

Ethical Principles for Corporate Counsel in Energy

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Ethical Issues in Environmental Law – It's Not Easy Being Green

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It's Not Easy Being Green

- Background
- Hypothetical
- Ethical Considerations
- Legal Considerations
- Measures to Minimize Ethical and Legal Risks

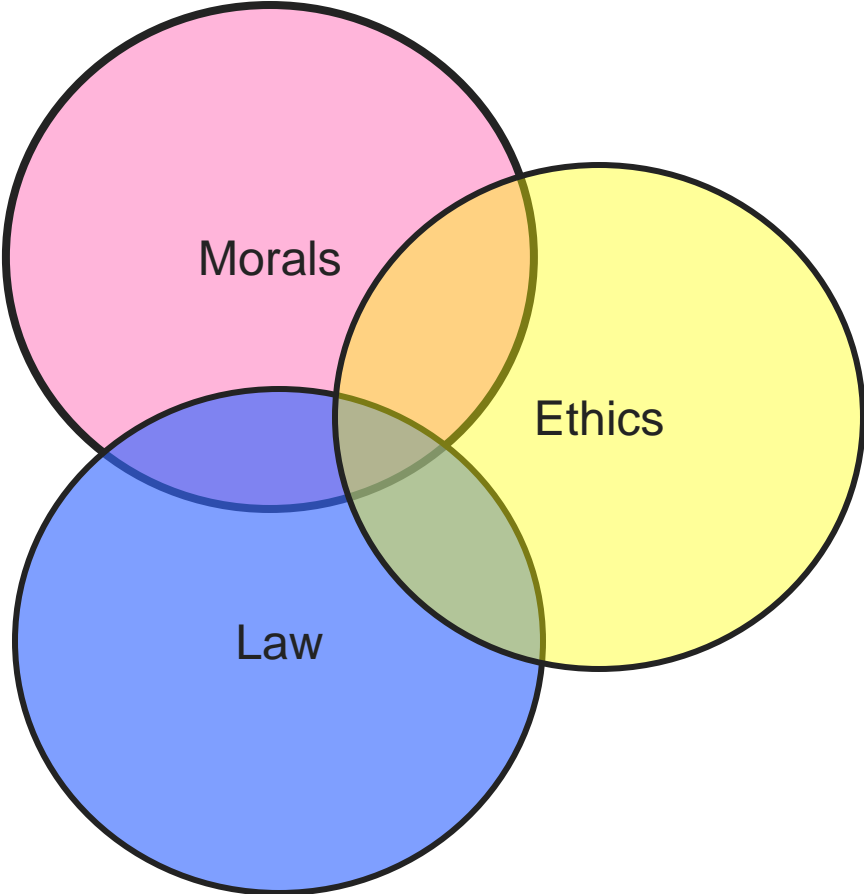
Background

- Environmental laws involve public health and welfare.
- Administrative and civil penalties are based on strict liability.
- Criminal liability for some statutes, e.g., the Clean Water Act, is predicated on simple negligence, see *U.S. v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), and for the *Migratory Bird Treaty Act*, on strict liability.
- “Responsible Corporate Officials” may be held personally responsible criminally based on their authority to exercise control over a corporation’s activity. See *U.S. v. Iverson*, 162 F.3d 1015 (9th Cir. 1998).

Background (cont'd)

- “Environmental laws reflect philosophical values and the need to conserve and protect the environment for its inherent value as well as for utilitarian reasons. *Issues of Legal Ethics in the Practice of Environmental Law*, Irma Russell, ABA SEER (2003), p. xvi.
- “The ethics rules that apply to the legal profession should also serve the public interest generally . . .” *Id.* at xix.
- The practice of environmental law, because it involves public health and welfare, may impose additional ethical responsibilities on lawyers.

The Relationship of Morals, Ethics, and Law



Hypothetical

- You are the general counsel of Do-Right Worldwide Industries (“DWI”), an international company with a wide range of high profile operations, including a petrochemical manufacturing facility in Longhorn, Texas.
- The Longhorn facility is surrounded by a low income, ethnically diverse neighborhood.
- DWI has a corporate environmental manager, Dudley Do-Right, a nephew of the corporate founder, who has responsibility for, among other things, the Longhorn facility.
- You and Dudley routinely work together on matters involving environmental issues at the Longhorn facility.
- The following are: (1) the substance of your conversation with Dudley about an environmental matter and (2) follow-up questions raising ethical issues.

Hypothetical (cont'd)

- Dudley reports to you that:
 - a key piece of air pollution control equipment necessary to keep emissions of certain air pollutants under permit limits is broken and will take two weeks to prepare.
 - DWI cannot shut down the facility because its production over the next two weeks is critical to supplying DWI's most important customer its feedstock.
- Dudley says his inclination is to continue operating and asks for your legal advice on how to proceed.

Who is your client?

“In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing or when explanation appears reasonably necessary to avoid misunderstanding on their part.”
Texas Disciplinary Rules of Professional Conduct (“Rule”) § 1.12(e).

Are you competent to handle this matter?

“A lawyer shall not accept ... a legal matter which the lawyer knows or should know is beyond the lawyer’s competence....” Rule § 1.01.

Would agreeing to Dudley's suggested approach result in a violation and, if so, in criminal conduct?

- What is the law?
- What constitutes a violation?
 - Performance of act
 - Failure to report
- What triggers criminal liability?

If running facility without pollution control equipment constitutes a criminal violation, what should you do?

- “A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.” Rule §1.02(c).
- “When a lawyer has confidential information establishing that a client is likely to commit a criminal ... act that is likely to result in substantial injury to the financial interests or property of another, the lawyer shall promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime....” Rule §1.02(d).

Any further obligation?

“When a lawyer knows that a client expects representation not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.” Rule §1.02(f).

-
- What if the injury in question is not a criminal violation?
 - What if the injury in question is to health and not to financial interests or property?

May you disclose the information to a third party?

When the lawyer has reason to believe it is necessary to prevent the client from committing a criminal or fraudulent act, the lawyer may reveal confidential information. See Rule § 1.05(c)(7).

Must you disclose the information to a third party?

“When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal the information to the extent reasonably necessary to prevent the client from committing the crime.” Rule § 1.05(e).

-
- What is meant by “substantial”?
 - What if act will result in bodily injury that is not necessarily substantial?
 - What if substantial bodily harm or death will result but the conduct is not criminal?

If Dudley can't be swayed, what do you do?

- “Except where prior disclosure ... is required by law or other rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization.” Rule § 1.12(c).
- “In determining the internal procedures, actions or measures that are reasonably necessary..., a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations.” Rule § 1.12(c).

If Dudley can't be swayed, what do you do? (cont'd)

- Such procedures, actions and measures may include, but are not limited to, the following:
 - (1) asking reconsideration of the matter
 - (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
 - (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

If DWI can't be swayed, what do you do?

- As previously discussed, disclose.

If DWI can't be swayed, what do you do? (cont'd)

- Withdraw
 - A lawyer shall not withdraw from representing a client unless “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent.” Rule § 1.15(b)(2).
 - A lawyer may withdraw if “the client insists upon pursuing an objective that the lawyers consider repugnant or imprudent....” Rule § 1.15(b)(4).

What if there is a criminal or civil proceeding and you are called as a witness?

“A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client...” Rule § 3.08(a).

What if Dudley or his superior informs you they intend to draft a press release downplaying the potential harm?

In the course of representing a client, a lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicatory proceeding. A lawyer shall not counsel or assist another person to make such a statement. Rule § 3.07(a).

What if Dudley or his superior suggests you tell nearby residents there is no danger?

“In the course of representing a client a lawyer shall not knowingly...make a false statement of material fact or law to a third person....” Rule § 4.01(a)

What if residents are represented by counsel?

“A lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person ... the lawyer knows to be represented by another lawyer regarding the subject....”
Rule § 4.02.

What if they're not?

“In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.” Rule § 4.03.

What if client wants you to bully residents or bring a SLAPP suit?

“A lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person....” Rule § 4.04

What if you're in a contested case permit proceeding in which compliance is an issue?

“(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act;

....

(5) offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take reasonable remedial measures, including disclosure of the true facts.” Rule § 3.03

Legal Considerations

- What governmental body has jurisdiction?
 - TCEQ/RRC of Texas
 - US EPA
- What does law require?
 - Statute
 - Rule
 - Permit
 - Administrative or civil order
- What are the common law considerations, e.g., risks to human health or property?
- What is the corporate policy, i.e., what representations has DWI made to corporate stakeholders?

Legal Considerations (cont'd.)

- What options are available?
 - Don't operate
 - Operate and don't disclose
 - Disclose to agency and seek compliance order to continue operating
- What are the risks?
 - Ethical sanctions--for lawyers
 - Administrative, civil, and criminal sanctions, e.g., fines and injunctive relief
 - Agency action
 - Citizen suit
 - Claims for natural resource damages
 - Common law claims for toxic tort and property damage
 - Reputational injury

Measures to Minimize Exposure to Ethical and Legal Risks

- Develop corporate environmental policy, e.g., beyond compliance, endorsed and enforced by top management
- Develop corporate and facility-based environmental policies and procedures
- Ensure adequate environmental infrastructure, lines of reporting, and staffing
- Provide for staff training and continuing education and updates

Measures to Minimize Exposure to Ethical and Legal Risks (cont'd)

- Perform periodic environmental audits to verify compliance and to ensure that policies and procedures are adequate
- Consider use of regulatory tools to reduce legal exposure, *e.g.*,
 - Texas Environmental, Health and Safety Audit Privilege Act
 - Federal Voluntary Disclosure Guidelines
 - “All Appropriate Inquiry”--Bona Fide Prospective Purchaser Defense
 - Administrative and Civil Compliance Orders

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Ethical Lessons for In-House Counsel of *In re Dole Foods Co., Inc.*

Liz Klingensmith, Partner, Houston

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Dole Food Company, Inc.



In re Dole Food Co: DE Court Rules on Rotten Transaction, Guides on Going Private



The Chairman, CEO and “de facto” Controller

David H. Murdock, Age 92



The CEO's "right-hand man," Dole's General Counsel

Michael Carter



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The Judgment

Murdock and Carter jointly and severally liable to Plaintiffs:

\$148,190,590.18

The Beginning



Make Every Day Shine™

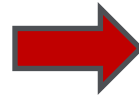


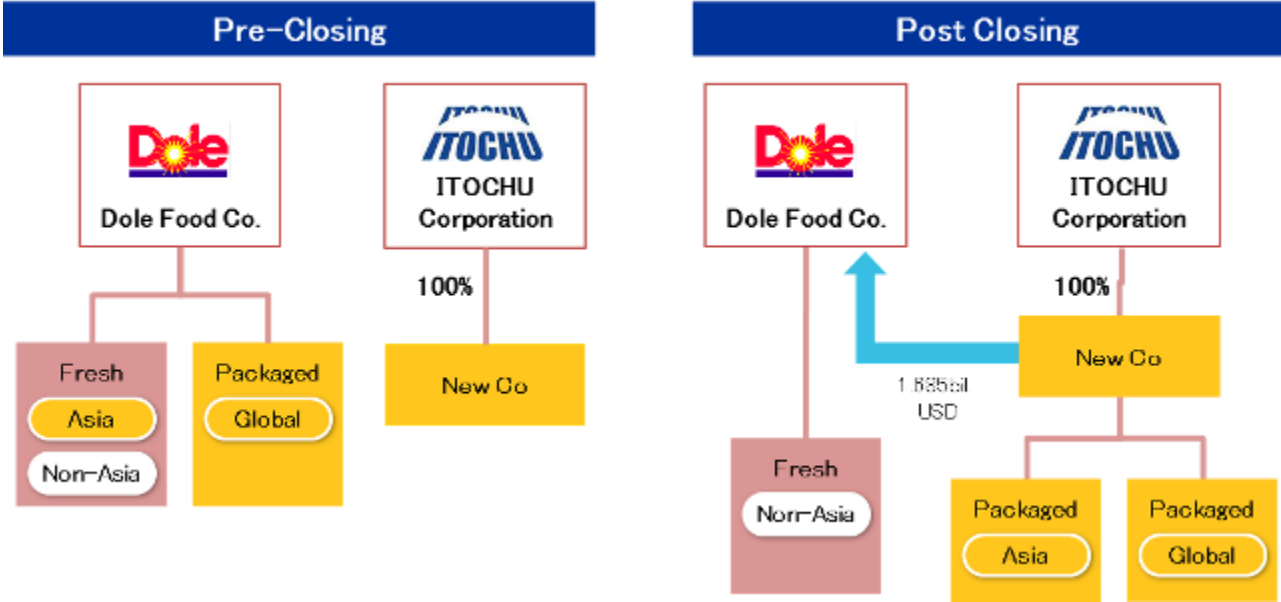
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Murdock's Reacts to the 2008 Financial Crisis

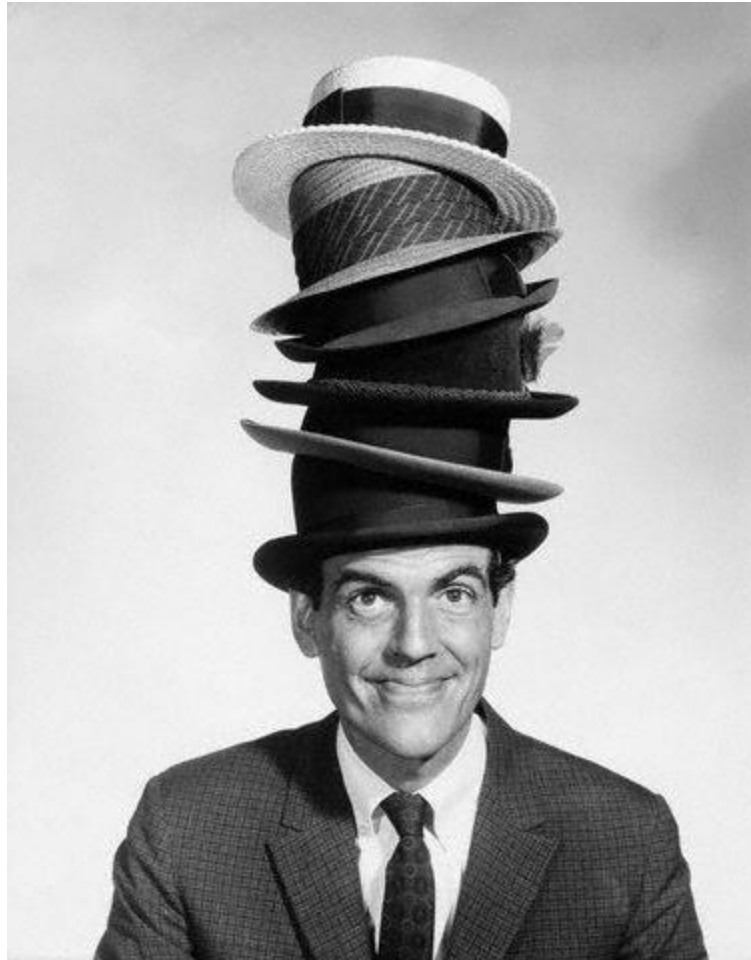


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ITOCHU acquires Dole's Packaged Foods Business



Enter the General Counsel—a man of many hats



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Carter Manipulates the Market



The “Brouhaha” Over the Self-Tender



The Nine Member Board – The Repurchase Plan

The Insiders:

Murdock, Carter, DeLorenzo, and
Murdock's son

The Outsiders:

Conrad, Weinberg, Lansing,
Dickson and Elaine Chao



Carter Cancels the Repurchase Plan



Moving in for the Kill



The Special Committee



Carter Flat-Out Lies



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The Hostile Offer



HOSTILE TAKEOVER

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The Committee Carries On



Condensed Consolidated Statement of Operations

	Quarter Ended		Fiscal Year	
	December 29, 2012	December 31, 2011	December 29, 2012	December 31, 2011
	(In millions, except per share data)			
Revenues, net	\$887.6	\$962.0	\$4,246.7	\$4,778.4
Cost of products sold	(823.3)	(897.5)	(3,878.9)	(4,375.7)
Gross margin	64.3	64.5	367.8	402.7
Selling, marketing and general administrative expenses	(95.2)	(70.2)	(310.5)	(289.8)
Charges for restructuring and long-term receivables	(1.1)	(3.8)	(5.2)	(16.4)
ITOCU transaction related costs	(40.1)	-	(48.4)	-
Gain on asset sales	1.0	1.2	12.9	4.5
Operating income	(71.1)	(8.3)	16.6	101.0
Other income (expense), net	(0.5)	4.3	(3.1)	(0.4)
Interest income	1.0	0.7	4.7	4.1
Interest expense	(5.3)	(2.4)	(12.2)	(9.6)
Income (loss) from continuing operations before income taxes	(75.9)	(5.7)		
Income taxes	(12.4)	12.7		
Earnings (Loss) from equity method investments	0.7	(1.6)		
Income (loss) from continuing operations, net	(87.6)	5.4		
Discontinued operations, net	(122.8)	(1.7)		
Net income (loss)	(\$210.4)	\$3.7		
Income (loss) from continuing operations per share - Diluted	(\$0.99)	\$0.06		
Weighted average common shares - Diluted	88,103	87,724		



Carter Prepares Post-Merger “Revised” Budget



Merger Approved



Post- Merger Performance Soars



Dole increases income through acquisitions of farms.



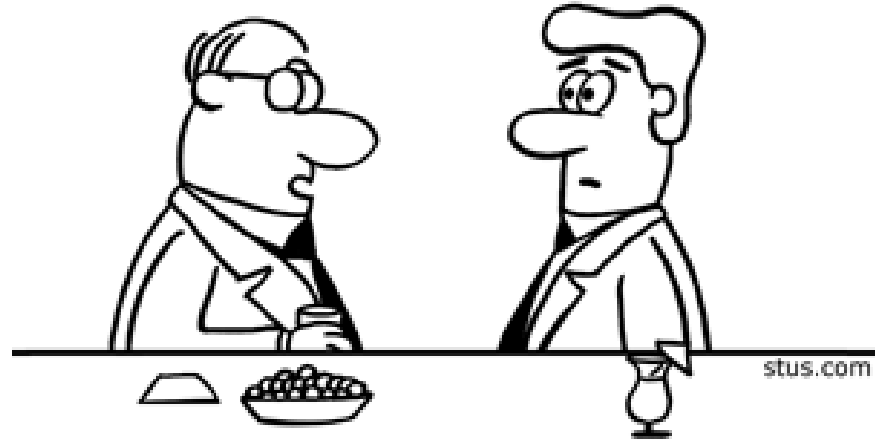
Dole realizes cost savings from ITOCHU transaction.

The Litigation



Fair Dealing: Timing and Initiation

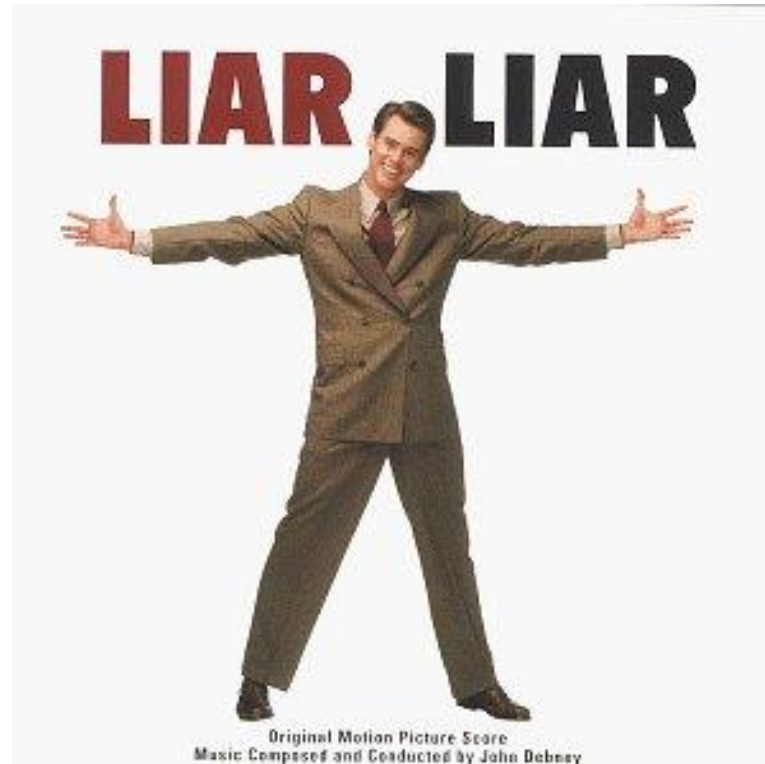
- Fraud vitiates everything
- Extensive planning time
- Knowingly pushed down stock price
- Suspended repurchase plan
- Self-dealing



This "fiduciary" thingy really complicates exploiting my job to get stinking rich.

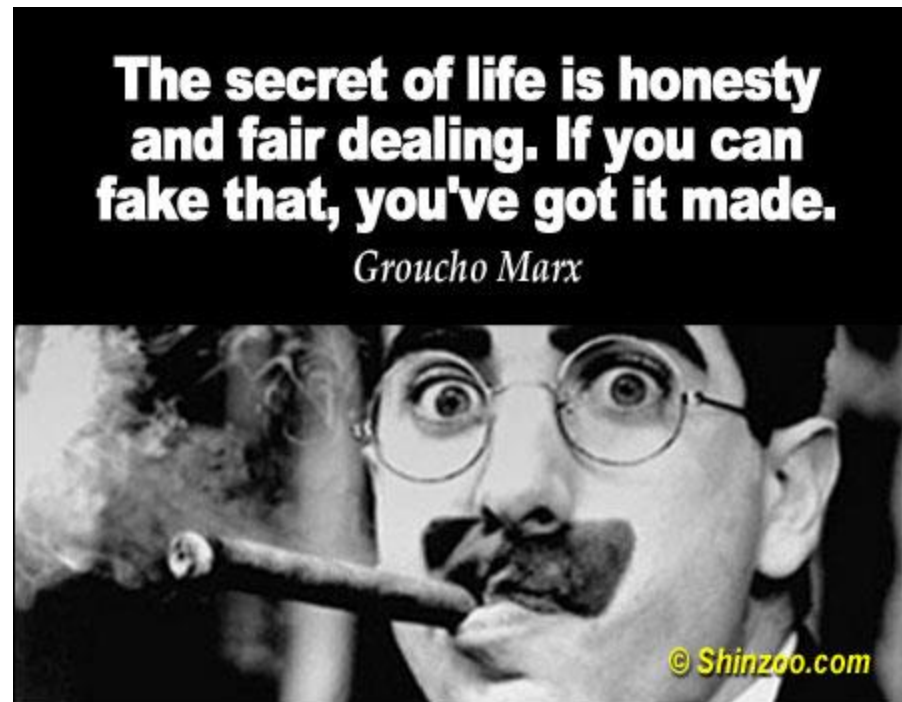
Fair Dealing: Transaction Negotiation

- False financial information
- Interference with Special Committee

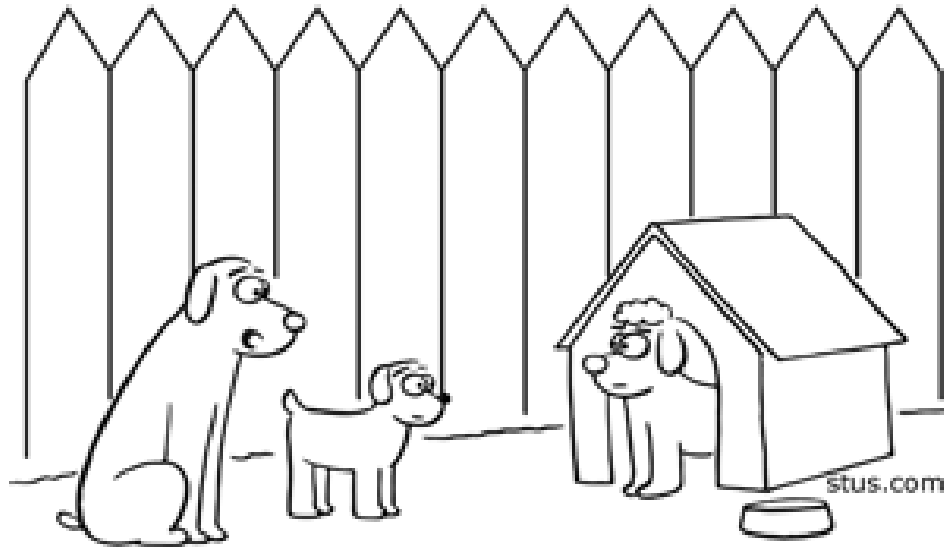


Fair Price

- Exclusion of cost savings and income from farm acquisition deprived plaintiffs of a “fairer” price



Liability of Fiduciaries



I know we're supposed to be totally loyal, but to whom?



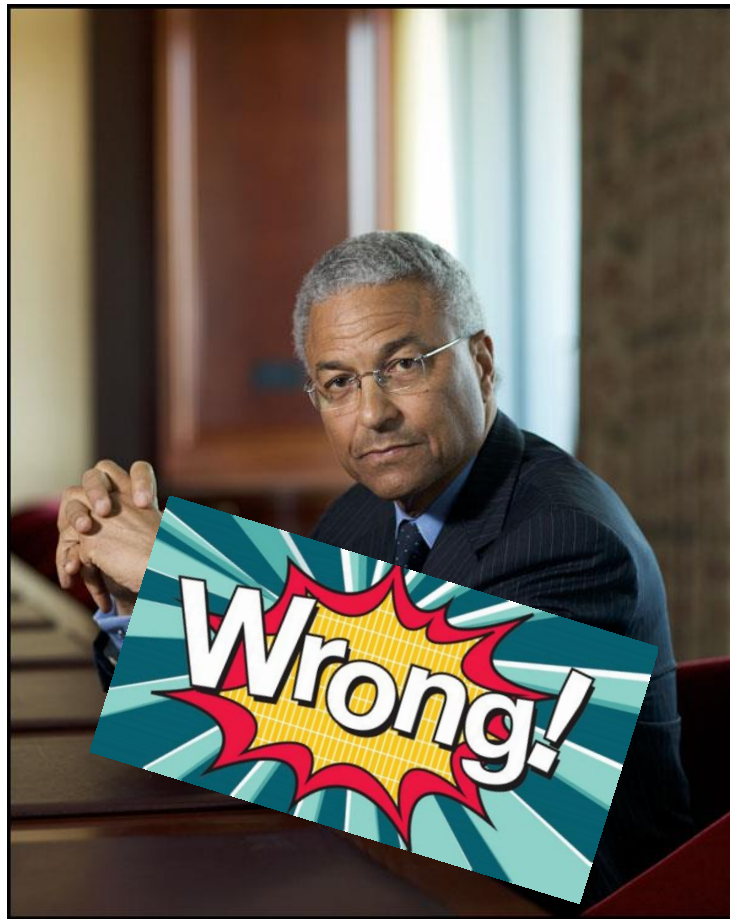
Got Ethics?



Ethics: Organization as Client (Rule 1.12)

- A lawyer employed by an organization represents the entity
- A lawyer must proceed in the best interest of the organization
- A lawyer must explain the client's identity to avoid misunderstanding

Carter's Wrong



Ethics: Conflict of Interest (Rule 1.06)

- A lawyer shall not represent opposing parties in a substantially related matter where parties' interests are materially and directly adverse
- Except when:
 - Lawyer reasonably believes the representation will not materially affect each client; and
 - Clients consent to representation after full disclosure of conflict and possible adverse consequences

Carter's Wrong Again



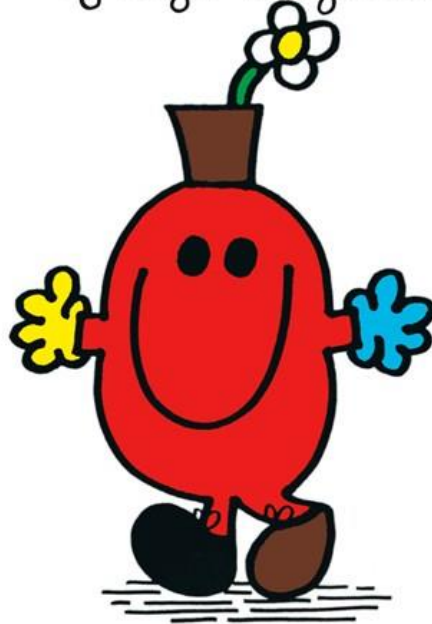
Ethics: Trusted Advisor (Rule 2.01)

- A lawyer shall exercise independent professional judgment and render candid advice when advising a client

Carter Can't Get It Right

MR. WRONG

by Roger Hargreaves



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Ethics: Truthfulness (Rule 4.01)

- During a representation, a lawyer shall not
 - knowingly make a false statement of material fact or law to a third person; or
 - fail to disclose a material fact to a third person when disclosure is necessary to avoid
 - making the lawyer a party to a criminal act or
 - knowingly assisting a fraudulent act perpetrated by a client

Aw, come on now, Carter!

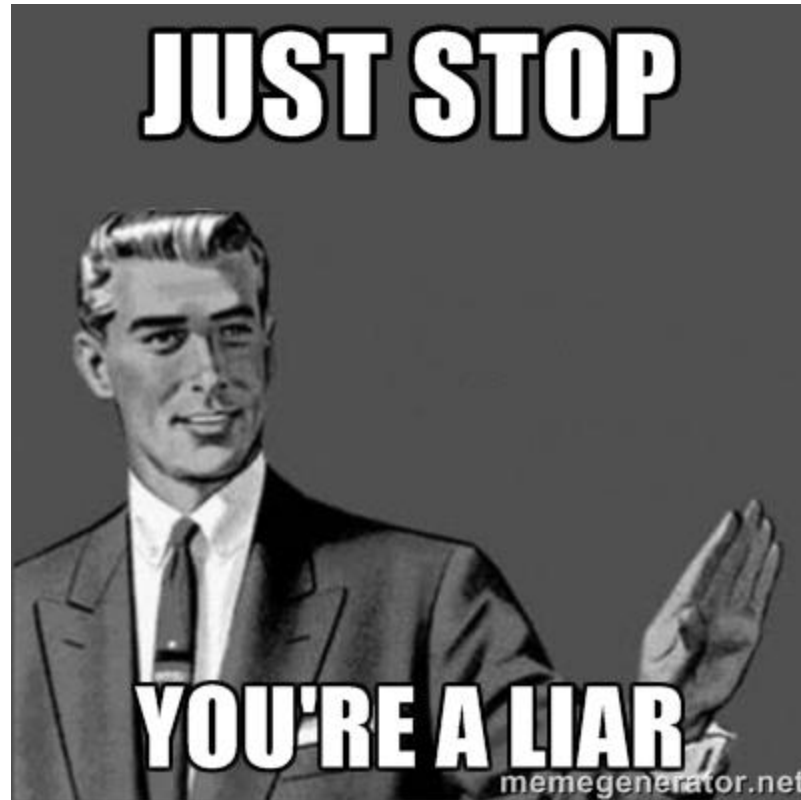


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Ethics: Attorney Misconduct (Rule 8.4)

- A lawyer shall not:
 - violate the ethics rules
 - ...
 - engage in conduct involving dishonesty, fraud, deceit or misrepresentation
 - ...

Carter...



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Helping Carter: Hypothetical No. 1

Dole was engaged in negotiations to sell its interest in a large farm to a local farmer who was unrepresented in the transaction. During the negotiations, Dole told the farmer to call Carter if the farmer had any questions about the farm. The farmer called Carter, asked certain questions about the size of the farm, and expressed hesitations concerning the high asking price for the farm. Carter responded that, based on his experience handling farm sales, that the farmer would be getting a lot of farm for the price. At the time Carter spoke to the farmer, Carter knew that there was a defect in the title and that the farmer's attempt to purchase Dole's interest in the farm would not result in the farmer's acquisition of any interest in the property. Relying on Carter's assurances, the farmer agreed to make the purchase. Shortly after the sale closed, the farmer discovered that his acquisition was worthless.



Is Carter subject to discipline?

- (a) Yes, because Carter knowingly made false representations of fact to the buyer.
- (b) Yes, because Carter implied that his opinion regarding the value of the farm was a disinterested opinion.
- (c) No, because Carter's statement that the farmer would be getting a lot of farm for the money was a statement of opinion regarding the value of the farm.
- (d) No, because the farmer was not Carter's client



Is Carter subject to discipline?

(a) Yes, because Carter knowingly made false representations of fact to the buyer.



Helping Carter: Hypothetical No. 2

Carter represented Dole in negotiating the sale of Dole's Packaged Food business to ITOCHU. Dole told Carter in confidence that although the business had once been very profitable, recent profits had been stable but modest. As the negotiations proceeded, ITOCHU appeared to be losing interest in the deal. Hoping to restore ITOCHU's interest, Carter stated, "The Packaged Food business is everyone's dream: happy kids, steady profits, and clear consciences." ITOCHU bought the Packaged Food business but was disappointed when profits were only modest.



Is Carter subject to discipline?

- (a) Yes, because the Carter made a false statement of fact to ITOCHU.
- (b) Yes, because Carter exaggerated the profitability of the business.
- (c) No, because Carter represented Dole, not ITOCHU
- (d) No, because Carter's statement constitutes acceptable puffing in negotiations



Is Carter subject to discipline?

(d) No, because Carter's statement constitutes acceptable puffing in negotiations



Helping Carter: Hypothetical No. 3

Dole has applied to a bank for a \$1 million loan to be secured by a lien on the Dole's inventory. The inventory, consisting of small cans of crushed pineapple or mandarin oranges, constantly turns over. The security documents are complex and if improperly drawn they could result in an invalid lien. Deutsche Bank has approved the loan on the condition that Dole and Deutsche Bank jointly retain Carter to prepare the necessary security instruments and that Dole pay the Carter's fees. Both Dole and Deutsche Bank give informed consent in writing to Carter's representation of both parties. This arrangement is customary where Carter's law office and Deutsche Bank are located. It is obvious to Carter that he can adequately represent the interests of both Dole and Deutsche Bank.



Is it Ethical for Carter to Prepare the Documents?

- (a) Yes, because both deutsche Bank and Dole have given their informed consent to the arrangement.
- (b) Yes, because the arrangement is customary
- (c) No, because the attorney's fees are being paid by Dole, not Deutsche Bank.
- (d) No, because Dole and Deutsche Bank have differing interests.



Is it Ethical for Carter to Prepare the Documents?

(a) Yes, because both Deutsche Bank and Dole have given their informed consent to the arrangement.



The Ethics Lesson for Today



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Thank you



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Ethics in Workplace Investigations

Matthew Deffebach, Partner, Houston

Felicity Fowler, Partner, Houston

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Using a Lawyer to Conduct the Investigation

- What is the purpose of the investigation?
- Is there any potential for the lawyer to be called as a fact witness in this investigation?
 - Tex. Disciplinary Rules of Professional Conduct 3.08
 - Model Rules of Professional Conduct 3.7



Using a Lawyer to Conduct the Investigation

- Implications of a lawyer conducting the investigation
- How to deal with an outside investigator



Upjohn Warnings

- Establish who is (and who is not) the client.
- Balance when mirandizing witnesses.
- Consider a third party investigator.



Gathering Information

- Can an employer monitor an employee's social media activity?



To quote further from people's exhibit A, your Twitter feed, "[@holdupguy](#) I'm in the getaway vehicle with the money and hostages. Where R U?"

Snoop Doggy Dog

- Social media snooping
 - Is it OK to snoop into someone else's *private* social media posts? (No!)
- Three influential cases
 - *Konop* (9th), *Pietrylo* (DNJ), *Ehling* (DNJ)
- OK to use publicly-available information
- “Authorized User Exception”
 - ALL FORMS OF ELECTRONIC COMMUNICATION. Consent is KEY.

Gathering Information

- Can you ask for consent to monitor an employee's third party (AOL, Yahoo, etc.) e-mail account?

Can you access an employee's personal device, such as an iPhone?



Gathering Information

- If an employee presents the required documents for taking FMLA leave, but you think the employee is lying, can you call a PI to spy on the employee?



Gathering Information

- Can an employer place an officemate to monitor whether someone who seeks to take leave for an adoption is really using the leave for that purpose?



Gathering Information

- Can you listen in on phone conversations of an employee who you believe may be planning to take off with your trade secrets and join a competitor?



Gathering Information

- Can you videotape employee activity anywhere on premises as long as the cameras are “open and obvious?”



Gathering Information

- Can an employer obtain information in an investigation and require an employee to keep the investigation confidential?



Gathering Information

- An employee was just interviewed privately by an OSHA agent, can you require the employee to provide you an affidavit of what he/she told OSHA?



Gathering Information

- Can you search an employee's personal vehicle on company property?



Gathering Information

- Can you use GPS tracking to monitor an employee's activities?



Gathering Information

- Can you use information from an interview with an employee where the employee is interviewed “against his/her will” in that he/she insisted on having a representative present, but you refused?



“I want a Representative”

- In Non-Union context, “too bad, so sad.”
- In Union context, these are *Weingarten* rights.
 - A fellow union member can attend when requested.
 - Or, employer must discontinue interview.

WEINGARTEN RIGHTS

“If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working condition, I respectfully request that my union representative or steward be present at the meeting. Without representation, I choose not to answer any questions.”

Bad Actors Who are Key Stakeholders

- How should you deal with those key stakeholders who want to, or do engage in wrongful conduct?
- Do you have an obligation do dissuade a key stakeholder from engaging in wrongful conduct? An obligation to report the key stakeholder internally?
 - Texas Disciplinary Rules of Professional Conduct 1.12
 - Model Rules of Professional Conduct Rule 1.13

Business Advice or Legal Advice?

- Outside counsel instructed Defendants' human resources personnel on what actions (including disciplinary actions) should be taken, when to take those actions and who should perform them
- Outside counsel told Defendants what should be documented and how it should be documented
- Outside counsel drafted written communications to employee responding to his complaints
- Outside counsel drafted scripts for conversations with employee about his complaints
- The human resources department reported to outside counsel the outcome of actions outside counsel directed, asked outside counsel what to do next, and updated outside counsel on new developments.

Communications = Business Advice ~~=~~ Protected by Attorney-Client Privilege

- “Despite its legal content, human resources work, like other business activities with a regulatory flavor, is part of the day-to-day operation of a business; it is not a privileged legal activity.”
- “...outside counsel...‘was not a consultant primarily on legal issues, but instead ... helped supervise and direct the internal investigations as a primary adjunct member of Defendant’s human resources team.”
- “...the overwhelming majority of these communications discuss how Defendants should conduct the internal investigation and how to respond to and ameliorate [the employee’s] complaints. That a stray sentence of comment within an e-mail chain references litigation strategy or advice does not render the entire communication privileged, nor does it alter the business-related character of the rest of the communication.”

Communications = Business Advice ~~=~~ Work Product

- “While it may be true that the possibility of litigation prompted Defendants to seek outside counsel’s advice, the communications themselves demonstrate that rather than discussing litigation strategy or advice, [outside counsel] advised Defendants on how to conduct the internal investigation and how to address [the employee’s] ongoing work performance issues and internal complaints, i.e., human resources advice that would have been given regardless of the potential for litigation.”
- “Legal advice given for the purpose of preventing litigation is different than advice given in anticipation of litigation.”

-- *Koumoulis v. Indep. Fin. Mktg. Group*, 29 F. Supp. 3d 142 (E.D.N.Y. 2014)

Koumoulis as an Outlier

In re Kellogg Brown & Root, 756 F.3d 754 (D.C. Cir. 2014):

- Attorney Client privilege protects communications related to investigation if obtaining or providing legal advice was “one significant purpose” of the investigation.
- Do not draw “a rigid distinction” between business advice and legal advice. Instead ask: “Was obtaining or providing legal advice a primary purpose of the communication, meaning one of the significant purposes of the communication?”
 - If yes, attorney client privilege applies.

Practical Tips

- Counsel should be mindful of the difference between business advice and legal advice.
- Where appropriate, counsel should identify applicable legal principles or relevant statutes to help underscore the legal nature of the communication. Note that this communication involves delivery of legal advice that is outside the ordinary course of the day-to-day operation of the client and note when litigation is reasonably foreseeable.
- Counsel should include legends on communications such as “ATTORNEY-CLIENT COMMUNICATION, PRIVILEGED AND CONFIDENTIAL.”

Practical Tips

- Substance of the communication should contain more than “a stray sentence or comment within an email chain referen[cing] litigation strategy or advice.”
- Employers should think critically about whether counsel’s involvement in an investigation presents the appearance that counsel is actually participating in the investigation in the background by directing the investigation.
- At the outset of investigation, employers should define clearly the scope and responsibilities of participants in the investigation.

Taping Witnesses

- Can you?
- But should you?



Questions?

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