



2018  
MID-YEAR  
ENERGY FORUM

Monday, Oct. 29 – Tuesday, Oct. 30

Renaissance Downtown Hotel  
999 Ninth Street, NW Washington, DC

## Navigating Ethics in Enforcement Cases

*October 30, 2018, 11:00 am – 12:15 pm*

**SESSION OVERVIEW:** The panel, including FERC enforcement staff, defense counsel, and DC Bar ethics counsel, will discuss the various ethical issues that may arise at each stage of a FERC enforcement investigation. The panel will discuss ethics issues involving business organizations as clients, joint representations, joint defense arrangements, appearing with witnesses for testimony, potential conflicts and withdrawing as counsel, and other matters. The panelists will share insights from their unique perspectives on how to navigate important ethical issues related to these situations, such as conflicts of interest, duty of candor, and duties owed to former clients.

*Speakers:*

Joseph Williams, Partner, Norton Rose Fulbright US LLP  
Catherine Krupka, Partner, Eversheds Sutherland (US) LLP  
Geof Hobday, Attorney, Federal Energy Regulatory Commission

# Navigating Ethics in Enforcement Cases

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Panelists:

Catherine Krupka – Partner, Eversheds-Sutherland  
Saul Singer – Senior Legal Ethics Counsel, DC Bar  
Joseph Williams – Partner, Norton Rose

Energy Bar Association Annual Meeting  
October 30, 2018

# Overview

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- Representing companies and/or individuals in agency enforcement matters
- Role of company counsel in inquiries
- Diligence and truthful statements – agency counsel
- Diligence and truthful statements – investigation counsel
- Advice of counsel as an affirmative defense
- Privilege and international clients

# Rules of Professional Responsibility

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**ABA Model Rule 1.13 provides that the organization is the client, not its constituents.**

If a lawyer knows a constituent of the organization, i.e., an officer, employee, director or agent, is acting or intends to act in violation of an obligation to the organization that is likely to substantially injure the organization:

- the lawyer shall proceed as is reasonably necessary in the best interest of the organization.
- if reasonably necessary, the lawyer shall refer the matter to higher authority in the organization.

If the highest authority will not address the activity, the lawyer may reveal confidential information to third parties, such as regulators, only if and to the extent necessary to prevent substantial injury to the organization and to the extent not prohibited by ABA Rule 1.6 confidential provisions.

# Rules of Professional Responsibility

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**ABA Model Rule 4.3(a)** provides that when dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

# Rules of Professional Responsibility

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**ABA Model Rule 1.7** permits dual representation where two parties have no reasonable likelihood of becoming adverse, client consent is not needed. A lawyer may represent a constituent (*e.g.*, an officer or employee) whose representation will be directly adverse to the organization/client or whose representation presents a significant risk that one or more clients will be materially limited by the lawyer's responsibility if: (i) the lawyer reasonably believes that he/she will be able to provide competent and diligent representation to each client; (ii) the representation is not prohibited by the law; (iii) the representation does not involve the assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal; and (iv) each affected client gives informed consent, confirmed in writing.

# Rules of Professional Responsibility

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**ABA Model Rule 1.13(f)** requires a lawyer, in dealing with an organization's employees or other constituents, to explain the identity of the client (*i.e.*, the organization) when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

**ABA Model Rule 3.1** A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

**ABA Model Rule 4.1(a)** provides that lawyers may not “knowingly make a false statement of material fact or law to a third person.”

# FERC Rule On Representation By Counsel

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- Any person compelled to appear, or who appears in person at a formal investigation by request or permission of the Investigating Officer may be accompanied, represented and advised by counsel, ... except that all witnesses shall be sequestered and, unless permitted in the discretion of the Investigating Officer, no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding. When counsel does represent more than one person in an investigation, for example, where the counsel is counsel to the witness and his employer, said counsel shall inform the Investigating Officer and each client of said counsel's possible conflict of interest in representing that client and, if said counsel appears with a witness giving testimony on the record in an investigation, counsel shall state on the record all persons said counsel represents in the investigation.

# CFTC Rule On Representation By Counsel

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- *Right to counsel.* A person compelled to appear, or who appears in person by request or permission of the [CFTC] or its staff during an investigation, may be accompanied, represented, and advised by counsel....

# Criminal Considerations

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- If an agency is known to be referring individuals and/or a company to criminal authorities, when should criminal counsel get involved and what are the implications for case management at the agency?
  - Shadow counsel versus agency defense counsel.
- Invoking the Fifth Amendment at the agency.
  - Adverse inference against a company and individuals in civil matters.
  - Company policy on cooperation, fee indemnities and employment.

# In-House Counsel Role

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- Did you advise on the matter under review?
- Will you be required to affirm that you represent the individual in their personal capacity?
- Is the individual a fact witness, subject, target?
- Are you acting as a lawyer for the company?
- Do you have a view of the person or trading under review?

# Diligence and Truthful Statements - Agency

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- Agency statements to witnesses
- Agency employee statements to Commissioners/decision-makers
- Agency statements to courts
- Duty of diligence in face of contrary evidence

# Diligence and Truthful Statements – Investigation Counsel

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- Statements to clients
- Statements to courts
- Differences in statements when representing different clients
- Accuracy of statements in disclosures
  - SEC
  - Other agencies (CARB, RGGI)
  - ISOs/RTOs
  - Counterparties in potential transactions

# Advice of Counsel as an Affirmative Defense

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- Was advice sought?
- Was the advice applicable to the activity under review? To what extent?
- Does it matter if advice based on different facts?
- Does it matter if advice was followed?
- Can you isolate advice to prevent inadvertent disclosures?

# Privilege and International Clients

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- International privilege standards
- International disclosure standards for CCOs
- Waiver in U.S.