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Representing Agricultural Enterprises: Ethical Concerns

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MS. VAUGHT: John Dillard is going to join us again, and he's going to give us a look at professional responsibility for lawyers who represent agricultural clients. As an attorney in Washington who represents agricultural clients himself, he has a lot of expertise in this area. So everybody welcome back John.

MR. DILLARD: Thank you. . . .

. . .

MR. DILLARD: All right. [I] run into ethics issues from time to time, so kind of if -- how I look at it, instead of going into one particular issue, what are the kind of three things, if I was talking to someone who kind of dabbled or was thinking about getting into, like, dealing with kind of food and ag clients, what are the three things I would look for, that I would take into consideration. I think the top one, the number one thing is competence, because you are looking at kind of a specialized area of the law. I think that's important, and I think also kind of understanding a lot of times what we deal with is kind of the different rules around multi-jurisdictional practice, kind of what's allowed with that.

Then something you hope you never have to deal with, but you need to keep in mind, is kind of when to tell on your client. And that's not a good way to kind of get a lot of clients, is kind of letting them know you're available to tell on them. I try not to, I hope it's not a secret. I hope that I -- I'm not but so far into my legal practice, I'm

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relatively recent out of school and kind of new to the practice and still kind of in the part of my career where I'm trying to get a lot of clients and trying to bring in a lot of clients, and I get, like kind of on here, like, super excited whenever a new client comes in. There's a range of emotions, but you know, you're trying to bring in new business, and there's a real risk, though, of making sure you can actually handle what you bring in. And so it's very kind of elementary, but I think one of the most important professional rules to remember is Rule 1.1, which covers competence. You can read it, won't read it for you, but basically if you take on a case, you need to have kind of the skill and knowledge or the ability to acquire the skill and knowledge relatively easily to handle your case.

Now, how we and I use to kind of demonstrate, like, why is a challenge with practicing, like, agricultural law is kind of the breadth of what could be considered agricultural law. Now, this is actually a graphic that I came up -- I got to be an ag teacher for a day at my old high school, so I was super excited about that. I talked to them about agricultural law, and I realized I was the only one there excited about agricultural law. But I got this graphic out of it. The way kind of how I think of it is, is, you know, agricultural law, you have all these different kind of areas of the law that are very different from each other, you know, ranging from, like, very transactional stuff, like real estate or wills or contracts, you know, but then you also have criminal law and international law and food safety matters, where it kind of runs the gamut and agricultural law is just this little subset of, like, all these different little discrete areas of the law that are kind of unified in that, you know, you have clients that are in the production of food or fiber or forest products. It can be really challenging if you kind of hold yourself out as "I'm an agricultural lawyer." You know, you get hit with a lot of different -- especially if you're, like,

listed online or whatnot, you get hit with a lot of different questions, and there's no way to have kind of competence in all these kind of different fields.

An example that I think we encounter at the firm most commonly -- I have a partner that has, like, just this very specialized practice in representing, like, vendors that use the SNAP program, the EBT, for what used to be the food stamp program. We get calls from all across the country and, just, I don't know what he does. But, you know, we get these calls in from across the country, and it's usually people and they're calling us, they found him online. They call us after they've spent, you know, five grand or ten grand on their local attorney. Then you say, "Well, this is how much it'll cost to, like, solve the problem." It's, like, "Well, here's the issue: I already spent that with the guy, and most of what I got was your phone number." I mean, that's really an issue that we run into a lot, so kind of the considerations for, you know, making sure that you have the competence is kind of the legal knowledge and skill. I mean, it's not like most areas of the law are rocket science. You can bring yourself up to speed on something, but you just need to be cognizant of kind of your limitations.

I know there are a lot of egos amongst practitioners. I mean, the general answer I have to any question is, like, "Yes is the answer. Now what's the question?" It's, you know, taking a step back and kind of recognizing, you know, this is what I can handle. I think that's really – you know, if it's a simple, like, property dispute or neighbor dispute or something, you know, it's something pretty much anybody with a bar number could handle. But it's understanding kind of when something gets to a level where maybe you need to bring in some help or bring in

some type or invest some time in kind of bringing yourself up to speed on something.

Now, why it's important, it kind of goes back to, you know, we get the calls from the people; it's, like, "Well, I already spent the five or ten grand I had lying around, on the other attorney." You have your client's livelihood at stake in many cases, and a lot of times, I mean, one of the kind of facts of life when you're in this profession, especially if you're dealing with farmers, is you don't, or you aren't dealing with -- oftentimes you aren't dealing people that have a lot of financial reserves to kind of play with. You don't have somebody that can kind of absorb a big hit all the time. So it's very important to make sure that you deliver value for the services that you provide because they have oftentimes a limited budget for purchasing legal services.

I think another thing, why it's important for agriculture, is, you know, for a, you know, a very old profession, I mean, one of the old -- you know, something that, you know, this country is built on, there's a really complex set of regulations that kind of run through the food and ag industry. You have all kinds of -- like, I challenge you to try to import 10 pounds of cheese into this country without three lawyers. I've tried; I had to get two more lawyers.

You know, there's -- just because we have a lot of these new deal programs they're still kicking around, you have different state laws that don't always, you know, make sense or whatnot. And so it is something where it's very complex. There are also consequences for the practitioner. Malpractice is a real concern, as it is in any type of area of the law. Getting any type of, you know, ineffective assistance of counsel, that has impacts on your legal

malpractice. I mean, it has impacts. You could get sued, and oftentimes if you're in-house counsel, you have fiduciary responsibilities to your clients. And so it's very important, you know, not only for the clients, but also for kind of covering yourself. It's competence, and this is intuitive, is often is more of a concern for new lawyers, especially if you're a solo practitioner, just because you're kind of getting into the field. And supervision can certainly help out. That's not to say there aren't many great solo practitioners out there that started out on their own, but it is a concern. They do have to spend or invest the time in bringing themselves up to speed.

Another consideration for many people that are, you know, above my pay grade is, you know, senior attorneys are also held responsible for the acts of their junior attorneys. You know, firms have -- I have of a case cited to here, you know, where a firm was held liable, or a supervisor was held liable, for a firm's kind of mishandling of a case, even though everything could be attributed, the actual mishandling took place, in this particular issue it was an adoption case, where the firm had, like, an outlying branch, and it was associated with the firm, but it had one attorney, and the attorney was straight out of law school. And the firm had kind of the sink-or-swim approach to their associates.

Now, I know that's a pretty common approach in the field or in private practice, but it is an issue where kind of senior attorneys can be held liable. And so kind of to watch out for that or to help out with that, the best remedy is to make sure that there's some type of supervision program in place, some type of -- it doesn't have to be super formal, but, you know, checking in, making sure that you're making yourself available for junior attorneys, kind of checking in on their projects, knowing what they're going

on. If you're a solo practitioner, seeking mentors, you know, it could be somebody that you respect or somebody that you know has experience in something, kind of running that back with them.

Another thing, another remedy to kind of make sure that you're up to speed on competence is self-education, you know, taking some time and investing in yourself. Under the bar rules in most states you're not allowed to do that on the client's dime. It's also generally bad business when they hear that you're just learning how to do something and they're paying for it, so that's kind of how you deal with that. Another kind of issue -- and this goes back to the example I gave the example of the food stamp vendors, but if you do encounter an area of the law, understanding when you're unfamiliar with it under Rule 1.1, you're required to kind of recognize when something goes beyond your level of expertise. You can't claim lack of experience in a particular area of the law as a defense to any type of allegation of incompetent representation because, basically, you can't say, "Look, this is complicated." This is a common issue, the unfamiliarity. It is a common issue, especially with general practitioners, and there's no -- you know, with medical malpractice there -- it does take into consideration kind of the size of the town or the medical market, so to speak, but there's not the same type of consideration given for attorneys in terms of if you're in a small town or if you're a general practitioner. That's something to keep in mind. It's based on what would a reasonable practitioner do.

In terms of if you are dealing with some type of area of the law that you're unfamiliar with, and we do this oftentimes, and sometimes we get brought in in terms of being a, like, food and ag niche firm. We'll oftentimes get brought in from, like, a bigger firm that maybe doesn't have

kind of specialized or, like, niche knowledge, but you can associate with an experienced co-counsel, and that can be really valuable in terms of bringing in a different perspective. Also, like the solution to lot of these things, is just kind of self-educate. You know, invest some time in learning. One issue in particular -- and you see this a lot with administrative matters as well as litigation -- is paying attention, especially if you're practicing -- like say you're admitted *pro hac vice* in a different state -- is making sure you pay attention to kind of the procedural requirements, or if, in addition to being in another state, in front of a government agency, paying attention to the procedural requirements and kind of understanding, you know, the different forms that need to be submitted, the different deadlines. That's really where you can do your client a big disservice, failing to follow that type of protocol.

The next one . . . is the multi-jurisdictional practice. And so if you pick up any type of specialty in, like, this field, like, the food and ag law, a lot of times you're going to get kind of called in to cases kind of across the country because there's only so many -- there's only so many big cases. There's only so many people that kind of invest the time to build up that type of expertise. It's kind of a fact of life that you're oftentimes going to have to cross into -- or practice in another jurisdiction outside of where you're licensed. And so one of the rules is, obviously -- and your bar is usually pretty vigilant about enforcing it, but you can't practice outside of a jurisdiction that you're licensed or assist someone else in doing so. These are kind of the considerations with dealing with multi-jurisdictional practice, the absolute most important one is to know when to seek admission *pro hac vice*, or I'm not very good with the Latin pronunciation, so however you would say that, think of that. Also abstain from -- and this one is more common sense for the most part – but abstain from

advertising or holding yourself out as licensed to practice in a foreign jurisdiction. Then, if you do *pro hac* into a case, make sure that you associate with competent local counsel or a local co-counsel to kind of assist you with making sure you don't run afoul of any of the local procedural issues.

At the federal level, it's a little bit different, because a lot of times you'll have federal agencies that you'll practice in front of if you're dealing with ag and food law. Q lot of times there'll be FDA or USDA that you'll find yourself in front of, so it's important to know when you need to actually seek *pro hac* admission. If you're practicing in front of a federal agency, this is not required. If you have, say, a GPSA issue with, like, a livestock market or an AMS issue with some type of, like, produce-marketing something, produce-marketing issue or an FDA, like a recall issue or some type of violation, you don't need to have admission *pro hac vice* in that case because you're -- anybody with a bar license can practice in front of the federal agencies, but when you get into federal courts -- like, let's say your challenge -- let's say you don't like the results -- or FDA doesn't like the results of a particular notice of violation issue and it ends up being appealed to the federal courts. Then obviously if it's in a state outside of where you're licensed to practice, you do need to seek *pro hac* admission and find a local co-counsel.

Corporate or government practice, different states vary, but it's important here as well. It's kind of a running theme. Know when to seek *pro hac* admission. I speak of this mostly with knowledge of Virginia because that's where I'm licensed, but I know it's pretty common elsewhere. If you're, say, with a company that's located in a state that you're not licensed in, in general if you're in-house counsel you can provide legal services for your employer in the jurisdiction even if you're not barred there.

That generally doesn't extend -- or that certainly doesn't extend to well, like, you know, Joe at work, his son got a DUI, and you just want to go into court to help him out with that. If you're not licensed, that's clearly -- clearly not allowed. If you are in-house counsel and not barred in a state, many states require registration. Even if you're not a member of their bar, you do have to let them know hey, I'm working with such and such company, providing legal services in this state.

If you're -- in terms of when you -- so I've been talking about, like, when to seek admission *pro hac vice*, and so kind of finally getting around to that, you can -- you have to do it if you're representing a client before a court or a state administrative agency if it's in a matter that you're not -- in a state that you're not barred in. It generally has to be a specific matter, so in terms of, like, from a practical standpoint, when you're filling out an application to do it, you have to say, like, what's the case number. So if you're just kind of working on maybe getting a case going, it's kind of hard to -- you can't do that because you can't point to a specific matter. Kind of one of the practical – and so kind of along those lines you're generally permitted to engage in some type of conduct in anticipation of a litigation if you -- so long as you reasonably expect to be temporarily admitted, so admitted for that case.

Like I said, if you're thinking about filing a lawsuit or if you know a lawsuit is going to be filed and you think it's reasonable that you would be temporarily admitted, you can show up in the state, you can start doing some type of work on that, and then as soon as there is an actual case number or an actual matter, an actual controversy in motion, that's when you can seek admission, *seek pro hac* admission. Oftentimes states will limit the number of *pro hac* cases that you can participate in. I know, for example, I

think Indiana, I think, caps it out at about five. That's a state we end up in a lot. Also, because we end up in Indiana a lot and have gotten -- had one attorney get bitten by this, you need to be very aware of your renewal requirements, which are usually annual. If you do not comply or – you know, for example, in most of the states where we are, if we're doing something *pro hac*, it's usually end of the calendar year you have to reregister. If you forget to do that, that causes problems because you're then technically practicing without a license in the state.

Now, in a lot of cases, you know, you may have one attorney from a firm that's, say, you know, out there actually litigating, they are admitted *pro hoc*, but you have two or three people back at the office or out there kind of helping in the field. Subordinate attorneys are generally not required to seek *pro hac* admission so long as they have a rather limited role. If they're conducting research, meeting with clients, and interviewing witnesses, they're generally not required to have *pro hac* admission. It really just depends. Yeah, so that's kind of – the important thing is to make sure you kind of remember it as you go through. Really, if you find yourself in this situation, really pay attention to kind of the procedural requirements, which are oftentimes applied very strictly. We are moving along quicker than I thought, so there'll be more time for hypos.

The most uncomfortable topic to kind of consider is, you know, when to tell on your clients because, I mean, the thing is, under our Constitution everybody is entitled to at least, even the biggest -- worst person in the world is entitled to, you know, one best friend or one person in their corner, and that's their attorney. And I take that role very seriously. . . . [I]t's a great responsibility, but, you know, at the same time, you know, while food and agriculture are generally positive, it seems like very benign fields --

everybody feels good about food, and everybody feels good about agriculture -- but the fact of the matter is, is you're also dealing with, you know, with clients that, if they screw something up, people can die. That's not something that you see in every field.

You know, real estate transactions might be big dollars, but usually nobody is dying. But if you screw up in food manufacturing or food processing or, you know, even something at the farm level, people can die. And so it's very important to kind of remember, even though you think of it more in the criminal context in terms of, you know, "Okay. When do I tell on my client?" like, it is important to consider also within the food and agriculture world as well. The general rule is that a lawyer may reveal -- and it's important the model rules are "may reveal," not "shall reveal" -- information related to the representation of a client to the extent that the lawyer reasonably believes it's necessary to prevent certain death or substantial bodily harm or to prevent the client from committing a crime or fraud that could result in some type of financial damage that -- that's basically the lawyer's services have been used to help to kind of perpetuate. And so the big thing is certain death, substantial injury, or "Have I been kind of used as a tool to help carry out some big fraud?"

As I discussed and actually Cari -- Cari talked on this earlier today in terms of the example of Peanut Corporation of America, but just to kind of illustrate what we're dealing with when I say that, our clients can kill people, is if we look -- and I have three examples here from relatively recent. You had a candy apple case that was this year where seven people died. Peanut Corporation of America, you had nine people die. The Jenson brothers in Colorado, I think you had 33 people die from contaminated -- I believe it was melons or cantaloupes, so in addition to

killing or making people very sick, you also have to consider --take into consideration, like, the impact that this has on the food and agriculture industry in terms of, you know, recalls or kind of loss of consumer trust can devastate certain industries. I mean, look at, you know, whenever there's a spinach recall, you know, nobody eats spinach for three months, even if, you know, most of the spinach sources wouldn't be affected. And so that's another consideration out there.

As I mentioned, kind of going back to the text, the model rules say that a lawyer may reveal information. And that's the case in Tennessee. That's the case in almost every state. I kind of have several here in the Southeast that I pulled out. One notable exception is the District of Columbia, which is where I'm co-barred. DC does require disclosure in the event that there's going to be some type of injury or death resulting from a client. One of the things to consider is in terms of if you're dealing with some type of physical harm, so either death or a substantial injury is that this is perspective only. You're trying to prevent something from happening, so only -- you can only disclose information about your client to the extent that it would prevent a future death or a future injury. Obviously, you cannot -- or it should be obvious that you can't disclose something about what they did in the past because they've told you that in confidence. You aren't going to change anything, as harsh as that may seem.

Another thing to remember here is that this provision that allows you to disclose information about your client, there's no limitation to kind of the scope of your representation. So in other words, if you're, like, doing a trust for somebody or, you know, helping them come up with, like, a farm transition program, they're kind of like, you know, "I think this would go easer if my uncle wasn't

still alive. I think I'm going to kill him." You know, you can't say, "Well, I'm just working on the trust," like, "I just want to deal with that." But, you know, that's not something -- now, under Tennessee law you would still not be required to disclose that, but nobody would come back to you later if you did disclose that and say, "Well, you're only supposed to talk about the trust, and he wasn't talking about the trust." So that's kind of on special considerations there.

The substantial financial injury matter is a little bit different. You can obviously disclose kind of prospective injuries. So if it's, like, "Look, this guy is going to rip you off or is trying to rip somebody off. I want to stop him," that's one thing. You can also disclose to mitigate or rectify past fraud. So, I mean, if it's a situation where you discover, like, "Okay. My client embezzled, like, $3 million. He still has it, but he's getting ready to spend it," like, you know, you can step in even though the injury has already been done. Unlike, you know, somebody's substantial injury or somebody's death, you can actually rectify if money goes missing. So that's why there's a difference there, but in this case it is limited to the scope of the representation. So if you're, like, if you're, like, doing, like, somebody's DUI or something and they're, like, "Oh, yeah, by the way, I'm going to rip off, like, the crop insurance people. Like, I'm just going to, like, send them -- you know, I've kind of, like, set this up, and I'm going to rip them off and make a couple of extra -- extra couple hundred thousand dollars." That's not something you would be allowed to disclose because it's outside of the scope of your representation. It's not something that your legal services have been used in the furtherance of. And another thing is to kind of consider the disclosure is only allowed if the attorney basically would be an accessory to the crime or fraud.

As an example . . . [t]o kind of discuss, you know, the example that sticks out the most -- and unfortunately -- or fortunately for, like, the legal profession but unfortunately, like, there were no lawyers brought into this, like, you know -- and a lot of people died that didn't have to. . . . It is basically a situation where the management at this company purposely concealed, you know, these salmonella results, and they would ship -- they knew they had a salmonella problem. They started shipping product back before they got test results. They used -- they kind of fudged some test results to get things down the line. The thing is, if a lawyer had been brought into this situation, it would certainly be one of those rare occasions, very rare occasions where it would be appropriate for a practitioner to disclose his client's activities, hopefully. I mean, that's why that rule is in place, is to kind of save -- make sure that the kind of oath of confidence -- or the confidence that you have in your client doesn't override, like, the kind of policy of keeping people from being injured or being hurt.

So kind of remedies or kind of practice pointers in dealing with this, if you do have a client that is looking to do something wrong, obviously you want to discourage. Your job is to provide them legal advice, so you want to discourage your client from any type of criminal or fraudulent activities. You want to encourage your client themselves to disclose something. One remedy is if you disagree with what the client is doing or kind of the road that the client is taking, you do what's called a noisy withdrawal. That's kind of like pornography in terms of -- I don't know how you describe a noisy withdrawal, but you can -- when you see it, you see it. It’s taking some type of action, like, calling attention to, like, you know, "I am leaving. I am no longer providing legal services."

In the very rare instance you did feel like you had an obligation to disclose some type of information, it's important to only divulge what is necessary to either save somebody's life or prevent somebody from being injured. If possible, make anonymous disclosures. You know, in practice how easy is that to do? I, you know, fortunately don't have a lot of experience with that. In the corporate setting it's a little bit different in terms of kind of the financial matters, under the ethical rules, and also Sarbanes-Oxley is kind of in statute. The idea is you need to promote -- or raise issues continually up the ladder to kind of satisfy your ethical obligations.

The example I have here is taking a matter to the general counsel. If the general counsel does nothing about it, take it to the CEO of the company. If the highest level of management doesn't do anything about it, under Sarbanes-Oxley you're required to take it to the board of directors, so there's that. . . .

[The remainder of the presentation consisted of audience discussion of hypothetical situations raising ethics issues and is not set out here.]

MS. VAUGHT: On behalf of the *Tennessee Journal of Law & Policy* and the Center for Advocacy and Dispute Resolution, I just want to thank you for attending today. Some of the issues that we talked about are in a constant changing period, and we saw that today. Actually, the Sixth Circuit issued a national stay on Waters of the United States rule that we talked about earlier this morning, so that's already changed. So we see a lot of these things are really popular in the law today.

The Journal was excited to host this today, and we hope you've enjoyed hearing from our panelists and

speakers. At this time I would like to thank the members of the Journal who helped: Will Mazzota, Dan Whitaker, Ryan Shanahan, Steffen, Sean, and Joseph. Additionally, we had help from the CLE coordinator for the school, Micki Fox with the *Tennessee Law Review*. The last two people I want to thank are Jenny Lackey, with the Center for Advocacy and Dispute Resolution, and our faculty adviser, Penny White. At this time I'm going to let Steffen close us out. And thanks for coming.

MS. PELLETIER: I'll keep this short. I'm Steffen Pelletier, I'm the Editor-in-Chief of the *Tennessee Journal of Law & Policy*. Before we close out today, we owe a huge thank you to Laura for putting together today's symposium. She has worked for nearly seven months towards the success of this symposium. It has certainly been about issues that she is extremely passionate about, and she pulled together a great panel of speakers. So just a little token of our appreciation, Laura, we'd like to say thank you so much for all you've done. With that, that concludes the symposium. Save travels, and thank you all for coming.