



SOME LIKE IT HOT:

CURRENT ETHICAL ISSUES IN ENVIRONMENTAL LAW

IEL Energy Industry Environmental Law Conference – Houston, Texas

May 18, 2018



OVERVIEW

- Environmental Experts & Ethics
- Duty to Disclose
- Conflicts of Interest
- Complex Compliance Situations
- Environmental Ethics in a Digital World
- #MeToo



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ENVIRONMENTAL EXPERTS & ETHICS

Unauthorized Practice of Law





EXPERTS & ETHICS

COMMON SCENARIO:

Providing expert opinion in litigation

- Expert from Rampage Environmental Group in deposition says:

“First of all, I’m not a lawyer, but I do from time to time interpret regulations from a technical perspective, and I have reached the conclusion that my client’s facilities are exempt under the State’s environmental Rule XXX.XX”



EXPERTS & ETHICS

- Expert both in deposition and in written report gives:
 - Interpretation of legal rules;
 - Applies those rules to facts of client’s activities; and
 - Offers and opinion that client’s activities fall outside of scope of rules.

Is this practice by the consultant ethical?

A. Yes, consultants are permitted to interpret laws and regulations.

B. No, consultants are not bound by lawyer's rules of professional conduct.

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CONSULTANTS/ENGINEERS – QUALIFICATIONS

- **Texas Occupations Code § 1001.003**
- Practice of Engineering means:
 - “[T]he performance of or an offer or attempt to perform any public or private service or creative work, the adequate performance of which requires engineering education, training, and experience in applying special knowledge or judgment of the mathematical, physical, or engineering sciences to that service or creative work.”



PRACTICE OF ENGINEERING

- Practice of Engineering includes, for example:
 - Consultation, investigation, analysis, planning, engineering for program management, providing an expert engineering opinion or testimony, engineering for testing or evaluating materials for construction;
 - Design or conceptual design of engineering works or systems;
 - Development or optimization of plans and specifications for engineering works;



PRACTICE OF ENGINEERING

- Practice of Engineering Does Not Include:
 - Practice of Law
- Practice of Engineering definition does not include interpreting environmental rules and regulations



PRACTICE OF ENGINEERING

- Practice of Engineering includes, for example:
 - Planning the use or alteration of land for water;
 - Performing an engineering survey or study;
 - Engineering for construction, alteration, or repair of real property;
 - Engineering for preparation of an operating or maintenance manual;
 - Planning the use or alteration of land for water;
 - Performing an engineering survey or study;
 - Engineering for construction, alteration, or repair of real property;
 - Engineering for preparation of an operating or maintenance manual;



PRACTICE OF LAW

- **Practice of Law is defined in Texas Government Code § 81.101.**
- Practice of Law means:
 - “the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge or court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.”



PRACTICE OF LAW

- “The definition is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.”
- Courts can add to activities that constitute the practice of law



OTHER APPLICABLE RULES

- **Rule 5.5: Unauthorized Practice of Law; Multi-jurisdictional 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.
- **Focus is on the behavior and activities of lawyers, not consultants or other non-lawyers**

CLIENTS AND REPORTING

Disclosure Requirements



DILEMMA

- The Avenger Co. reports that a pipe bursts at a nearby Texas facility, which has resulted in a spill of unknown chemicals to the soil and groundwater.
- The engineer's investigation confirms that the spill **does not present a risk of "reasonable certain death or substantial bodily injury"** but that it will pose ecological harm and risks of minor human health risks.
- The business manager decides that it does not want to report the spill to any regulatory body and instructs legal counsel not to do anything further about this matter.



Does the in-house or outside lawyer have a duty to report this event?

A. Yes

B. No

C.
Depends

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Does your answer change if federal or state environmental laws require reporting?

A. Yes

B. No

C.
Depends

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ETHICAL REPORTING OBLIGATIONS

MODEL RULE 1.05(a) Confidentiality of Information

- **Confidentiality includes both privileged and non-privileged information.**
- Privileged information refers to the information of a client protected by the lawyer-client privilege of Rule 5.3 of the Texas Rules of Evidence.
- Unprivileged information means all information relating to a client or furnished by the client acquired during the course of or by reason of the representation.



ETHICAL REPORTING OBLIGATIONS

MODEL RULE 1.05(b) Confidentiality of Information

- **The lawyer shall not knowingly:**
 - Reveal confidential information of a client to anyone else other than the client or its representatives.
- **Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.**



THE PLOT THICKENS...

What if the spill requires reporting under either federal or state statutes?

- The engineer (assuming membership in NPSE) would not be restrained from disclosure.
 - **22 TAC s. 137.63 (Engineer's Responsibility to the Profession)**
- **Model Rule 5.3 (Responsibilities Regarding Non-Lawyers)**
 - "...with respect to a non-lawyer employed by or associated with a lawyer...[the] lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts ensure that the person's conduct is compatible with the professional obligations of the lawyer."

CONFLICTS OF INTEREST



DILEMMA

- You have been asked by Black Panther Corp. (BPC) in a multi-party cost recovery matter where BPC may be adverse to Kilmonger LP.
- A conflicts check reveals that the firm has never represented Kilmonger, but has represented W'Kabi Inc., which is the parent of Kilmonger, in a merger transaction.
- The retainer agreement in the merger says that your firm represents W'Kabi and all associated companies.

Is there an existing conflict? Do you need to obtain consent?

A. YES to both

B. NO to both

C. YES to 1st question;
NO to 2nd question

D. NO to 1st question;
YES to 2nd question

E. None of the above;
I am confused!

DILEMMA

- You obtain consent from W'Kabi to represent Black Panther Corp.
- The position on substantive legal issues you will be arguing in Black Panther's defense is directly contrary to the position you are advocating on behalf of another client in a different and unrelated pending matter.
- The other client finds out and wants you withdraw from the Black Panther representation.

Is arguing two sides of the same legal issue a conflict?

A. YES, the lawyer must withdraw immediately.

B. NO, withdrawal is not required.



APPLICABLE RULES

Rule 1.7 Conflict of Interest: Current Clients

(a) A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.



APPLICABLE RULES

Rule 1.7 Conflict of Interest: Current Clients

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

HISTORICAL NONCOMPLIANCE ISSUES

Complex Compliance Situations



COMPLEX COMPLIANCE SITUATIONS

- Two legal requirements directly conflict.
- Full compliance would have adverse effects on the public.
- Severe disruption of supply (e.g., severe weather event or major pipeline outage).
- Inadvertent noncompliance is discovered and returning to full compliance cannot be immediately achieved.
- A new legal requirement is imposed with inadequate lead time or has severe unintended consequences.
- A government entity fails to act in a timely manner.
- Failure to process timely and complete permit renewal.
- Failure to exercise waiver authority under applicable law.



DILEMMA – DISCOVERY OF NONCOMPLIANCE

- A major facility had a number of complex and vaguely worded air emission permits. Certain interpretations were adopted over many years, sometimes in consultation with government officials (e.g., agreement to deem a typographical error in a permit corrected.)
- An internal review concluded some operations and emissions could not be reconciled with a reasonable interpretation of permit terms. It was also concluded the facility should seek to replace vague permit conditions with ones clearly authorizing its desired operations.
- The plan was to approach the agency, disclose the permit problems, seek a consent order to legalize current operations while new permits were negotiated, and pay a penalty for any permit noncompliance the agency reasonably determined to exist.
- A signed consent order would make the facility's operations legally compliant, but until the consent order could be finalized the facility would have to shut down or else operate out of compliance with permit provisions.



DECISION FRAMEWORK & ETHICAL CONSIDERATIONS

- Determine whether achieving compliance is not reasonably possible in the near term (e.g., extenuating circumstances)
- Develop a compliance and gap closure plan
- Nature and timing of steps is a case-by-case determination
- Reasonable measures to minimize, mitigate or offset duration and extent of noncompliance should be addressed
- Stewardship process to ensure issue is resolved



DECISION FRAMEWORK & ETHICAL CONSIDERATIONS

- Consider whether disclosure to governmental authority is appropriate.
- Is disclosure legally required?
- Even if not required, is disclosure prudent given the nature of the issue, regulatory system, government policy or public expectations?
- Timing Issues?
- Review should proceed as quickly as possible consistent with developing adequate data and analysis to support decision-making.

ENVIRONMENTAL ETHICS IN A DIGITAL WORLD

SOCIAL NETWORKING AND BLOGGING



DILEMMA

- During the course of environmental litigation, you discover that the a key witness for the plaintiff (Ms. Deadpool) has accounts on Facebook and LinkedIn.
- You believe that the witness has information on her pages that would impeach her at trial.
- You ask your administrative assistant to try to “friend” the witness using her real name, but not revealing where she works.
- The witness accepts your assistant’s request, but does not reveal any additional personal information.



Has the lawyer engaged in professional misconduct?

- A. The lawyer is not responsible for her assistant's actions.
- B. The lawyer did not make a false statement of material fact to the witness
- C. All of the above.
- D. None of the above.



APPLICABLE RULES

- **Model Rule 1.6: Confidentiality Rule**

- Lawyers may not discuss confidential client information in blogs, Facebook, LinkedIn or other social media apps.

- **Model Rule 5.3: Regarding Non-lawyer Assistants**

- "...a lawyer shall be responsible for conduct of such a person that would be in violation of the Rules of Professional Misconduct if engaged in by a lawyer if (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved...."



APPLICABLE RULES

- **Model Rule 4.1 Truthfulness in Statement to Others**

- In the course of representing a client, a client shall not knowingly make a false statement of material fact or law to a third party.

- **Model Rule 7.1 Communications Concerning a Lawyers Services**

- "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false if it contains a material misrepresentation of fact or law, or omits a fact necessary to make a statement considered as a whole not materially misleading."



APPLICABLE RULES

- **Model Rule 8.4: Misconduct**

- It is professional misconduct for a lawyer to:
 - (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
 - (c) engage in misconduct involving dishonesty, fraud, deceit or misrepresentation;"
 - (d) engage in conduct that is prejudicial to the administration of justice;

ME TOO

Sexual Harassment in Law Firms



DILEMMA

- Associate Tarana Burke is working late on an environmental matter for a client.
- Senior Partner Harry Weinstein states: "Hon, it's nearly midnight, what are you doing here so late? Just go home, and I may call you later."
- As she is leaving, Weinstein says to her "You know, women should stay home and have babies and not practice law."
- Tarana looks surprised by this statement, but says nothing.
- Weinstein sees this and responds: "Sweetie, don't get your panties in a wad. If you want to work in this industry you gotta be tough like a man."

Is Weinstein's statement a violation of the Texas Rules of Professional Misconduct?

A. YES

B. NO

C.
DEPENDS



APPLICABLE RULES

TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 5.08. Prohibited Discriminatory Activities

- (a) A lawyer shall not willfully, *in connection with an adjudicatory proceeding*, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity.
- Currently, there is no specific rule on sexual harassment.



APPLICABLE RULES

New ABA Model Rule 8.4(g): Misconduct

- It is professional misconduct for a lawyer to: **...(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.** This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

APPLICABLE RULES

- Does the answer change if this is the Dubai office of a US firm?
- **ABA Model Rule 8.5 Disciplinary Authority; Choice of Law**
 - (a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is **subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs**. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

WRAP UP & QUESTIONS

