



Chapter Twenty – 0250LT

## Emerging Ethical Issues in Renewable Energy

**Hosted by the Professional Responsibility and  
Environmental Law and Energy Committees**

## Course Summary

In this one hour CLE, we will cover the regulatory framework in the U.S., international treaties relevant to the practice, sources to consult for advice in renewable energy, ethical issues that arise in practicing in a specialized industry and competence issues relating to the evolving nature of energy law and regulatory environment, and industry perspective regarding how lawyers can act as effective counselors and advocates.

The session would answer emerging ethical issues in the field of renewable energy, including:

- ❖ Conflicts among the parties a lawyer is representing- there are limited lawyers with the capability and interest in representing clients in this sector;
- ❖ Changing nature of energy law and regulatory environment- particularly when it comes to renewable energy issues surrounding wind, sustainability and climate change- akin to the law related to the Internet;
- ❖ Conflicts of interest (1.7, 1.8) and Competence;
- ❖ Do lawyers have an ethical duty to protect the environment?
- ❖ What kind of advice do clients want/need? What are they not aware of?
- ❖ Should there be green ethics for lawyers?

### Panelists:

**Diana K. Ashton, Esq.**  
Assistant General Counsel  
Polsinelli PC, Kansas City

**Hanan Fishman**  
President  
Alencon Systems, LLC

**Deborah A. Winokur, Esq.**  
Conflicts Counsel, Office of General Counsel  
Polsinelli PC, Wilmington

# BIOGRAPHIES

## *Emerging Ethical Issues in Renewable Energy*

### **PANELISTS:**

#### **Diana K. Ashton, Esq.**

Diana K. Ashton is the Assistant General Counsel at Polsinelli PC. Diana has experience in identifying and analyzing complex legal, regulatory, and business issues and providing appropriate legal guidance regarding applicable legal and professional standards.

Prior to joining Polsinelli, Diana provided legal compliance, ethics, and risk management counsel for several large law firms in Philadelphia, PA. Her background also includes legislative and redistricting experience while employed with the state of California's Statewide Database, which is housed at the University of California, Berkeley, School of Law.

Diana is a lecturer in law at the University of Pennsylvania Law School, where she teaches a course on Professional Responsibility. She also serves as co-chair of the Professional Responsibility Committee for the Philadelphia Bar Association and is a member of the Professional Guidance Committee of the Philadelphia Bar Association.

#### **Hanan Fishman**

Hanan Fishman is the President of Alencon Systems, LLC. Hanan is responsible for the commercial affairs of the business including its go to market strategy, sales and marketing activities and all financial and P&L management.

Hanan was formerly President of PartMaker, Inc. (division of Autodesk's Delcam Unit) where he oversaw the development, marketing and sales of Delcam's PartMaker CAM system. In addition to leading the PartMaker Inc. business, Hanan had responsibility for leading a number of other business lines for Autodesk's Delcam Unit. These roles included managing the distribution channel for all of Autodesk's Delcam CAM products in the eastern half of the United States as well as Israel. Hanan was a member of Delcam's Global Operating Council, which guided the strategic direction of the Delcam group within Autodesk.

#### **Deborah A. Winokur, Esq.**

Deborah A. Winokur is Conflicts Counsel in the Office of General Counsel in the Wilmington, DE office of Polsinelli PC. As part of the General Counsel Department, Deborah assures the firm's adherence to ethical standards and compliance with firm policies.

Deborah worked as a senior associate in both the corporate and trial departments at Dechert LLP prior to joining Polsinelli. Deborah advised clients on regulatory and compliance issues.

Deborah co-chairs the Professional Responsibility Committee for the Philadelphia Bar Association, is a member of the Professional Guidance Committee of the Philadelphia Bar Association and conducts Continuing Legal Education seminars on risk management and ethics issues.

# Emerging Ethical Issues in Renewable Energy

## **Relevant Rules**

### **Rule 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

### **Selected Comments:**

#### **Legal Knowledge and Skill**

1. In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.
2. A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

### **Rule 1.7 Conflict of Interest: Current Clients**

- a. Except as provided in paragraph (b), 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.
- 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.

### **Selected Comments:**

#### **Identifying Conflicts of Interest: Directly Adverse**

6. Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
7. Directly adverse conflicts can also arise in transactional matters. For example, if lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same

transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

8. Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

### **Lawyer's Responsibilities to Former Clients and Other Third Persons**

9. In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

### **Personal Interest Conflicts**

10. The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 5.8 for specific Rules that prohibit or restrict a lawyer's involvement in the offer, sale, or placement of investment products regardless of an actual conflict or the potential for conflict. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

## **Consent to Future Conflict**

22. Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict non-consentable under paragraph (b).

## **Special Considerations in Common Representation**

29. In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great the multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

30. A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the



attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

31. As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.
32. When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).
33. Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

## **Rule 1.9 Duties to Former Clients**

- a. A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
- b. A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
  1. whose interests are materially adverse to that person; and
  2. about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.
- c. A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
  1. use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
  2. reveal information relating to the representation except as these Rules would permit or require with respect to a client.

## **Opinions Discussed**

The Philadelphia Bar Association Professional Guidance Committee Opinion 2012-11 (January 2013):

<http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2012-11Final.pdf>

The Philadelphia Bar Association Professional Guidance Committee Opinion 2013-1 (January 2013):

<http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion2013-1Final.pdf>

ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-377

## **Resources for Information on Renewable Energy Industry**

ITC: See <https://www.seia.org/initiatives/solar-investment-tax-credit-itc>

NJ & Mass SRECS: [http://www.srectrade.com/srec\\_markets/introduction](http://www.srectrade.com/srec_markets/introduction)

Storage in MD and HI: <http://www.utilitydive.com/news/maryland-hawaii-turn-to-storage-incentives-as-state-markets-gain-momentum/444261/>

New York REV: <http://www.utilitydive.com/news/maryland-hawaii-turn-to-storage-incentives-as-state-markets-gain-momentum/444261/>

