

CHAPTER 1

Representing The Corporate Criminal: Special Problems and Ethical Considerations⁽¹⁾

John R. Leathers, Moderator

Frost & Jacobs

Lexington, Kentucky

and

Professor Forest Jackson Bowman

West Virginia University College of Law

Morgantown, West Virginia

MR. LEATHERS: Let me begin by saying that ethics presentations generally have a tendency to sound a little like Billy Graham on the soapbox. When I taught this subject years ago at the University of Kentucky, it struck me that it was really a very terrible thing to teach in the classroom for that very reason. We have been fortunate in borrowing an idea that I first saw done by Professor Arthur Miller from Harvard, who did it at a Kentucky Bar Association meeting several years ago.

What we basically try to do, as one of the members of the panel said, is to return everybody to law school, but with the benefit of the experience that they have gained in the practice of law over the years.

What we have is a hypothetical scenario placed before the panel, each of whom is assigned a different role in this particular scenario. The facts will unfold through a variety of developments. The thing about it is that, if you begin any ethics problem knowing where it's going to go, in point of fact, all of us could probably avoid the ethical pitfalls. The truth of the practice of law, however, is that the facts unfold around you and involve you; it's because of this that the ethics get considerably more difficult--and the economics of the practice of law figure into that as well.

So what we want to do today is take the scenario and work it through with a variety of participants who are going to role play. They don't know any more than you do about how this is going to unfold, so what you are going to see is the development of a hypothetical situation with them.

Let me introduce the members of the panel first, so that you can understand the roles they are going to play. Over on the end we have Forest Jackson Bowman, who is a professor at the West Virginia College of Law. He is an ethics teacher and is going to, sort of, be our umpire.

We will keep a score on ethical violations by various members of the panel. We don't have a scorecard in here. Professor Bowman is going to keep that in his head.

Sitting next to him we have James L. Dickinson, who is with the Natural Resources Environmental Protection Cabinet in Kentucky. This is going to involve a hearing in front of the Cabinet, and he is going to be counsel for the Cabinet for that proceeding.

Seated next to him we have Rick A. Harrington, who is general counsel of CONSOL, Inc. He is going to play the role of corporate counsel--inside counsel--in this particular transaction.

Seated here we have Anna Daily, who is with the Charleston, West Virginia, office of Smith, Heenan & Althen. She is going to be outside counsel for the corporation in this proceeding.

Seated over here we have a really last-minute player, my friend Dick Ward, from Wyatt, Tarent & Combs in Lexington, Kentucky. Dick is going to represent a low-level employee in this particular proceeding, George "Bubba" Fugate.

Seated next to him we have Rebecca A. Betts from the Charleston, West Virginia, firm of King, Betts & Allen. She is going to end up being counsel for a supervisory level employee in this proceeding.

Finally, on the end, we have Phillip B. Scott, who is going to take the place, take the part of a U.S. prosecutor. Phil is an Assistant U.S. Attorney in Charleston.

So that's the way the group is going to set up. The situation basically is that a major foreign corporation--Mega Coal Corporation--has a wholly-owned U.S. subsidiary--Mega U.S.A. That wholly-owned U.S. subsidiary in turn, has a wholly-owned subsidiary--Mega-Kentucky--in the mining business in Kentucky.

That subsidiary in Kentucky is going to apply for a new mining permit in a watershed where they previously have not been mining. There has been some mining in the watershed previously. That was pre-1977 mining. Some of the remains of that mining process will actually be improved by the mining under the proposed permit.

The area was clear-cut of timber around the turn of the century. It now has second-growth timber which is eighty or ninety years old or so. And there is a stream that goes through the particular area.

In charge of getting this particular project permitted is a fellow who works for the company whose name is Bubba, and he is going to be Dick Ward's client.

He has a young woman working for him who is an engineer. Her name is Suzanne Mullins. She is married to Jason la Pell, a fellow who has a degree in aquatic biology and is an investigative journalist with environmentalist ties. She has been in charge of getting the permit application together.

She takes Jason out one day to show him the site, Pour Fork Branch of Disadvantage Creek. They have a discussion about all the things that are going to take place. When she goes down to place a bottle of wine in the stream to cool, she sees a movement. Using Jason's butterfly net, she scoops out what turns out to be a fingerling brown trout.

She realizes that this particular area, unbeknownst to her or other members of the company, in point of fact, is supporting a native trout population. Apparently they are even able to reproduce in the area. She feels ill at the thought of this and asks Jason to take her home.

So that's the basic fact situation that we have.

Now, where we are going to go from here is as follows: After figuring this out, Suzanne faces a dilemma as to what she is going to do about it. She has not told Jason about the brown trout that she saw in the stream.

She decides the next day that this is so important to her future in the company, and so important to the company's status as a wholly-owned subsidiary of another major company, that she is going to do whatever it takes to get this permit. She feels that if the presence of the trout is known, the permit will not be available

because, either the trout population will be damaged in the mining process, or, even should they survive, the water temperature will be raised sufficiently so that they will not be able to reproduce.

What she decides to do is to get rid of the trout. During her lunch hour at the site the next day, she has with her a quantity of a toxic substance. She goes as close to the headwaters of the stream as she possibly can. She pours that into the stream. The little fellows float to the surface belly up.

She is horrified, however, to find out that, not only are there fingerling trout in there, there are trout as much as six and eight inches long. They all sweep on down the watershed and, from there, we take off with the scenario.

What happens later to her in the day is very disturbing. She has to take a water quality sample later in the day and test it. This will ultimately have to be reported and supplied to the regulatory authorities. It also is included in the permit application package that they are trying to finalize.

When she sees the results of the water quality sample, she finds that the pH of the water has been changed dramatically and there is now manganese in the water at a level not previously present.

She doesn't know why this is happening. She had thought that nothing that was done with the toxic substance would affect any of that; that it would have washed right on out of there. She consults a basic chemistry manual and learns that the toxic substance has caused a reaction that has raised the particular parameters of the water for that point in time.

So here she is, she has taken a sample, she has got a bad result; what is she going to do about it?

We do not know. All we know is that, a week later, a water quality report is submitted to the regulatory authority. It makes no mention of the elevated pH or manganese. That report is signed by Suzanne. Shortly thereafter, a permit application is filed with Natural Resources and Environmental Protection Cabinet. It is signed by Bubba. It also makes no mention of those elevated conditions, nor does it mention the presence of trout in the stream.

Now, it's at this time, Dick, that Bubba shows up at your office. You are a criminal defense lawyer. You represent persons primarily in DUI's and so forth, but Bubba has seen your name in your television advertisements and has come to see you.

Is this a great role for a Wyatt Tarrant lawyer, or what? You've got to love this.

So here is Bubba, your client, Dick, and he says to you, "Gee, I'm really worried about what is going on at Mega. We are applying for a surface permit, there is this woman that works for me, she is married to an environmentalist, and the guy works for a newspaper, you know, and so I'm a little antsy about what's going on.

"I think there is something funny going on in this permit application that we have got going on here, and I'm just wondering if I shouldn't have a lawyer to talk to me under these circumstances and to tell me what my possible involvement may be in all this."

Now, first of all, Dick, let's assume that you have had some experience in the past in dealing with crimes under things like the Clean Water Act.⁽²⁾ What is it that you're going to do with Bubba when he first talks to you?

MR. WARD: Probably I'm just going to sit down and interview him. I'm assuming I have no conflict of interest⁽³⁾ at this time with any other role relating to the company or the other persons involved. I likely