

ETHICAL DUTIES, INCLUDING THE REQUIREMENT OF COMPETENCE, IN THE AFTERMATH OF *PADILLA V. KENTUCKY*

Presented by Learned Hand Team
Robert Van Pelt American Inn of Court
January 18, 2011

After introduction of the program topic, which was approved for mandatory continuing legal education credit on ethics, the narrator introduces a radio drama, entitled:

THE CASE OF THE FOREIGN FOREMAN

CAST (in order of appearance):

Intercom: Melanie Kirk
Locke: Andy Barry
Tinker: Jim Luers
Barrel: Laura Hegge
Birch: James Goddard
2d Intercom: Andy Barry
Bloch: Melanie Kirk
Mayo: Prof. Ruser
Sludge: Jessica Milburn
Judge: Judge Cassel

SCENE ONE: OFFICE OF LOCKE & LODE, LLP

Narrator: Ladies and Gentlemen, welcome to the Learned Hand Players' presentation of The Case of the Foreign Foreman. We begin this evening's drama at the law office of the firm of Locke & Lode, LLP, where civil practitioner Matt Locke receives a visit from his construction-company-owner client, George Tinker.

[Intercom] Mr. Locke.

Locke: [Talking on intercom.] Yes.

[Intercom] Mr. Tinker is here to see you.

Locke: Send him in.

Tinker: [Entering.] Morning, Matt.

Locke: Morning, George.

Tinker: How go the black arts of the law today? Based on the bill I got in the mail yesterday, I assume you've got the West Park case resolved by now.

Locke: Not quite, George, but we're getting there. Actually, there are a few questions I need to ask you about our privilege log. Do you have minute?

Tinker: I don't have time for that this morning, Matt. Do you remember Jim Mayo? He got pulled over by the police last night. They cited him for DUI, or driving under suspension, or some such nonsense. I think they even pulled his driver's license. I can't have him out of commission. He's my best foreman, and I need him on the job to finish work on the Uptown/Downtown Hotel project. We need to be at substantial completion in twelve months, and I can't do it without Jim.

Locke: That sounds like tough break for Jim, but nothing a good criminal lawyer shouldn't be able to handle. But you know, George, I'm not the guy for this one.

Tinker: I know this isn't your bread and butter, but I really trust your judgment, Matt.

Locke: I handle construction litigation, George, not criminal cases. I'd like to help you, but I don't dabble. I do know someone who can help. Whenever one of our clients' spoiled-brat kids gets pulled over for a DUI, we send them to Ernestine Bloch over at Bloch and Tachel. I have yet to see a case where she didn't tie the County Attorney up in knots. She should have Jim back behind the wheel and on the job in no time. Here, let me give you her number.

Narrator: We interrupt this program for a word from our sponsor, the Robert Van Pelt American Inn of Court. Professor Ruser

[Professor Ruser introduces potential discussion questions from Scene One]

SCENE TWO: OFFICE OF BLOCH & TACHEL, P.C.

Narrator: We return now to our program, The Case of the Foreign Foreman. In this scene, we move to the law offices of that well-known firm of criminal defense attorneys, Block & Tachel, P.C., where new associate Jo Barrel decides to place a telephone call to her former teacher at the law school, Professor Birch.

Barrel: [On the phone.] Hi, Professor Birch, it's Jo Barrel.

Birch: Jo! How is the real world treating you? Is it as bad as we said it would be?

Barrel: Not quite. I'm working at Bloch and Tachel. I have my own office, a nice view, and my first client. Actually that's what I'm calling about.

Birch: I did get your e-mail yesterday, which I read. I am familiar with the facts pertaining to your client. (e.g. charged with his fourth-offense DUI and with felony DUS; a long-time legal permanent resident (4 years); unmarried and has no legal dependents; travels abroad annually to visit family (in Mexico) during the holidays and stays for about 1 month).

Barrel: Great.

Birch: The first thing you need to know is that the Supreme Court recently decided the Padilla case. As a general matter, that case finds that criminal defendants have a Sixth Amendment right to be advised of the potential immigration consequences of guilty pleas. Counsel must therefore inform criminal defendant clients of potential immigration consequences.

Barrel: I see.

Birch: For your particular client, the immigration issues are pretty complex because of his status, travel habits, and the type of crime for which he is charged.

First, because your client is a lawful permanent resident (LPR), there is an issue of whether he will be deportable as a result of a conviction under section 237 of the INA. More specifically, is DUS a crime involving "moral turpitude" (CIMT). The answer to this is not entirely clear.

If it is a crime involving moral turpitude, then the client would be deportable because he committed the offense within 5 years of the last date he entered the U.S. and because the possible sentence is one year or more.

Barrel: I think I see what you mean. Is there anything else?

Birch: Yes actually. Since your client leaves the U.S. to visit relatives in Mexico each year, inadmissibility under section 212 is also an issue. If he is convicted of DUI or DUS, and if it is a crime involving moral turpitude, travelling could become a problem. More specifically, if he leaves the U.S after conviction and then tries to re-enter he would be deemed to be seeking admission under a section 101(a)(13)(C)(v), even though he is an LPR. That would mean he would be subjected to the crime involving moral turpitude ground of inadmissibility.

Barrel: You kind of lost me there.

Birch: That's better for my billable hours. And one more thing. Given the length of his time as an LPR, and that he has no immediate family, he would not be eligible for any relief from removal, either to prevent deportation under section 237 or to allow subsequent re-entry under section 212.

In sum, the stakes are pretty high here. I think this case needs a lot more analysis and strategizing in order to adequately advise the client on his best options regarding immigration consequences. And luckily, I am available for assistance.

Barrel: Is this work you do as part of the clinic?

Birch: Oh no. This is immigration work. It would be strictly between me, your law firm, and your client. My rate is \$200 per hour, with a \$1,000 retainer up front. I would be happy to help if your client is interested.

Barrel: Let's hold off for now. I'll need to clear this with Ms. Bloch first. Thanks for all your help, Professor.

Narrator: It's time again for a word from our sponsor and here's Professor Ruser.

[Professor Ruser introduces potential discussion questions from Scene Two]

**SCENE THREE:
ERNESTINE BLOCH'S OFFICE**

Narrator: As we return to this evening's program, we find associate Jo Barrel visiting her boss, partner Ernestine Bloch, at the firm of Block & Tachel, P.C.

Barrel: [Entering office.] Ms. Bloch?

Bloch: Oh, good morning, Jo. I hear you've been hard at work on that DUI file I gave you last week. Are you ready for the meeting with Mr. Mayo this morning?

Barrel: Well, I think so . . . pretty much. There are a few things I need to speak to you about before he gets here, however.

Bloch: Shoot.

Barrel: In reviewing the file, I discovered that Mr. Mayo is a legal permanent resident. And, through a little research, I learned that there's a Supreme Court case out there that suggests that defense attorneys have a duty to inform their clients about potential immigration consequences of their actions.

Bloch: Yeah, I seem to recall hearing something about that.

Barrel: Well, given that I don't know the first thing about immigration law, I contacted an immigration law expert regarding the case. The expert explained to me that, given the fact pattern here, Mr. Mayo could face some pretty serious immigration consequences if he is convicted of the charges. I've considered retaining the expert for the case, but he's pretty expensive and I don't know how to justify the expense in a simple DUI/DUS case. Do you think it is advisable for us to even take this case?

Bloch: Look. We need to be aware that this guy has come to us as a referral from Matt Locke. We get a lot of business from Matt and it doesn't sit well with him when we turn away clients. Also, as I understand it, Mr. Mayo works for one of Matt's best clients. I would hate for Matt to get complaints from his client about the expenses we incurred in this case. You catch my drift?

Barrel: Yeah, I think so.

[Intercom] Ms. Bloch?

Bloch: Yes?

[Intercom] Mr. Mayo is here to see you and Ms. Barrel.

Bloch: Very good. Show him in.

Barrel: Hello, Mr. Mayo. I'm Jo Barrel. [Gesturing.] This is Ernestine Bloch. She's a senior partner with our firm and she will be sitting-in on our meeting today.

Mayo: Sure. It's nice to meet both of you.

Barrel: Mr. Mayo, I've reviewed your file and am generally familiar with the situation. Let me just make sure that everything is accurate: According to my materials, you have been charged with driving under the influence and driving under suspension. You have three prior DUI offenses, correct?

Mayo: Yeah, I think that's right.

Barrel: Also, it says here that you are employed as a construction foreman, are unmarried, have no legal dependents, and that you have been a legal permanent resident for a little over 4 years. Does this sound right?

Mayo: Yep.

Barrel: Is there anything else I should know or do you have any questions for us?

Mayo: Well, I think I've told you everything. You know, these charges have hit me pretty hard. For the most part, I've always managed to stay out of trouble. I want to make sure that I'm fully protected here and that I do everything in my power to put all this behind me so I can get on with my life.

Barrel: Don't worry—you've come to the right place.

Narrator: We pause briefly for another word from our sponsor.

[Professor Ruser introduces potential discussion questions from Scene Three]

**SCENE FOUR:
PLEA HEARING**

Narrator: As we return to The Case of the Foreign Foreman, young associate Jo Barrel is just outside of the courtroom, meeting with the deputy county attorney, Ms. Sludge.

Barrel: Good morning Ms. Sludge, we need to talk about Mr. Mayo.

Sludge: Yeah, what about him?

Barrel: The guy has immigration issues, he could get deported if he pleads or is found guilty at trial on the DUS. So you dismiss the DUS, we will plead to DUI, and in case it makes you feel better, it might affect his immigration status anyway.

Sludge: Uh huh. If he's going to screw up his immigration status anyway, what difference does it make? Besides, you know this office has a policy of never dealing on a fourth offense DUI. Have you seen his record? His BAC was .297.

Barrel: I'm just worried about the immigration consequences for him.

Sludge: Well is he illegal? Because if he is, I don't care to do any favors; [pausing briefly] I didn't see a detainer from ICE

Barrel: That's because he isn't illegal. Look, I need to be able to tell this guy there's a chance he can avoid being deported; I have to advise him that the DUS can get him deported, which means he's not going to be willing to plea, which means you'll have to try the case unless you just dismiss the DUS and give us the DUI.

Sludge: Why tell him anything at all? Oh, wait, that Padilla thing. I guess you guys have to advise your clients about all that immigration stuff.

Barrel: Either you dismiss the DUS and we'll plead to the DUI, or you force a trial on the DUI and DUS, and I'll demand a jury, we won't waive that, and I know you don't care but in the end, the guy may have immigration problems anyway even if I get an acquittal on the DUS. So. Your choice.

Sludge: Well, let me think about it? Does this guy have kids or something?

Barrel: Let's not get into that. Look, I'll save all my special immigration requests for cases in which a guy is otherwise legally here, just like Mr. Mayo.

Sludge: Ah, forget it, I don't have time for this, I don't have a clue what your problem is with the immigration crap but I'll just drop it for now—you get your DUI.

Narrator: Time again for a word from our sponsor.

[Professor Ruser introduces potential discussion questions from Scene Four]

**SCENE FIVE:
COURTROOM**

Narrator: As we return to The Case of the Foreign Foreman, we are in the courtroom, where Jim Mayo, accompanied by his lawyer, Jo Barrel, is about to enter a plea of guilty to the DUI charge, in accordance with the plea bargain Barrel negotiated with prosecutor Sludge.

Judge: We are on the record in Case No. CR10-666, State v. Mayo. Ms. Barrel, I understand that your client has agreed to plead guilty to a fourth offense driving under the influence charge in exchange for a dismissal of the felony DUS charge pending against him. Is that correct?

Barrel: Yes, your honor.

Judge: Mr. Mayo, is this also your understanding?

Mayo: Yes, your honor.

Judge: Alright. Before the court can accept your plea, Mr. Mayo, it is my responsibility and duty to fully advise you of your rights under the law and the effect and consequences of your plea of guilty. As it applies to you, the crime of fourth offense driving under the influence carries with it a possible sentence of five years imprisonment and a 15-year to life license suspension. Do you understand?

Mayo: Yes.

Judge: Additionally, if you are not a U.S. citizen, your guilty plea may also adversely impact your immigration status, and could result in your removal from the United States. Do you understand?

Mayo: [Turning to Barrel.] Huh? What does that mean?

Barrel: [Quietly answering Barrel.] Oh, don't worry about it. That's just standard legal stuff judges have to say at these types of hearings.

Judge: Ms. Barrel, have you spoken to your client about the immigration consequences of his guilty plea?

Barrel: No, your honor. But I've analyzed it and am satisfied that it is unlikely that there will be any adverse immigration consequences. Given the nature of the charges pending against Mr. Mayo, I don't think that conversation is necessary. We can proceed.

Judge: Ms. Barrel, clearly your client is confused. I'm not going to accept a guilty plea until Mr. Mayo has a chance to speak to you about this matter. I'll return to my chambers until you have a chance to sort this out. The court will stand in recess. [Judge exits.]

Mayo: Ok. So, what is the judge talking about?

Barrel: Nothing really. I think he just wants to make sure you understand that it's *possible* that you could get deported if you are convicted of these charges.

Mayo: Deported? What are you talking about? You never mentioned this before!

Barrel: Well, to tell you the truth, I really don't know much about it or what could happen, but I think you'll be okay. If you want more information, you really should hire an immigration attorney. Immigration law is super complicated and way beyond my area of expertise. In any event, this is a sweet deal, and, quite frankly, any good attorney would tell you just to accept the agreement and move on.

Narrator: In just a moment, we'll return for the final scene of our dramatic presentation of The Case of the Foreign Foreman.

[Professor Ruser introduces potential discussion questions from Scene Five]

SCENE SIX: DENOUMENT

Narrator: As we conclude tonight's program, we return to the place where we began, the offices of Locke & Lode, LLP. Matt Locke is about to receive an unexpected visit from his client, George Tinker.

Locke: George. What a nice surprise? Was Patty not at her desk?

Tinker: I didn't stop to check. Matt, we have a problem. And I mean we have a problem.

Locke: What's the matter? I told you, we will win the West Park case on appeal. That trial judge just doesn't understand the nuances of construction law like I do. The court of appeals will straighten him out.

Tinker: I'm not here about the West Park case. I don't care about West Park. Jim Mayo went back to Mexico, and he can't come back.

Locke: Jim who?

Tinker: You don't even remember, do you? Jim Mayo. He was my project foreman for the Uptown/Downtown Hotel.

Locke: Oh, right. Why doesn't he want to come back?

Tinker: He wants to come back, the government won't let him.

Locke: What's the problem? Was he deported? Is he illegal or something? Did this have anything to do with that speeding ticket?

Tinker: He wasn't deported. He went back to Mexico for a few months at Christmastime. And the charge was driving under the influence. And here's some more legalese for you – prohibition of re-entry. Is that a new concept for you? Well, don't feel too bad, that two-bit criminal defense lawyer you sent me to evidently didn't understand it either. But I'll tell you what it means. It means that Jim Mayo is back in Mexico to stay. And the Uptown/Downtown Hotel is not going to get built on time.

Locke: Wow.

Tinker: Wow is right. You and I need to figure out how to deal with \$1,000,000.00 in liquidated damages.

Locke: I guess we do.

Tinker: Actually, the way I see it, the concern is more yours than mine.

Narrator: And that concludes our dramatic presentation of The Case of the Foreign Foreman. We now return you to our studios for a discussion of this evening's program, moderated by Professor Ruser.

[audience already has one page (duplexed) handout, in separate document]

[audience is now engaged with discussion questions, in separate document]