

## **Ethics and Agricultural Law: Three Considerations**

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### **Introduction**

The practice of agricultural law can be fulfilling and rewarding. However, like other areas of the law, agricultural law can present some serious ethical challenges. When presented with the challenge of putting together a discussion on ethics in the context of agricultural law, three particular issues came to mind:

- Our clients are subject to substantial regulation by federal, state, and local authorities. It would be impossible for a practitioner to acquire the necessary experience and knowledge to properly represent them in all matters that could potentially arise.
- Depending on the degree of specialization that you engage in, you may have a limited number of clients in the jurisdiction(s) where you are licensed. Licensure in multiple states can be expensive, requires staying on top of your registration requirements, and could (gasp!) involve taking multiple bar exams. This creates a temptation for practitioners to cross the line when it comes to the unauthorized practice of law.
- Our clients are not generally involved in run-of-the mill criminal matters, however, our clients can make products that have the potential to harm or kill the general public. Furthermore, our clients are subject to market pressures and have short-term incentives to ignore, conceal, or wish away some food safety concerns. This may put the practitioner in the undesirable position of being the only person standing between their client and a food borne illness outbreak.

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With this in mind, I have prepared a summary of the legal and ethical considerations that a practitioner should consider when confronted with these issues. I have focused on the Model Rules of Professional Conduct (MRPC). It is important to note that jurisdictions have their own ethics rules and their interpretations of the rules can vary.

## **I. Competence**

In this competitive legal market, a new client or a new case or matter can be a blessing. However, there is a temptation to bite off more than you can chew. This can have negative consequences for both the client and the practitioner. Clients can lose their livelihood or their liberty. Attorneys can face disciplinary actions or face suit for malpractice. There is no way to be completely prepared ahead of time for every client matter that walks through the door. And there are plenty of ways to get yourself up to speed or find competent representation for your clients. However, competence is a very relevant consideration for the oftentimes complex matters that arise when representing farmers or food processors.

### **a. Authority**

#### **i. MRPC 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **b. Potential Consequences for Violation**

#### **i. Client**

1. Loss of licensure necessary to conduct business
2. Financial loss from unwarranted fines, unfavorable settlements
3. Incarceration attributable to ineffective assistance of counsel
4. Waste of money on legal services

#### **ii. Practitioner**

1. Damage to reputation, loss of future legal engagements
2. Disciplinary actions
3. Malpractice lawsuits

### **c. Relevant Case**

#### **i. *In re Yacavino*, 494 A.2d 801 (N.J. 1985)**

1. Synopsis: Firm delegated simple, uncontested adoption proceeding to new associate operating as sole attorney in firm's outlying office. Associate failed to pursue adoption case. Associate later left firm but retained adoption case. Upon client's inquiries, Associate presented two falsified court orders purporting to demonstrate progress in adoption case. Bar complaint filed by local prosecutor.
2. Outcome:
  - a. Firm admonished in opinion for failure to provide proper oversight
  - b. Associate suspended from practice for 3 years

**d. Remedies**

- i.** Acquire expertise through research, study (not all on the client's dime)
- ii.** Associate or consult with competent specialist
- iii.** Decline the undertaking
- iv.** Refer to a competent specialist

**e. Practice Pointers**

- i.** Pay close attention to procedural requirements in administrative actions
- ii.** Guidance manuals for regulatory staff can be a helpful resource
  - 1.** Available online, FOIA
- iii.** Consider CLEs, educational materials to fast-track learning
- iv.** American Agricultural Law Association, industry trade associations, state bar associations can be helpful for referrals

**II. Multijurisdictional Practice**

If you've developed a specialized practice in agricultural law, your knowledge and experience may have value beyond the borders of the jurisdictions in which you are licensed. While multijurisdictional practice is common for attorneys with focused practices, there are some pitfalls. Practitioners who handle or vie for cases in foreign jurisdiction need to understand the parameters of what constitutes the unauthorized practice of law and know when to seek admission *pro hac vice*.

**a. Authority**

**i. MRPC 5.5 – Unauthorized Practice of Law; Multijurisdictional Practice of Law**

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that :

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.

## **b. Consequences for Violation**

### **i. Criminal**

1. Unauthorized practice of law is punished as a misdemeanor in many jurisdictions

### **ii. Disciplinary**

1. Can face disciplinary actions in jurisdictions where licensed

2. Can be barred from practice in jurisdiction where offense occurred

**c. Relevant Case**

- i.** *Indiana Supreme Court Disciplinary Com'n v. Farmer*, 978 N.E.2d 409 (Ind. 2012)

- 1.** Synopsis: Ohio attorney retained by family of Indiana inmate to conduct preliminary research, interview inmate, and review case documents. Purpose was to eventually assist in post-conviction relief efforts. Attorney is paid by inmate's family, which later agrees to retain him for post-conviction relief representation. Over a period of 3-4 years, Attorney visited inmate and others relevant to the case and copied court documents. Attorney did not register with Indiana State Bar. Inmate later filed bar complaint.
- 2.** Outcome: Indiana Supreme Court held that Attorney did not violate Rule 5.5 because he was protected by the "safe harbor" provision that allows attorneys to conduct preliminary research, interview witnesses, and review cases files without registering so long as the attorney reasonably expects to seek admission *pro hac vice*.

**d. Remedies**

- i.** Avoid advertising in jurisdictions where not licensed
- ii.** Do not hold yourself out as licensed to practice in jurisdictions where you are not licensed
- iii.** Associate with competent local counsel
- iv.** Seek admission *pro hac vice*

**e. Practice Pointers**

- i.** Carefully follow admission *pro hac vice* procedures
- ii.** Be aware of renewal requirements

**III. When to Tell on your Client?**

The Sixth Amendment entitles everyone facing prosecution has at least one person with whom they can confide their deepest and darkest secrets – their attorney. That expectation of confidentiality forms the basis of a sacred trust between the accused and their attorney. However, there are some limits to the attorney's duty to not divulge confidential information in extreme circumstances. Hopefully, you will not ever face a situation where you feel you may need to disclose client confidences. However, it is important to understand Rule 1.6 and be prepared should unfortunate circumstances arise.

**a. Authority**

**i. MRCP 1.6 – Confidentiality of Information**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**b. Consequences for Violation**

**i. Client**

1. Financial loss
2. Loss of liberty
3. Embarrassment, humiliation

**ii. Attorney**

1. Disciplinary action
2. Civil liability (malpractice)
3. Diminution of reputation
4. Loss of future business

**c. Relevant Case**

**i. *McClure v. Thompson*, 323 F.3d 1233 (9th Cir. 2003)**

1. Synopsis: Attorney represented Client arrested for murder of mother and disappearance of two children. Acting under the mistaken belief that children may have still been alive, Attorney anonymously reports location where Client stated he left children. Police locate children, both of whom were dead.
2. Outcome: Attorney did not violate ethical duties by disclosing location of children. Attorney was acting in best interest of client by attempting to save children, prevent additional murder charges.

**d. Remedies**

- i. Discourage client from engaging in criminal/fraudulent activities
- ii. Encourage client to voluntarily disclose
- iii. If client refuses to disclose, you can undertake a “noisy withdrawal”
- iv. If you do decide to disclose, disclose only what is necessary
- v. If practical, disclosures should be made anonymously

**e. Practice Pointers**

- i. Disclosure is voluntary in most jurisdictions, but required in some
- ii. Disclosure is an absolute last resort – most practitioners will face this
- iii. Corporate attorneys should report wrongdoings up the corporate ladder
- iv. Under Sarbanes-Oxley, attorneys involved with the preparation of documents filed with the SEC are required, by law, to disclose securities fraud

**f. Hypothetical**

**True Deception**

Rust Cohle is the owner of Flat Circle Flavor, a Louisiana-based ingredients supplier. Rust retained you to provide personal legal services on an “as-needed” basis. He sets up a meeting at a roadside watering hole wherein he discusses his plans to open up an unlicensed private investigation business. During the meeting, Rust starts to spin a yarn. Over the course of several Lone Star beers and two packs of cigarettes, he tells you that he and his former business partner, Marty Hart, were once part of one of our nation’s biggest and darkest scandals.

In the late 1990s, Flat Circle was an ingredient supplier to Yellow King Snack Foods. Yellow King exclusively marketed to America’s Eagle Scouts, county fair beauty pageant winners, and Rotary Club presidents. The problem was, Yellow King’s snack products were contaminated with an extremely toxic fungus – consuming even *de minimus* amounts of these products amounted to a death sentence. In light of the national tragedy wherein the United States lost thousands of beauty queens and community leaders – future and present, President Clinton declared a national month of mourning in hopes of rebuilding the nation and steeling its resolve.

FDA was able to trace the source of contamination back to Yellow King. For his company’s role in the scandal, Yellow King’s CEO, Reggie LeDoux, was convicted on hundreds of counts of

manslaughter. The judge sentenced Reggie to enough consecutive 10-year prison terms (without the possibility of parole) to ensure that he will die in prison.

After kicking around in the court system for years, there is now a wrongful death class action pending against Yellow King. The anticipated damages associated with the class exceed \$3 billion – a sum that would certainly bankrupt Yellow King, a publicly traded company.

Rust gives you all of this background to explain that it was actually him and Marty that supplied the toxin-contaminated ingredient to Yellow King. In anticipation of something like this, Rust had the local FDA investigator on his payroll, meaning that the agency and DOJ was certain not to look too far into any possible role that Flat Circle played in the contamination. Rust, a confirmed nihilist, declined to step forward and take any role in the scandal. The business continues today with Rust as the majority shareholder. However, Flat Circle no longer sells its contaminated ingredients and Rust has handed off all management responsibilities.

**The Fifth Circuit Court of Appeals is currently considering an appeal of a district court's denial of Reggie LeDoux's *habeas corpus* petition. Can you disclose to Mr. LeDoux's attorney what you know about Flat Circle's role in the contamination scandal?**

*No. Rule 1.6(b)(1) allows for disclosure of confidential communications in instances where such disclosures would prevent reasonably certain death or bodily injury. While a lifetime sentence in prison is no cupcake, Reggie LeDoux is not at risk of death or maiming. Without Rust's consent, you cannot disclose this information.*

**Can you disclose this information to the team of Yellow King's attorneys that are defending the class action?**

*No. Rule 1.6(b)(3) allows an attorney to disclose confidential client communications to prevent, mitigate, or rectify substantial injury to the financial interests or property that results from the client's commission of a crime. In this case, disclosure would likely mitigate Yellow King's damages because it could make a cross claim on Rust, Marty, and Flat Circle. However, disclosure is only allowed if the client has used the attorney's services to further a crime or fraud. In this case, you have been retained as personal counsel for Rust, not his food business.*

**Can you divulge anything that Rust has told you?**

*No. While his intention to continue an unlicensed private investigation service may be a state law violation, it is not likely one that will result in an imminent threat of death, bodily harm, or substantial financial injury. However, as an officer of the court, you would be required to withdraw from the client if he refused to operate his business in a legal fashion.*