does this.

What about that? George, let me put that question to you? Here it is in front of a hearing officer in your
Department. You're sitting there. You've watched your employee, former employee put on the stand, and
everybody has been left with impression that he just doesn't know what in the heck he's talking about out
there. But now that you know the facts, that what he's saying is the truth, what do you think about her
conduct in examining him in that regard?

MR. PIPER: Well, I don't think that's improper. I think it's her job to try to get out in this administrative
proceeding exactly what he knows because there are situations where people believe a certain thing to be
true, and upon further examination sometimes maybe the facts don't really come out until it's cross-
examined. I don't think that's improper. In an administrative proceeding, the plan, of course, is for all sides
to look at an issue and try to get to the bottom of it. So I don't think there's anything wrong with her trying
to do that.

MR. LEATHERS: What about that? Let me ask you, Josh. As I see this situation, she's trying to leave that
hearing officer with the impression that that guy is just mistaken, that there is no acid bearing formation and
there was no memo. He's old and befuddled, and he just doesn't recall. When in point of fact, she knows that
what he's said is a hundred percent true. Can she do that? Is that fair?

MR. BARRETT: I believe that if she knows that what the gentleman is saying is one hundred percent true,
there's no question that she cannot attempt to create a false impression before the court or to take a frivolous
position with respect to that issue. And I think that Model Rule 3.1 would address that to some extent, even
though it talks mostly about claims and issues. But I think it carries with it the understanding that you will
not make an assertion to the court that you know to be frivolous or lacking merit.

Second, Model Rule 3.3, "Candor Towards the Tribunal," I think, includes the – "A lawyer shall not
knowingly [(1)] make a false statement of material fact or law to a tribunal; [(2)] fail to disclose a material
fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client . . . " Model Rule 3.3 (4) says: A lawyer shall not "offer evidence that the lawyer knows to be false . . ." It seems to me that these rules should be interpreted to embrace the situation where the lawyer actually knows that this memorandum exists, and it was properly done, and in fact, the situation that has been described earlier where it was withheld in discovery, I think, even further implicates the lawyer in improper conduct of deceiving the court. I think that it is legitimate to cross-examine a witness; it is legitimate to cross-examine a witness that hurts you, even as to one of your client's own documents, but I think there is a limit, and I think the limit is that you can not knowingly adduce false evidence to the court or to the tribunal.

MR. LEATHERS: But let's look at this thing very closely because in truth, she has not affirmatively done anything to the tribunal. She has not offered any evidence directly. She has simply tried to dispute the position that this fellow is taking by calling into question his credibility. She has not put affirmative materials in front of the tribunal. But she knows that, in substance, what it will do, or hopes that it will do, is leave the tribunal with impression that there is no such memo. Now, if she does not say to the tribunal, "There is no such memo," has she violated any ethical rule when she tries to leave the tribunal with that impression, notwithstanding the fact that it is false? A very fine distinction, isn't it? What do you think about that? Tom, what do you think?

MR. MENG: Assuming she hasn't made a false statement, Model Rule 3.3(a)(2) may also govern where it says: "A lawyer shall not knowingly fail to disclose a material fact to the tribunal." She's obviously withheld information or participated in withholding information in the first instance during the course of discovery. Whether at that point, Model Rule 3.3 comes into play, I don't know. It seems rather minor in comparison to her total situation, I think. She didn't have any problem in not furnishing that information during the course of discovery. I guess I don't view her cross-examination technique as a major sin.

MR. LEATHERS: Let us suppose that in this, additionally, we learn that she has spoken with Old Engineer ahead of time and said to him, "Aren't you drawing a pension from MineCo? Are you sure that you really recall that memo that you told me about? I never found that memo. Are you certain about that?" What would you think about her conduct in having those kinds of discussions. Dan, what do you think about that?

MR. RITTER: Well, if she said to him, "I never found that memo," then that's an outright lie, and that's a misstatement, and I think for her to make any suggestions to him that he should testify to that, and particularly mentioning his pension and so forth, I think that's totally inappropriate. I'm particularly concerned that she made a total misrepresentation to the client suggesting that he testify along those lines. I think that's totally improper.

MR. LEATHERS: Okay. What I'd like to do now is follow this up. We've had this fellow on the stand. They've tried to leave this particular impression and, again, I'm borrowing most of this from the movie "Class Action." If you want to go see "Class Action," it is a very interesting movie for lawyers. It's like the "Disarmament-Offense-of-the-Minute-Club," and as I watched the movie with apparently no one there but laymen, I would gasp about every thirty seconds as I watched them take this young woman through this obviously career terminal scenario. But it really does illustrate a lot of very nice points, and if you want to see some really killer, heartless cross-examinations, you have to see this young woman in "Class Action" do the job on this guy and other people. I recommended it very highly.

What happens then, let us say, in our scenario is that the opposing party – and here we'll let it be Josh Barrett – ultimately is putting on his case, and there's got to be this terrible dispute about this memorandum. He knows that Tom Meng has long represented MineCo, is familiar with their operations and so forth, and indeed, that he was representing MineCo during the time that Old Engineer has described.

What happens in "Class Action" is that, surprisingly enough, counsel calls as a witness opposing counsel.
And so we'll have Josh Barrett call as a witness, Tom Meng, whom he's going to examine on the issue of, was there such a memo during that time when Old Engineer says that it existed?

Let's start with that proposition. What about that? What about calling opposing counsel as a witness? That's a terribly dramatic thing in the movie and, actually, it occasionally happens. The rules have been changed to allow, in some circumstances, counsel who are part of the same firm to serve as a witness. What do you think about that device, Rick, calling him as a witness?

PROFESSOR UNDERWOOD: Well, there are certainly circumstances in which the lawyer ends up getting in the position of being a witness, and of course, Model Rule 3.7 changes the rules as to imputed disqualification somewhat. Here I think we already have knowing participation, obstruction of justice, probably criminal at this point, and so this is a rather minor point, that one might offend Model Rule 3.7. Here, if the lawyer is being called to give testimony adverse to the client, I think he probably, theoretically still has imputed disqualification problems under Model Rule 3.7(b).

But the more interesting question, which I think you want to get to is, is there a problem with - don't people play tactical games with this? If you're going to call opposing counsel, you'd better have a damn good reason, and the court will probably require some explanation as to your bases for believing it's not privileged. What are you trying to get? Why is it all right for you to do that? It's the proponent of the evidence that bears on burden. I wish I could carry citations around in my head. There's an interesting case you might want to write down, called Shelton v. American Motors, Inc., where a federal judge makes the observation that lawyer depositions or trying to depose the other lawyer is a "negative development in litigation," and is frequently done to harass and manipulate and intimidate. So parties seeking that kind of evidence bear the burden of justifying it. I think the same would be true in calling somebody at trial. So those are all the considerations. Of course, we all know where this is headed. This is headed in the direction of showing you why you should have resigned from the firm before, and why there might even have to be a disclosure. But really, based on my limited experience with life, the truth does come out, if not all the time, a sufficient numbers of times, that it's probably more practical to be a truth teller than a liar.

MR. LEATHERS: Okay. What happens in the movie "Class Action," which we'll use as our takeoff here, is that the mid-level partner does take the witness stand and is examined on the missing memo. He, of course, knows that the memo is missing, and he is the one who actually took it. What is more interesting than that, however, is that in the course of examination by opposing counsel, they never get a straight answer out of the guy on that particular issue. Every time they ask him a question, I keep waiting for someone to say, "Judge, would you instruct the witness to answer the question?" And the guy gives every kind of evasive answer in the world. But when it's over, he has basically dodged the bullet. He has not perjured himself, I don't think, and so there he is on the witness stand, except for one thing. He is now cross-examined by the young woman who is defense counsel with him in the matter.

So here you are, Tom. You'll be on the witness stand. You've got this young woman who's an associate. I left out the part that they're having an affair, which is also an integral part of the movie, but I didn't put in here because Tom is not the kind of guy who would do that. I don't know if I should have said that because is that to imply that Tom is the kind of guy who has done all the rest of it? Tom, would you rather that I portray you as potential philanderer?

MR. MENG: I want out of this.

MR. LEATHERS: You want out of this. You're on the witness stand. Your associate asks you a direct question. She says, "Now, Mr. Meng, so that we can be clear, so the hearing officer can know once and for all, and we'll settle this forever, was there or was there not such a memo?" And you say, "No, there was no such memo." He has now perjured himself. Okay.
Now, what are the options and duties of the parties? You have the young woman who asked the question. You have the lawyer as the witness, who gave the perjured testimony. Here you have senior level partner who has been sitting at counsel table, and he just heard his partner perjure himself on the witness stand on what's a very crucial matter. What is it that the people ought to do?

Dan, I've been having you be senior counsel. You just heard your partner perjure himself. What are you going to do about it?

MR. RITTER: Well, I think there's an ethical obligation to inform the tribunal. I didn't state at the beginning that in Ohio, it's known as the Model Code, not the Model Rules, so that there may be some difference. But I believe there's an ethical obligation to advise the tribunal, and I think at that point, that you would ask to talk to the judge in chambers, and go in and advise him.

MR. LEATHERS: The situation is desperate, isn't it? I can well remember when I was a third-year law student, we all had to work in legal clinic, and the first case that I ever got sent to court, I'm sitting there by myself with a client in a minor criminal misdemeanor case. The guy takes the witness stand, and it suddenly occurred to me, he just perjured himself. It's probably one of the sickest feelings I think any lawyer can possibly have.

And so what is it that's to be done under the circumstances? What do you think about it, George? What do you think you ought to do? You're sitting there on the other side. They've just offered perjured testimony. What do you think their duties are?

MR. PIPER: I think that they should inform the hearing officer. It's a tough thing, but I think in a circumstance like that where the parties know that perjured testimony has been given, that they need to make the hearing officer aware of it. I don't know that they have to make it right during the proceeding, but I think the hearing officer needs to be told that it has occurred.

MR. LEATHERS: The rules are very interesting in this scenario because what they basically contemplate is that something has got to be done to remedy this. The solution you've heard from Dan and from George so far is that you ought to do something with the hearing officer who would be the equivalent of a judge under these circumstances. But are there other options? Are there other places these people could start? Josh, what do you think?

MR. BARRETT: Well, the rule does speak in terms of remedial measures if the evidence has already been offered. I'm assuming that – actually I'm not clear what the hypothetical is. If the female, the young associate knew that the mid-level partner was going to give false testimony, she had an ethical duty not to do that, not to put that testimony on at all.

MR. LEATHERS: That's an interesting question. Why did she ask that question? Is it possible that she was asking it for this guy to finally get right with the world and say, "Yes"? In the movie, you can tell from the eye signals, she's expecting "no" to be the answer – okay – and the guy gets the hint, so that they're in it together in the movie.

MR. BARRETT: If it turns out that the associate, in putting on the evidence, really thought that there was going to be a truthful answer, and it turned out that there was – that the answer was perjured, was false, at that point, there are options available.

Now, the comments in the Model Rules speak of consulting with your client. If your client is giving false testimony, then you have an opportunity to speak to your client about making this situation right. I would believe that in this circumstance, that the same could and should be done with the mid-level partner, to ask
the court for a recess and to speak to the person and say, "Look, I'm not going to let you perjure yourself. I'm going to have to tell the tribunal about it, but I suggest that you do so yourself and clear this matter up." I think that would be the appropriate next step. From there, if the mid-level partner would just then refuse to comply with that request, at that point, I think there is an obligation to make the perjury known to the tribunal or to opposing counsel and, in this situation, I think the tribunal would be appropriate.

MR. LEATHERS: What the Model Rule says is that, in this circumstance, if it is necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. So let's give her the benefit of the doubt and think that she thought finally the guy would do the right thing and he would say, "Yes, there was such a memo." She's shocked. He really did perjure himself. Okay. Not only has he deep-sixed the document, now under oath, he's really done it.

What is she going to do about it? It's been suggested that she's got the obligation to do something. Let's figure out what her options are. First of all, could she simply say, "That's it. Tickets or no tickets, I'm never going to be a partner in this law firm. I quit the law firm, and I'm going to move the court for leave to withdraw as counsel of record, leaving the law firm in place, but me out." Is that an acceptable solution for her? Dan, what do you think?

MR. RITTER: I don't believe so, because there are couple issues there. One, I assume she's counsel of record. She's involved in the case, and her withdrawal might have some impact on her client. But the thing that bothers me is that it simply doesn't resolve the basic issue, which is getting the truth before the tribunal. I think withdrawal or leaving the firm doesn't answer the question, and I don't believe it's sufficient action under the rules. You simply have to bring it out, and I believe that the proper way is to advise the tribunal under these circumstances.

MR. LEATHERS: Before she takes the step, herself, of advising the tribunal, would you think it's appropriate for her to have a conference inside with the mid-level partner and the senior partner, and say, "Look, guys, we're in deep. It's getting nowhere but worse. Let's try to find some way that will save all of us professionally," before she advises the tribunal. Could she do that?

MR. RITTER: I think that with the history of this case in which she has been rebuked at every effort and as a participant herself, that's a futile effort in this case. I don't think that she can reasonably expect that that would lead to the appropriate resolution. I think it's a futile gesture, and I don't think that it would add anything.

MR. LEATHERS: So you don't see any possibility of her remedying this inside the law firm. What do you think about her remedying it outside the law firm with the client? We have not, up until this point, ever had any of these people say to the client, "By the way, did you know that we're trashing the documents and perjuring ourselves in order to help your business?" What about that? Go to the client? Can she do that?

MR. RITTER: Yes, she can do it. I guess it's an alternative. My feeling on that might be that the client – that would be a very difficult one for the client to handle, and I think that, although you could do it, once again, if the client said either, "Well, it's so damaging, I don't want it brought out," or more likely, the client would say, "It's your decision. You're my lawyer." At that point, I think you're into the tribunal again.

MR. LEATHERS: Let us suppose that in a big organization like MineCo what they've been doing is coordinating, really, with MineCo's inside counsel, and that's with whom she would have contact. But that above MineCo's inside counsel, you've got a President and you've got a Board of Directors. Would any of these problems have been obviated earlier if this young woman had gone to the client? What do you think about that, Rick?
PROFESSOR UNDERWOOD: Well, I think that's right. What we've done is we've taken this scenario out to the point where, by not doing reasonable things in the first place, we've now reached the point of no return, and it's impossible to remedy the situation elegantly. The client is supposed to be consulted; the client is supposed to determine the objectives of litigation, and should be consulted on the means. (33) What's happened here is that these lawyers have been doing these horrendous things all under the assumption that they're doing it for the client, when it really doesn't sound like it's benefiting the client at all. So when these things are confronted early on and there's proper participation with your client, you'll get a better result. I agree with the last speaker that it's too late now. There isn't anything you can do.

One of the things that intrigues me about the scenario is that I'm not a criminal defense lawyer or a prosecutor, but I wonder if she did not actually commit a crime herself when, it seemed to me, she was deliberately injecting this perjury since she knew it was false testimony. So we may even have the potential of yet another criminal violation on top of the possible obstruction of justice and everything else. So, I guess I wasn't completely responsive, going to the client in the first instance is always the best, I think.

MR. LEATHERS: Yeah. Actually, if you would back up through this scenario, what you were hearing from panel members all along were answers that would have derailed all of this at a very early point in time, beginning when Tom said, at the very outset, it's discoverable and it has to be produced in an appropriate fashion under the rules.

All of this scenario flows basically from one misstep after another. There were an infinite number of places in this thing to have saved all of this from the total professional disaster that it now has become. So literally at any point, a correct step, a correct thought could have saved it. There were so many different ways to save it along the way.

What I've done now, and I've backed it up a step and looked at still another way to have saved it. There were ways internally in the law firm to say "no." If those ways proved unsuccessful, there probably were potential ways outside that firm to save it way back down the line, one of which was going to the client. So let's begin with that going to the client option. Early on, when she realized the document has been deep-sixed and that she couldn't seem to get anything done inside the firm, she goes to the client, and let's have there her begin with in-house counsel for the client.

Now, this is a gutsy thing, obviously, isn't it? I mean, if you want to talk about something that's a true test of character, here it is. Not only is she resisting the carrot that she can see out there, you can see how making this particular move is probably terminal to her career in that law firm and maybe even in most other big law firms. I mean, you really can see that kind of threat. But let's assume she's got the nerve or the character do that. She goes to in-house counsel and he says, "I don't want to hear about that." Okay. Have you sufficiently informed the client at that point by simply ceasing to talk with in-house counsel?

George, what would you think about her conduct under those circumstances?

MR. PIPER: No. I think in a situation like that, she needs to go to the officials of MineCo if need be, and discuss it with them because they need to know specifically what the problem is. It could be that what she's been told by in-house counsel, that's not the end of it, and he may be overruled, or that may be a way to correct the problem right there. I would say that she should go further.

MR. LEATHERS: What that's raising is really the problem of in representing MineCo, who do you represent? We explored this a little bit earlier when we were talking about the University. We were making the point, do you represent their Athletic Department? Do you represent the University as a whole?

Now when you represent MineCo and you do not get what you think is an appropriate answer from their in-
house counsel, you go above him. This is contemplated, apparently, in the rules on representing organizations, perhaps even ultimately to the Board of Directors. Each step, it seems to me, is more and more difficult as a practical matter for a person to take. Each one of those requires still more nerve because now you go to the President, after having been rebuffed by his counsel, saying, "Gee, I'm a low level associate over at this law firm, and I'm here to tell you, Mr. President, that something terrible is happening." That's going to be a very difficult situation for her, and to get above that, to the Board of Directors or other officers of the corporation, is going to even be more difficult still, it seems to me.

Now, what we'll do now is that she's offered this testimony, the end of this entire thing, and that she does not do anything to recant the testimony. She does not go to the client. She does not remonstrate the partner who perjured himself. Instead, they just quit.

Now, what happens in this scenario that's very interesting, however, is that the other side – and in my hypothetical, this will be Josh – calls a witness, and the witness is New Engineer. New Engineer has been on a witness list and everybody knew about him. Josh asks New Engineer a few questions and says, "Do you know anything about there being an acid forming formation out there on this particular property?" And he says, "Oh, yeah. Everybody knows about that. Old Engineer did that study out there years ago and he wrote a memo about it."

Now, here out of the mouth of one of the employees of MineCo is the confirmation that the testimony you just heard from their lawyer was perjured and that the impression that she left of Old Engineer is false. And now, as the truly dramatic device in this particular case, what you learn in the movie "Class Action" is that the reason they knew to call New Engineer is that the young woman has gone to Josh and said, "There are some problems in this case. If you really want to make it, you ought to call New Engineer as a witness and see what you get." Okay. Now, that's what she's done. What about that conduct on her part? Is that a corrective measure for the things that you've seen, the deep-sixing of a document? What do you think about it, Josh? She comes to you and tells you that. You go to New Engineer, find out what he's going testify to. Now you know you've got it.

Clearly, you can show what they've done now. What do you think?

MR. BARRETT: Actually, I'm not sure. It seems to be somewhat unclear because I don't really think that that's the appropriate way to handle that disclosure. It seems to me that the disclosure of somebody's perjury ought to be a discreet event that ought to be handled in connection with the rules rather than going sort of outside the ordinary framework of representation and giving a hint to opposing counsel. I don't know that I can cite a specific rule on that, but my inclination would be that that really be the inappropriate way to handle it.

MR. LEATHERS: Can there be any question that the information she's disclosed to Josh in my scenario is confidential information which she normally would have been expected not to disclose to the other party? There can't be any question, I think, on that particular point.

The thing that's interesting about this Model Rule is that the comments say – and this is talking about having offered false evidence: "If necessary to rectify the situation, an advocate must disclose the existence of the client's deception" – and here's what I want to focus on – "to the court or to the other party."(35)

Now, in my scenario, what she has done in substance is disclosed that, although not directly, but giving sufficient information to lead Josh to the path where he now knows false evidence has been offered. She gave it to him rather than giving it to the hearing officer. What do we all think about that solution for her? I think what you've been hearing from the panel was a preference that this ought to be disclosed to the tribunal itself rather than to the other party. But the comments to Model Rule 3.3 do say "to the other party."
Is her action violative of disclosing confidential information? Do you feel as comfortable with that as you would with her disclosing it to the hearing officer? Dan, what you do think on that point?

MR. RITTER: I'd like to again point out that Ohio Model Codes state — and the Model Code, interestingly enough, in that circumstance says that if you advise your client, and the client refuses or is unable to make it correct, then you shall reveal the fraud to the affected person or the tribunal. The Model Code adds the words "except when the information is protected as a privileged communication." And the Ohio Model Code eliminates those last quoted words so that the Ohio Model Code doesn't give the attorney protection for privileged communications. So I think under the Ohio Code, you would have to proceed to let the tribunal know what's going on.

MR. LEATHERS: Am I right in what you just read me, though, that there was an "or" in there, that it was "to the affected party or to the tribunal"?

MR. RITTER: "To the affected person or the tribunal."

MR. LEATHERS: Okay. What do you think about her choice to do it by disclosing it to the affected person rather than to the tribunal? Does that bother you more than disclosing it to the tribunal?

MR. RITTER: Well, I think that is acceptable if the affected person is going to take the next step which is to go after the document. But I think, again, if you look at the purpose of the rule as being to correct it and to get it in front of the fact finder, I would be concerned if the affected person said for some reason I can't believe what it would be — that he wasn't going to do anything about that. I think you would then have to go beyond that. I think just compliance with the rule, without getting into the spirit of it and the purpose of it, would not be enough.

MR. LEATHERS: What do you think about that, Tom? I don't know. As I look at this stuff — now let me put this to Tom — I just kept thinking throughout this, that this kind of conduct, I would not feel comfortable disclosing to the other party. I would feel more comfortable doing something with the tribunal than I would going to the other party. To me, that business about disclosing confidential information to opposing counsel really has more of a kind of Benedict Arnold smack to it, than if you went to the official who's in charge of the proceeding. And I think what we're seeing is that under the Model Rule, perhaps you have a choice, and maybe my reaction to that is just personal.

Tom, what do you think on that point?

MR. MENG: John, her approach to go to the other counsel, I think — well, the main thing is — maybe not the main thing, but the important thing is that she does have a client who is involved in a piece of litigation and who is in jeopardy of either losing substantial amounts of money or mining rights to property. So we've been through the situation where she goes to the client and tries to get it resolved in a manner which might allow the client to salvage some hope in the litigation. Going to the other side and attempting a settlement at that point, I assume, would be one thing that the client should consider.

MR. LEATHERS: They might consider withdrawing their permit application, I would think, under those circumstances and come back later.

MR. MENG: They might, but at some point — I mean, Kentucky, as I understand it and under the Model Rules, there is what is known as a "squeal rule" where at some point, she does have to advise the — what the rule says is the appropriate authority, where there's been some violation, and that she do it during the course of the litigation. I think clearly if she chooses the avenue to inform the other side, that at some point, the tribunal or the appropriate authorities do have to be informed. I guess the gut reaction that everybody has is
that the tribunal should be informed based upon the concept that the fraud has been perpetrated upon the tribunal at that point. Maybe at some point earlier in the proceeding, during the pre-trial discovery and all, it might have been appropriate just to tell the other side, but it's gone a step further once the testimony has been offered to the court itself.

MR. LEATHERS: So that perhaps by that time, disclosure to the other party might not be enough, in your mind, to rectify the situation appropriately.

MR. MENG: John, it seems to be sort of a conflict in the sense that you do still have a duty of loyalty to your client, and if the best way of getting out of it from the client's standpoint is to tell the other side, maybe that's the way to approach it. But I think that would generally contemplate that you have consulted with the client, and the client has agreed that it is most appropriate to go to the other side and effectuate some type of settlement or withdraw the permit or do something other than subject yourself to whatever final ruling the tribunal may make.

MR. LEATHERS: Rick, what you do think under those circumstances about the choice between tribunal and the opposing party?

PROFESSOR UNDERWOOD: Well, I think the way this has been played out, I tend to agree that fraud has been committed on the tribunal, too, and I think your duty runs to the tribunal. I think in the context that we've set up, which, of course, is wildly implausible, the court is going to then advise the opponent, also. I mean, that's the way this scenario is going to be played out. So there may be reasons why the comments were drafted the way they were – or the rule was drafted the way it was. Well, I'm not sure. Sometimes these things don't have real reasons why they're drafted. It's a political, legislative process. But I would not want to leave the tribunal out on this. I think a fraud has been committed on the tribunal, and everyone is going to get advised sooner or later, except I know that you've probably got one more twist in this already screwy situation.

MR. LEATHERS: Well, let's take our scenario down the road. What happens is that the fraud is disclosed. The hearing officer says, "This whole thing has got to come to a halt. Let's back up on this. You can decide later on whether you want to continue with your permit application." Basically, it's like a mistrial if you were in a civil proceeding because the whole thing is so badly garbled up by the failure to disclose documents, perjured testimony, and those sorts of things, and so we back up. Some time in the future, someone comes back to try to process this thing through again, this time in a legitimate fashion, this time with the document being disclosed and so forth.

§ 2.04. Communications with Persons Represented by Counsel.

MR. LEATHERS: Let's take up some of the sorts of ordinary things that could happen in the ultimate relitigation of this with a clean disclosure taking place up front.

One of that I'd like to discuss at this point is the concept of communication with persons who are represented by counsel. Certainly, it's common in investigating a matter, prior to litigating it in an administrative tribunal or in a court, to want to be able to find out what people know about various things. One of the things that comes up pretty frequently in natural resources practice is, as I said before, somebody is going to want to know what MineCo's prior record was like as a mining company in other areas.

Let us suppose now that Natural Resources is represented here by George Piper. They have field personnel who inspect MineCo's operations in other areas. What you find is that Josh Barrett wants to talk to your inspector. What do you think about that, George? Can he go to your inspectors in the field without contacting you? Can he talk to them about MineCo's prior history because that might be relevant to his case, that MineCo is not going to comply with any permit that you issue?
MR. PIPER: Well, I think that comes under Model Rule 4.2, and it would be advisable for him to contact me first in a situation like that. After talking with him as to what he's trying to get at, depending on the circumstances, then, maybe he could talk to our people, but essentially, he should talk to the in-house counsel of the agency before he goes and starts interviewing inspectors. As a matter of fact, though, most of this goes on with the client actually talking to the people in the field, again transmitting the information to the attorney. So I often never know about it unless it would come up somehow.

MR. LEATHERS: Let's kind of take different types of persons with whom Josh might want to communicate. Certainly if Josh wants to communicate with the Secretary of the Department, the head of the Department, would you have any doubt that he would have to do so only by permission from you and through you?

MR. PIPER: Yes, I would think he'd have to go through me on that.

MR. LEATHERS: Okay. So that at one end, you've got somebody who's the head of the agency. They clearly are represented by counsel in our hypothetical. Down at the other end, you've got field personnel, and they are not policy making people, but they may have factual knowledge that would be relevant to preparation of anybody's case. Should he communicate with them only through counsel who represents the Department? This is a continuing controversy in Kentucky. There you'll always hear people at Natural Resources arguing about whether or not that can be done.

How would you go about determining whether or not that field person is represented by counsel in this circumstance? Josh, if you wanted to interview him, what kind of things would you consider?

MR. BARRETT: Well, of course, the State and the Department of Natural Resource have counsel who represent the interests of the State. One of the things, I think, that is especially difficult for everybody involved in these sorts of things is that the relationship with the agency is one in which there's a lot of open communication typically on a variety of subjects which may or may not be contested in connection with this particular litigation. Certainly by reason of the Freedom of Information Act, people have the right, I have the right, to go over to the Division of Energy and ask to look at files. And also, this would apply to our Surface Mining Act as well. And I'm going to have contact in talking to people from time to time.

There are also situations in which people have contact with inspectors on kind of general matters that have not crystallized in any sort of litigation. So I think it is very confusing, and I think there is also an open question as to whether or not these inspectors have an obligation to converse with interested members of the public. As you know, SMCRA has extensive provisions for citizen participation, and it involves and really depends on citizen participation as a part of its enforcement mechanism. So I think certain public policy issues and interests are involved here, and I think that it is a legitimate position to take that you can talk to any inspector in the field about any matter.

As a practical matter, being in litigation or being in a contested matter, it's best to recognize that you are going to be in disputed factual situations where the representation of an inspector may be taken as an admission, and I think that the rule really does look at those issues. In other words, if a person is represented, is an employee of the state, and his statements will be taken as an admission by the state, the rule would seem to apply unless there is a public — unless the person is authorized by law to have discussions with the person without counsel. So it is a very tricky area. I think the cautious route is probably the best route for people litigating on the environmental side, which is, if you know you're into the litigation, you probably ought to speak with counsel and make sure it's okay with counsel that you communicate directly with the inspector in the field. But I don't believe that that is a legal requirement. I think it is just a prudent practice, if you can.
MR. LEATHERS: Josh, might the position vary depending upon how you see the Department lining up in the litigation? Let's suppose that the Department is going to be opposed to issuance of this permit, in which case their interest is consistent with your's versus the other situation in which, let us suppose, they were going to be supporting of the issuance of a permit? Would that make a difference to you?

MR. BARRETT: Well, it does and it doesn't. Again, if I believe the Department is going to be aligned with me, in all likelihood, I'm going to talk to their lawyers about it. I'll have the advantage of being able to work with the lawyer. I think the issue is much trickier, though, when you are in an adversary position with the Department and they're concerned about the people in the field making admissions which are going to be used again in court.

MR. LEATHERS: If you look at the comments to the Model Rules on communicating with persons who are represented by counsel, the rule itself just basically says: "You shall not communicate with persons who are represented by counsel, except with permission with their counsel." But in trying to flesh out who's represented by counsel, the comments, I think, focus on why it's dangerous for someone to communicate with another person without doing it through their counsel. One is if the person you're communicating with has managerial responsibility, you shouldn't do that.

The second thing they say is that if it's a person whose act or omission might be imputed to the organization that you're talking to, and finally, in the evidentiary sense, if what you hear from that person would constitute an admission or a declaration against interest as against that organization, you ought not to communicate with them except through their counsel. So that they try to focus on the inherent danger in talking to those people rather than on the level at which parties cease to be represented by counsel.

You can put this in different context, though. Let us suppose, for instance, Tom, and here we'll have it, that you're rehabilitated. You're back into the fold. You did the right thing from the outset. You're representing MineCo in your usual, upright fashion, when you learn that Josh wants to interview Old Engineer. Is Old Engineer a person who is represented by counsel? He is no longer your employee. He is a pensioner of MineCo. Can you insist that Josh interview him only in conjunction through you? What do you think?

MR. MENG: John, I didn't understand your statement.

MR. LEATHERS: I'm asking you whether or not based on the fact that he is a former employee of MineCo, that makes him a person represented by counsel, so you can insist that they communicate through you. What do you think?

MR. MENG: Assuming his position to be what I believe it to be under the rules, I think it would as a person whose testimony would constitute an admission.

MR. LEATHERS: I think that's a very hard question, and the reason I ask this is I just saw a Kentucky case in the Kentucky Law Survey or Summary the other day that I believe took the position that one who was a former employee was represented by counsel, and hence, you had to communicate through their current counsel. I would have normally thought that if you looked at it at in terms of him no longer being an employee, you'd be free to talk to him. But I wanted to alert you to the fact that there may be, at least in Kentucky, a decision that goes the other way. If you look at the purpose behind the comments, Tom's response, I think, was a hundred percent on point, that what he's afraid of is he's my former employee. What he says might constitute an admission against me because he had that connection during the time period that he'd be talking about, and so I would want to know and be informed before he could discuss that under those particular circumstances. Rick, do you have a comment on that?

PROFESSOR UNDERWOOD: Yeah, I do. The only Kentucky case I'm aware of is another court case that
went the other way, and it cited the recent ABA Opinion stating that it was not the intent of the rules to change the conventional wisdom, the conventional wisdom being that former employees are fair game, that they were not intended to be covered by this. And I think it's a hot issue. It's always been my position that you're not supposed to deliberately induce people to violate privileges and stuff but, in the abstract, employees are fair game.

Under the evidentiary rules, a former employee is not going to be making vicarious admissions under the hearsay rule because, in order to make a vicarious admission, you have to be employed at the time of making the admission. I think the arguments to the contrary are strained, and I think what you see lawyers doing is saying – I saw a case just the other day where the lawyer took this position, and I don't see how you can sell this to a judge, and the judge was not impressed. The lawyer lost his credibility. He said, "I have no obligation to produce the former employee at deposition because he's not my employee, but you can't talk to him either."

Now, you know, you can't get away with those kinds of arguments. I think those arguments are too clever. I don't think they're going to fly. I think the courts will follow the ABA position. But there's a plausible – there's an aura of plausibility because of the comment to Model Rule 4.2, but the ABA has repudiated the position and has said that's not what the intent of the rule was.

§ 2.05. Representation of Whom -- Entity or Employee?

MR. LEATHERS: Finally, in conjunction with the question of who is represented when you represent an organization, I want to close with this hypo which I've always felt was extremely difficult. Let us suppose that, in the course of preparing MineCo's case to go to trial, the now rehabilitated Tom Meng is talking to New Engineer, a MineCo employee, and he's talking about, "Gee, what do you guys do at different places?" Tom learns from New Engineer that New Engineer has, at another mine site, been falsifying water monitoring reports. In fact, he's been showing compliance with the various guidelines that are required, when, in point of fact, they don't meet the guidelines.

Now, you're discussing with this with somebody who's an employee, Tom, of the organization that you represent. What are your duties to that employee when that occurs?

MR. MENG: I am talking to an employee who was an employed –

MR. LEATHERS: Who is an employee right now, and what you've learned is that at another site, totally unconnected to one we're talking about, he and others have been falsifying water monitoring data in violation of various civil laws and, perhaps, in violation of criminal law as well. What do you do in talking to that guy on that point? The other side is going to want to know this because they're going say, "That shows the scum that they are. They dont comply with permits." So this is very dangerous.

MR. MENG: At that point, that particular individual has engaged in conduct that may lead to consequences to him individually – first of all, I need to tell him that I represent the organization, and that I don't represent him. He then needs to decide whether he needs independent counsel to advise him. Until he makes some type of informed decision on consultation, I suppose I must stop questioning him temporarily.

MR. LEATHERS: This is a very hard point, I think, and when our firm encounters these kinds of problems, as we have from time to time, one of the things that we do is to advise this person that we're talking to whom we represent – the organization – not you individually – and then we have even gone so far as to advise our contact inside the organization, who may secure independent counsel for that particular person to advise him about talking further with us.
In closing, one of the things that I find most interesting, is that if you represent foreign corporations and foreign nationals, they may have a different view of the corporate culture than Americans do. In particular, you may find them more trusting that you are going to do the right thing for them because we're part of the same family. Model Rule 1.13 makes it very clear that you represent the corporation, and that if the corporation's interests may be adverse to those of the individual, you've got to put the individual on notice of it. In the context of foreign nationals, that sometimes can be very difficult – to make them understand how it could possibly be true that their interests don't coincide exactly with the organizations.


4. 2. Model Rule 1.5(a); Model Code DR 2-106(B).

5. 3. Professor Underwood has no problem with "underbilling," even if it is done for the purpose of securing future business. However, in 7 years as an "Ethics Chairman," he has yet to encounter the situation.

6. 4. Compare Model Rule 1.5(e) with Model Code DR 2-107(A).

7. 5. See Model Rule 1.5(b).

8. 6. See Model Rule 1.5(c).


10. 8. See Model Rule 1.7(b) and Model Code DR 5-101.


12. 10. See Manning v. Woring, Cox, James, Sklar, & Allen, 849 F.2d 222 (8th Cir. 1988).

13. 11. Model Rule 1.7 comment [5].

14. 12. *Id.*

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


18. 16. Model Rule 1.8(d); Model Code DR 5-104(B).

19. 1. Not to be confused with the "Rock" group of the same name.

20. 2. See Model Rules 3.4(a), (c), and (d); Model Code DRs 7-106(A), (C)(7) and 7-109(A).


23. See also Model Rules 3.4(c) and (d).

24. See Model Rule 5.2(b).


27. Compare Model Rule 4.1 with Model Code DR 7-102(A)(3) and (A)(5).


29. We really do recommend it on moral grounds too.

30. Model Rule 3.3 comments [4]-[13].

31. Model Rules 3.3(a)(4) and 3.3(c); Model Code DR 7-102(A)(4).


33. See Model Rule 1.2(a).

34. Model Rule 1.13(b) and (c).

35. Model Rule 3.3 comment [3], "False Evidence" (emphasis added).

36. Model Code DR 7-102(B)(1).

37. Actually, the Supreme Court of Kentucky deleted Model Rule 8.3 (Reporting Misconduct) when it adopted the Model Rules. Perhaps Tom was referring to Model Rule 3.3(a)(4).

38. See KBAE-332 (1988) (Model Code DR 7-104(A)(1) should be narrowly construed in this context.)


40. Model Rule 4.2; Model Code DR 7-104(a)(1).


42. Fed. R. Evid. 801(d)(2)(D).


44. Model Rule 1.13(d).

45. See also Model Rule 1.13(e).