UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

19th Annual Renewable Energy Law Institute and Essentials

January 29, 30-31, 2024
Austin, TX

Ethics in Renewables: Hot Button Topics in Transactions and Litigation

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ETHICS IN RENEWABLES:
HOT BUTTON TOPICS IN TRANSACTIONS AND LITIGATION

"If you have to ask…" is the age-old gut check for ethical dilemmas. We know that acting ethically often means doing less than you are allowed to do and more than you are required to do. This sounds like a good rule of thumb, but in practice it can be difficult to apply. In day-to-day practice, attorneys must juggle the obligation to advocate diligently and zealously for their clients (to win), and the obligation to the courts and to adversaries to be honest and upright (to comply with the law and rules of professional conduct).

Some rules are obvious: do not instruct your client to commit perjury; do not steal money from your client's trust account; do not falsify records used for negotiations or in court. But the thorny ethical issues are difficult to predict. This paper identifies a selection of scenarios that could arise in litigation or transaction practices. While many of the examples discussed herein come from or could be applied to other contexts, the ethical principals at issue can readily be applied to other industries, including the renewables industry. To that end, this article provides some recent examples of case law that present nettlesome issues within the specific context of energy transactions and litigation. We will begin by summarizing some key ethical rules and then evaluate specific scenarios to determine how those rules might apply.

I. PART 1: THE RELEVANT RULES

A. Model Rules 4.1 and 8.4: Truthfulness in Statements to Others

The ABA's Model Rule 4.1 provides the following guidance regarding making a false statement:

> In the course of representing a client a lawyer shall not knowingly:
>
> > (a) make a false statement of material fact or law to a third person; or

> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[1]

But while an attorney must be truthful in negotiations, she need not alert a counter-party to facts of which they are not aware, according to a comment to the Rule: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false."[2]

Model Rule 8.4 more generally states that a lawyer engages in misconduct when the lawyer "engage[s] in conduct involving dishonesty, fraud, deceit or misrepresentation."[3]

B. Model Rule 3.3 and Texas Disciplinary Rule of Professional Conduct 3.03: Truthfulness in Statements to a Tribunal

When a lawyer is communicating with a tribunal (such as a judge or arbitrator), similar rules apply regarding prohibited false statements under Model Rule 3.3:

A lawyer shall not knowingly:

> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer

[1] MODEL CODE OF PROF'L CONDUCT R. 4.1.
[2] *Id.* cmt.1 (emphasis added).
[3] *Id.* R. 8.4

Title search: Ethics in Renewables: Hot Button Topics in Transactions and Litigation

First appeared as part of the conference materials for the
19th Annual Renewable Energy Law Institute session
"Hot Button Ethics Issues in the Renewables Industry"