

## **How to be a Good Neighbor**

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### I. Introduction

- A. In recent years, large livestock operations have become controversial, and, like too many controversies in our society, this one has found its way to the court room.
- B. The Water Keepers led by Robert F. Kennedy Jr. are only the latest people to think that this industry would be easy litigation pickings.
- C. We have defended many large companies in many industries. No one thinks they deserve to be sued. You don't think so either.
- D. We are here to tell you about our experience defending Continental Grain, now ContiGroup Industries, and Premium Standard Farms.
  - 1. Continental didn't think they deserved to be sued either. They thought they were good neighbors.
  - 2. The people of Northwest Missouri had invited the company into the area because of the bad state of the local farm economy.
  - 3. So Continental built five farms in Northwest Missouri, with 20,000 sows and more than 200,000 hogs in all. This was before they merged with PSF.
    - a) They were in state-of-the-art flush buildings with 27 anaerobic lagoons.
    - b) But some of their neighbors organized against them and tried to keep them out.
    - c) They were small farm activists who thought operations like Continental's were an economic threat.
    - d) So they did the neighborly thing: they sued.
    - e) But they didn't want their neighbors to decide the case. They brought it in St. Louis, more than 200 miles away. St. Louis, if

you do not know this, is well-known throughout the Midwest for its large verdicts. Plaintiffs flock to its courts.

## II. Summary of case

A. We are here to talk about the case because if it happened to Continental, it could happen to any producer.

1. It doesn't even matter if most of your neighbors support you. That was true of Continental also.

2. The plaintiffs made up a minority of the people who lived within five miles of the farms, even of the closer neighbors.

B. Claims

1. Injuries

a) Odor. Every plaintiff said the odor was overwhelming. Sometimes fighting back tears they described the smell as "horrible," "terrible," "sickening," "nauseating," "ferocious," "a penetrating odor that you just really can't get rid of," "just spreads over everything," "the worst thing I've ever smelled."

b) Health problems.

(1) About one-third of the plaintiffs complained of symptoms from the farms.

(2) They ranged from irritant effects, like burning eyes, coughing and shortness of breath, to more serious problems such as two strokes and a heart attack, along with psychological conditions like depression and stress.

c) Insects. A little more than half the plaintiffs complained about infestations of swarms of flies, which they said they couldn't get rid of.

d) Water. No one had evidence of contaminated water on their property, but many of them claimed they were in fear of contamination. They had experts who contended that Continental's lagoons were leaking. Plus, there had been some spills, and a few of them had landed on some of the plaintiffs' property.

2. Punitive damages.

- a) They also sought punitive damages because they said Continental knew it was building shoddy farms and knew that it was going to create a nuisance. This was the focus of plaintiffs' fire in the case. They spent probably three-fourths of their case on this claim.
- b) They hoped for a verdict of close to \$100 million dollars.
- C. Then midway through this case, they brought a Clean Water Act and Clean Air Act case against PSF in Kansas City.
- D. About a year after that they brought a Clean Water Act and Clean Air Act case against Conti.
- E. So they had three large lawsuits against us.
- F. The nuisance case went to trial first. It lasted three and a half months. The jury deliberated nine days and then awarded 56 plaintiffs nothing, 52 plaintiffs \$100,000 each, and ruled for us on punitive damages.

### III. Trial

- A. The law firm that had this case was one of the largest in the state. They thought that they were on such a gravy train that they assigned their top trial lawyers to it, a team of six lawyers in the courtroom and untold others back at their office.
- B. This was a larger team than we had. And at times, we must admit, we felt outnumbered.
- C. Now in St. Louis, \$100,000 is not considered a lot of money, and in this case it was less than the amount that the plaintiffs' lawyers had invested in the case, in their cash outlays and the value of their time. The word on the street in St. Louis is that they had invested perhaps five and a half to seven million dollars in the case in time and expenses. But their fee was less than \$2 million.
- D. Then, a year later, when it didn't look like their prospects in the two Clean Water Act cases were any better, they decided to get out of the pig business.
  - 1. They withdrew from the two Clean Water Act cases.
  - 2. They fired the lawyers who had been prosecuting the cases for them.
  - 3. And the chief lawyer for their side went to a small firm, where he has continued to pursue those cases but, without a large firm to provide financial backing, he has struggled to keep his head above water.
  - 4. The Water Keepers have made a few noises about getting involved, but so far they haven't stepped in and haven't bought any new cases against the company either.

5. Neither have any other lawyers.

E. The reason is that, because of the experience the plaintiffs have had so far, lawyers are thinking twice about bringing this kind of a case.

F. But what happens if a case like this happens to you?

IV. What we would like to talk about today are the lessons we learned about defending cases like this.

A. We will concentrate on the nuisance case because that is the one that went to trial and set the stage for everything that came later.

B. One is a lesson that we lawyers didn't need, but a painful one for our client.

1. That is that it doesn't matter how well-intentioned you are and how responsible you are in how you treat others – it doesn't matter how good a neighbor you try to be.

2. In today's environment, in which people are constantly reading about huge verdicts and in which lawyers can be found to try to trump up nearly any kind of a case, you are subject to being sued.

3. Depending on what you do, you can lower your chances, but it can happen to anyone.

4. But if it does happen, the kind of neighbor you are will make a difference.

5. And also the kind of defendant you are.

6. Because if you show the community that you are not going to be a pushover for any kind of a claim, you will be better off in the long run.

V. The problem and the solution

A. These were all serious allegations, especially in the City of St. Louis, where we were faced with inner-city jurors with a natural distrust of big companies and with a Democratic judge who had a sentimental regard for these small farmer plaintiffs.

B. We thought that the single biggest thing we could do was to get the judge and the jury to visit the farms. If the jury had witnessed the conditions for themselves, we think they would have come away from the experience with the same impression nearly everyone else does. People who have never seen an operation like this commonly expect the worst and are amazed when they get there that they can barely smell anything, even when they are close to the lagoons. They are also surprised by how attractive they are and at the large spaces that separate the farms from the neighbors.

1. But the plaintiffs' attorneys fought that as vigorously as any issue in the trial, and the judge denied our request.
  2. She said she believed that a one- or two-day visit would not necessarily be representative of the conditions the plaintiffs lived with year in and year out.
- C. So we had to figure out how to give the jury a true picture of the conditions. There were two decisions we made on how to defend the case that did this.
1. First, there is the approach that I think is important for any large company defending a complicated case. You have to capture both the minds and hearts of the jury. That means giving them both scientific and common-sense evidence.
    - a) Jurors expect that big companies will have science to back up their claims. So you have to give it to them, with the best scientific expert witnesses you can find. The jury may not truly understand it, no matter how simple you make it, but you have to show them the science on your side.
    - b) But that is not where you win the case. You win it with common-sense evidence.
      - (1) In this case, our common-sense defense can be summed up in one simple sentence: Actions speak louder than words.
      - (2) We tried to show that the plaintiffs were not living their lives the way you would expect considering the awful nuisance they testified about in court. We also showed that was true of the people in the area who had not sued.
  2. The second important decision we made was to agree to have all the cases combined in one large proceeding. Sometimes defendants are afraid of that because it is not too hard to see how verdicts for individual plaintiffs can add up to huge amounts. But in my experience, where you have large numbers of plaintiffs, you will have some with appealing stories and some who have the opposite. If you hammer home the bad plaintiffs – bad from their point of view – those are the stories that become most memorable.
- D. So let me show how this all played out with the individual claims.

## VI. Odor

- A. This turned out to be the one complaint which the jury credited.
1. How do we know this?

- a) Every plaintiff complained about odor, but fewer people made claims of medical symptoms, flies or water problems. Still, everyone who recovered money got the same amount, no matter what non-odor claims they made.
  - b) But only those living within a mile-and-a-half of the farms recovered, and they got far less than they hoped.
2. We presented expert testimony from Dwaine Bundy of Iowa State and Jim Moore of Oregon State. They discussed how anaerobic lagoons work to break down waste and described how odor travels, to show the jury that scientifically, this was an appropriate waste treatment methodology for this area.
3. But more persuasive were the plaintiffs' actions.
- a) Some of them had bought land in the area since the farms were built.
  - b) Others added decks to their homes, moved children and grandchildren onto their property, and invited out-of-town friends to hunt and fish on their grounds.
  - c) We had a story to tell like that for nearly every plaintiff. But none could compare to Gareth Summa. He testified that the overwhelming odor was present 90% of the time and prevented him and his family from planning outdoor activities. Yet, it didn't keep him from hosting his daughter's wedding, with 250 guests, in his backyard.
4. We also told the jury about the actions of other neighbors, ones who didn't sue. Many of them testified for us that they didn't experience bothersome odor. I think the jury would have discounted their testimony if they didn't back it up with their actions.
- a) Some of them had moved into homes they rented on a month-to-month basis, so there was nothing to keep them there if conditions were intolerable.
  - b) Some employees lived on Continental's property and invited out-of-town relatives to visit and stay with them.
  - c) People in the area came to the farms with their children to hunt and fish.
  - d) And again, we had one great story to tell that stood out. There was a woman who opened a restaurant with outdoor dining near some

of the plaintiffs' homes two miles from Continental. Who would do that if their customers had to fight their way through a terrible stench just to get there? We brought the owner to trial to testify that she would never have started a restaurant where there was a terrible hog odor.

B. Health problems

1. I don't think the jury ever took these seriously.

- a) Only one or two of the plaintiffs told any doctor about their complaints, except for a doctor they were sent to by their lawyers, and that one gave them no treatment.
- b) The few plaintiffs who did mention their symptoms to a doctor didn't mention the nearby hog farms.
- c) That didn't make sense. We told the jury, imagine that you are living near something that you believe is emitting contaminants into the air that are getting into your body and you believe those contaminants are making you sick. Wouldn't you ask your doctor if you had anything to worry about? Wouldn't you ask if you were safe, if your children were safe? Of course you would, if it were true.
- d) The jury obviously believed it wasn't true.

C. Fly complaints

1. Going into the trial we were as afraid of this complaint as anything the plaintiffs raised. Our jury research indicated that women in particular were bothered by this complaint.

- a) Here is where we got lucky. The plaintiffs' lawyers were greedy. I don't think they fully appreciated this complaint until shortly before trial. So when we took the plaintiffs' deposition during the year before, not many mentioned flies. Then at trial they came up with these horrendous stories about flies inundating their homes. They tried to get around the inconsistencies by saying that the fly problem didn't begin until after their depositions, even though the farms had been there for several years by that time.
- b) Gordon came up with the perfect term for this phenomenon, and so, we began referring to this as "The Great 1998 Post-Deposition Fly Invasion."

- c) Gordon even asked one of the plaintiffs, “How do you think the flies knew that your deposition was over and so it was safe to come to your house?”
2. We also had a good expert to testify, Dr. John Campbell of the University of Nebraska. He told the jury that the flies in the plaintiffs’ homes were not the kind that come from hog operations. And he also had a good common-sense theme.
- a) That was that there were hardly any flies on Continental’s property.
  - b) The plaintiffs took hours of videotape on our farms. They felt free to come and go on our property at will.
  - c) And they claimed that the flies came from maggots that were breeding in the lagoons.
  - d) But there were no videos or photos of flies on our property.
  - e) Why not, we asked. If the plaintiffs were right, that would mean that millions of flies were being born on Continental’s farms and immediately said to each other, “Let’s get out of here and go bother the neighbors.” Again, that doesn’t make sense.

D. Water claim

1. That brings us to the last claim, that of water contamination.
2. They had two experts to support those claims, but they based their opinions on nothing but the fact that they had seen standing water in the vicinity of some of the lagoons. They had done no tests. Nor had any of the plaintiffs. Thus, there was no evidence that any contamination had left Continental’s property.
3. Because of the seriousness of these claims, we did do tests. We had a geophysics firm test the six lagoons that the plaintiffs claimed were in the worst shape. Those tests showed the lagoons were intact.
4. Then we again had actions-speak-louder than words evidence. The plaintiffs’ experts never reported their opinions about the lagoons to the state officials in charge of overseeing the water supply, which is the opposite of what you would expect if these experts were sincere in their beliefs.
5. The plaintiffs said they were living in fear that hog waste had contaminated their water, but they hadn’t taken the logical step of having their water tested, even though tests by state officials cost only \$15.

6. If you were afraid that your family's drinking water were contaminated, would you have it tested for 15 bucks? Of course you would. So would the jury.
7. Nor did they tell any of their neighbors who were not part of the lawsuit about their beliefs.
8. The picture we tried to paint was of people who were only concerned about winning their lawsuit, not about really helping.

## VII. Punitive Damages

### A. Introduction

1. Punitive Damages are the most dangerous part of a lawsuit.

- a) A jury has a roving commission to impose unlimited damages, unlike the compensatory damages which are required to be tied to a demonstrable injury.
- b) Courts are usually strict in limiting compensatory damages to only the amount proven to be necessary to compensate the plaintiff for their injuries.

2. The basis for punitive damages is to punish the defendant.

- a) Since the jury often has already decided that the defendant needs to be punished, the determination of damages can quickly involve huge amounts of money.
- b) Obtaining punitive damages was the primary goal of the plaintiffs in the Hanes case.
- c) The plaintiffs' attorneys would not have even considered the cost and risk of pursuing this case without the belief they could hit it big on punitive damages.

### B. Standards for Assessing Punitive Damages

1. A jury is required to find that the defendant's acts were "outrageous" and committed with an "evil motive."

- a) However, this is not as difficult as it seems since courts define "outrageous" as "conduct which demonstrates a reckless disregard for the rights or safety of others."
- b) This allows plaintiffs to point to a pattern of conduct, such as spills or permit violations to establish the necessary reckless conduct.

2. Most often the evidence used by plaintiffs to establish punitive damages comes directly from the defendant's own documents, which are provided to the plaintiffs in the discovery process of the lawsuit.

- a) Plaintiffs' attorneys will tediously examine all the defendant's documents which usually are kept in someone's files forever.
- b) This usually results in the discovery of comments made years ago that, on their face, appear to give short shrift to the rights of the neighbors when making decisions.
- c) It is often very difficult to explain tongue-in-cheek remarks about a plaintiff, a foul-up, a regulation or a regulator many years later.
- d) We certainly had to deal with a number of comments and incidents that were lightly considered at the time but didn't seem so minor when presented in a courtroom. We also had a manager with a very dry sense of humor, who didn't seem so funny when his comments were read to the jury.
- e) E-mails have become common place, but we now are making records of conversations that we really do not believe anyone else will ever read! Our manager routinely printed out his e-mails and kept them in a file, which proved to be a treasure trove for the plaintiffs. This practice put us behind the 8-ball from the very beginning, as the plaintiffs opened the trial by showing the jurors large blow-ups of his e-mails with his comments highlighted. For example, "I can run circles around the state regulators."

C. Preventative Medicine – If done well creates evidence used to defend against punitive damage claims

1. Good Neighbor Policy –

- a) Create an attitude within the company that the underlying corporate policy is to do the right thing.
- b) Do not condone statements or actions that in anyway appear to denigrate the neighbors. Certainly do not allow light-hearted comments to make their way into written documents.
- c) Know the state requirements and make your own policies even stricter.
- d) Join local and state boards, advisory committees, etc. Provide resources to these committees. Encourage employees to participate and pay their expenses.

- e) Make sure your facility is as clean as possible. Shelter buildings, etc. from view. Trees and other pleasant landscaping go a long way in lowering your profile and reducing hostilities with neighbors.
- f) Listen to complaints from neighbors. Set up an advisory board to handle complaints. Keep lines of communication open both ways. Be sure to resolve legitimate complaints because if you don't, the frivolous complaints will appear more legitimate. (When you leave bins overflowing with dead animals in clear sight of the public, the jurors are more likely to believe a neighbor complaining of odor who lives miles away.)
- g) Participate in the community and encourage employees to do so. Sponsor youth activities. Encourage employees to live near the facility. Plaintiffs love to point out when they don't!
- h) Generally be a good neighbor. Allow neighbors to fish, hunt or make other use of your facilities. (Of course have them sign a release!) Adopt policies that are neighbor friendly, such as limiting truck traffic at undesirable times. Discourage acts upsetting to neighbors and discipline those who violate those policies.

## 2. Document Retention Policy

- a) Establish in writing a reasonable policy on retention of documents, including e-mail.
- b) Review the needs and regulatory requirements of specific documents and establish a method of destroying all unnecessary documents in the shortest period allowable.
- c) Ensure that the policy is followed and old documents purged periodically. I can't emphasize how damaging old documents can be when looked at years later. It is very difficult to explain the context of a letter when the author is no longer available or when other explanatory documents are not available.

## VIII. Criminal Liability

### A. Introduction

1. Criminal prosecution is a real consideration of companies in this industry as the government has made environmental violations a major enforcement initiative.

2. More importantly, your industry and your facilities create strong reactions by many in the community.
  - a) Every problem will be magnified and reported.
  - b) You are a perfect target for prosecutors.
  - c) Think of the big headlines that are generated by any problem in your industry and how big they will be if an indictment is announced.
3. The government has demonstrated that it wants to include a significance deterrence in the enforcement of environmental crimes and the best way to do that is to prosecute responsible individuals, not just the company.
  - a) I have heard Justice Department officials boast that, "Going to jail will be considered another cost of doing business for those who commit environmental violations."
  - b) The prosecutions of the past 5 years has shown that they mean it.
  - c) The prisons now house many corporate employees who only thought they were cutting corners and never considered themselves to be criminals.

B. Clean Water Act

1. The most common statute used.
2. It is very simple to prove.
  - a) It requires only a discharge of a pollutant from a point source into the waters of the United States, without a permit or in excess of permit limits.
  - b) Basically anything other than clean water that enters into a creek, stream, wetland, water table, whatever, that could flow into a larger stream, etc. and subsequently reach a navigable water.
  - c) There is no requirement that the discharge be large or exceed certain standards.
  - d) Nor any requirement that the pollutant be hazardous or toxic.
3. Historically, agricultural activities were exempted from this act as there generally was no point source in agricultural run-off.
  - a) This changed in the late 80's to include CAFO's.

- b) Even if not a CAFO, or non-discharge facility, there are many possibilities for discharges to emanate from the expanded definition of point-source, which can include any collection system, containment, piping, etc.

#### 4. Offenses:

- a) Felony – An intentional or “knowing” violation. Certain to include a prison sentence, a fine and loss of citizenship rights. The fines range from a minimum of \$5,000 per day to \$50,000 per day. There is no requirement that the discharge was harmful, however, the amount of harm or lack of harm will be considered by prosecutors in determining whether or not to bring charges and by the court in considering the sentence.
- b) Misdemeanor – Negligent act. It is unusual in criminal law to punish non-intentional acts. Manslaughter is one of the few other crimes involving a negligent act. Prison time is still possible, however, limited to one year, plus a fine.
- c) Failure to report a discharge – It is a separate offense to fail to timely report a discharge if in violation of a permit or under a separate statute (CERCLA) if the discharge contains more than a reportable quantity of a listed hazardous material. Ammonia is a listed material. All violations under CERCLA are felonies.

#### C. Responsible Corporate Officer Doctrine

1. Don't be fooled into believing you are safe because you are high enough on the corporate ladder that you are not personally involved in activities that would cause a violation.
2. The government has continued to put pressure on corporations by using this doctrine, which allows them to convict high level employees, simply because of their position and responsibility within the company.

#### 3. Theories

- a) Willful Blindness – Invoked when the manager intentionally shields themselves from knowledge of the activity, while at the same time should have known the activity was occurring.
- b) Training – Failure to train employees in proper or legal methods.
- c) Funding - Failure to provide sufficient funds to properly dispose of pollutants

- d) Supervision – Failure to properly supervise employees who have responsibilities that could cause harm to the environment.

#### D. Federal Sentencing Guidelines

1. You do not want to be involved in the federal criminal system because it is grossly unfair.

- a) Once you are the target of an investigation, its like being on your own one yard line, but the field is slanted uphill, the wind is in your face, the other side controls the referees, and your punter has taken the day off.
- b) What makes this system worse is that Congress has established certain hard and fast guidelines for sentencing those convicted. Environmental crimes no longer bring only probation. These crimes have guidelines that usually ensure a prison sentence. There is no such thing as parole. The judge no longer has discretion in sentencing.
- c) It is the prosecutors who now have all the power, which they use this power to extort pleas of guilty from those who often believe themselves to be innocent.

#### E. Compliance Programs

1. One way to keep yourself out of the criminal system, or mitigate the damage, is to have a good compliance program.

- a) If the program meets the standards of the sentencing guidelines, the judge must give certain credits and the sentence will be mitigated.
- b) If the program impresses the prosecutor that the company did everything it could reasonably do to prevent the violation, the prosecutor can decide not to bring charges or to bring lesser charges.
- c) This is especially true if the program provides the company with notice of the violation before the government becomes aware of it and the company promptly reports the violation to the government.

2. Necessities of a good program.

- a) Design – The program needs to be designed to specifically fit the needs of the company to prevent and catch, at an early stage, the full range of possible violations.

- b) High Management Authority – The program must have the oversight of a senior management official with annual reporting to the board.
- c) Training – Ensure that training is conducted conscientiously and every employee signs a completion form to provide proof of attendance.
- d) Effectiveness – Common sense implementation of the program is important. Most problems come from employees or former employees who believe the company is not handling the problem. Establish 800 numbers for employees to anonymously report concerns they would be afraid to report to local managers. (Create an environment that encourages employees to report problems.) Conduct exit interviews of departing employees and obtain their signatures on the completed forms. This will help discredit any future allegations.
- e) Discipline – Appropriate discipline must be meted out when violations are discovered. Records of discipline must be maintained to prove that the program is more than a paper policy.
- f) Good Neighbor – This is the same as discussed above. You must create an atmosphere where your employees and neighbors believe that the company puts the environment above profit. The community should be aware of the 800 number so they also believe they can report concerns to the company. Most problems come about or are aggravated when the employees and neighbors complain to a government entity because they do not believe they can report concerns to the company or do not believe the company cares.
- g) Prompt Reporting – The benefits of the program are lost if reporting within the company is not done promptly. The company must report incidents promptly to the government and delay in reporting can cause the government to bring charges that they may not otherwise bring. Additionally, some events create an obligation to report and a failure to do so timely is a crime by itself. Clearly, this means the program must cause internal reporting to be done quickly so that an intelligent decision can be made on reporting the incident to the government.

#### F. Warning Signs of Criminal Investigation

1. Many companies ignore obvious signs that a criminal investigation is underway and fail to take an opportunity to head off criminal charges or to take steps to defend or mitigate the charges.

- a) Employee interviews being conducted by agents with gold badges.
- b) Employees being interviewed at home during the evenings rather than at office.
- c) Reports of interviews of former employees.
- d) Unusual requests by regulatory agencies.

2. If any of the above occur, you should contact an attorney at soon as possible.

- a) Failure to be proactive can seriously hamper the proper defense of the charges.
- b) Equally important is the fact that many investigations become more serious than necessary because the government believes the target is attempting to cover up the violation or interfering with the investigation. It is not unusual for the most serious charges resulting from these investigations to be obstruction of justice or making a false statement to a federal agent. (yes, even though you are under no obligation to speak to an federal agent it is a serious offense to lie to an agent)

## IX. Conclusion

The best way to defend yourself against punitive damages and criminal charges is to make every effort to prevent the acts leading to the charges. Even if you don't succeed in preventing the acts, you have given your attorneys the ammunition to fight the battle. Establish a compliance program, be a good neighbor and create an atmosphere where your employees don't consider doing something harmful to their neighbors and will quickly report to you anyone who does.