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Ethics for Water Lawyers

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This paper is to discuss legal ethical issues important to lawyers practicing in the area of water law. Rather than discuss ethical issues generally, we chose to focus on two specific areas that we thought might be of particular interest to lawyers practicing in the renewable energy sector, relating to dealing with others not your client and relating to problematic internal communications. To flesh out the questions that might arise and the type of analysis that might be performed, we have developed two hypotheticals. Below is some background information--to provide context--followed by a discussion of the two hypotheticals.

Background

Because we are in Texas, our starting point is the Texas Disciplinary Rules of Professional Conduct (the “Texas Rules”), which are found in Article X of the State Bar Rules entitled “Discipline and Suspension of Members, Section 9 (Sections 1 through 8 having been repealed effective 1992), which is reprinted in Tit. 2, Subtitle G, App. A (Vernon’s Supp. 1998). Accompanying the rules are comments, which though not binding provide guidance. Jurisdictions’ ethical rules differ so it is important to consult the rules of the particular jurisdiction in which you practice.

As the adjective “disciplinary” suggests, the Texas Rules are not aspirational; they state “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.” Texas Rules, Preamble: A Lawyer’s Responsibilities, n.7. On the other hand, the preamble to the rules acknowledges that “Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules.” Id., Note 9. The preamble suggests lawyers will be motivated “to attain the highest possible degree of ethical conduct” by “[t]he desire for the respect and confidence of the members of the profession and of the society which it serves.”

It should be noted that the Texas Rules do not define standards of civil liability of lawyers for professional conduct. Id, Note 15. Nothing in the rules is intended to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of a breach of such duty. The Texas Rules, however, do provide a basis for administrative sanctions.

Hypotheticals

First Hypothetical

Waters “R” US (“WRUS”), a water supply company, retains you to negotiate a ground water purchase agreement with a property owner, Rube Bumpkin, who presently uses his property for

grazing. Unbeknownst to Rube, based on a confidential hydrological study it performed, WRUS knows Rube's property is of particular value because of the quantities of groundwater it contains. Also unbeknownst to Rube, the necessary water treatment and transmission infrastructure will render Rube's property unsuitable for grazing. How do you proceed in your negotiations with Mr. Bumpkin?

Analysis

The Texas Rules' preamble explains that a lawyer may act in a number of roles, including as an advisor, an advocate, a negotiator, and an evaluator. The preamble suggests as a negotiator, "a lawyer seeks a result advantageous to the client, but consistent with requirements of honest dealing with others." Preamble: A Lawyer's Responsibilities, Note 2.

An initial question is whether Rube is represented by counsel. Rule 4.03 states: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that a lawyer is disinterested." It is the lawyer's responsibility to make sure Rube understands the lawyer's role. The notes to the rule also state that the lawyer's only advice to the unrepresented person should be to obtain counsel. If you know Rube has counsel, you should neither communicate nor cause or encourage another to communicate about the subject of that representation unless you have the consent of his lawyer. Rule 4.02(a). But if you don't know Rube has a lawyer, presumably you may communicate with him and are not obligated to suggest he retain counsel, though you might want to consider it.

Governing all your communications with Rube is Rule 4.01. Rule 4.01 provides: 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 making the lawyer party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Fraud or fraudulent is defined by the rule to denote "conduct having a purpose to deceive and no merely negligent misrepresentation or failure to apprise another of relevant information." The comments to rule 4.01 clarify this obligation:

Paragraph (a) of this rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value places on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party's supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of

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