

CHAPTER 2

Environmental Ethics – A Panel Discussion⁽¹⁾

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§ 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.⁽²⁾ 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,⁽³⁾ 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