THE TECHNICAL AND ETHICAL CHALLENGES FOR LAWYERS IN EVALUATING WIND ENERGY DEVELOPMENT AGREEMENTS

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I. INTRODUCTION

The U.S. wind energy industry has seen explosive growth over the past decade, with national installed capacity growing from 3864 megawatts in 2001[1]

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1. U.S. ENERGY INFO. ADMIN., ELECTRIC POWER ANNUAL 2010 1 tbl.ES1 (2011), http://205.254.135.7/electricity/annual/pdf/epa.pdf.

to 43,461 megawatts at the end of September 2011.[2] The year 2009 saw the most growth with 9645 megawatts of capacity installed in that year alone.[3] The debate over the extension of what is regarded by many as the industry's most important subsidy has caused concern regarding whether this pace can be sustained.[4] There remain a large number of wind energy projects at various states in the development "pipeline," with 8400 megawatts of capacity under construction at the time of this writing.[5] This assures there will still be wind energy issues requiring the services of competent attorneys in the days to come.

While there is much discussion of the roles of national and state policymakers and utility companies in this phenomenal growth, the often-overlooked players in this industry are the rural landowners who host the wind energy facilities. These landowners afford developers access to the wind resources that make this zero-emission electrical generation possible. Without their cooperation, the industry could not exist in its current form. The importance of stable and long-term access to the lands best suited for wind energy development is not lost upon developers nor their legal counsel, as evidenced by the lengths to which their contracts go both to secure access and to deflect any conceivable impediment thereto.[6]

An unfortunate and perhaps unintended consequence of this is the length and complexity of the typical wind energy development agreement. When rural landowners attempt to evaluate such agreements, they frequently find themselves confronted by a dense and daunting document. While many landowners may be sophisticated business men and women used to evaluating a number of commercial transactions in the agricultural context, very few of them have negotiated a ninety-nine-year lease for the construction and operation of a utility-scale electrical generation facility funded by a mezzanine financing syndicate. Thus, the rural landowner would be wise to seek the counsel of his or her attorney.

Although not quantified by research, many farmers and ranchers have a well-known reticence to engage an attorney to review such agreements, or to

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2. AM. WIND ENERGY ASS'N, U.S. WIND INDUSTRY THIRD QUARTER MARKET REPORT 1 (2011), *available at* http://www.awea.org/learnabout/publications/reports/upload/3Q-2011-AWEA-Market-Report-for-Public-2.pdf.

3. U.S. ENERGY INFO. ADMIN., *supra* note 1, at 1 tbl.ES1.

4. *See, e.g.*, *Alternative Energy Tax Incentives: The Effect of Short-Term Extensions on Alternative Technology Investment, Domestic Manufacturing, and Jobs: Hearing Before the Subcomm. on Energy, Natural Res. & Infrastructure of the S. Comm. on Fin.*, 112th Cong. (2011) (statement of Martha Wyrsch, President, Vestas-American Wind Technology, Inc.).

5. AM. WIND ENERGY ASS'N, *supra* note 2, at 1.

6. *See* ROBERT R. NARDI & JOHN H. DANIELS, WINDUSTRY, WIND ENERGY EASEMENT AND LEASE AGREEMENTS 3 (2005) *available at* http://www.windustry.org/sites/windustry.org/files/LandEMain.pdf (outlining numerous issues addressed by many wind energy development contracts).

engage attorneys at all. This can be a great detriment in the context of wind energy development agreements, as such agreements cannot only tie up the landowner's property for extended lengths of time, but can also result in tens or hundreds of thousands of dollars in additional cash flow to the landowner. The advice of competent legal counsel in negotiating such agreements could make a tremendous difference in both the landowner's bottom line and in the quality of the agreement, thereby impacting the relationship between the landowner and the developer. Nevertheless, many landowners eschew this important resource, driven either by perceptions of the cost of legal services or pressured by landmen to "sign up now, because you're the last landowner we're talking to and everyone else is already in."

Putting aside the reluctance of landowners to seek legal assistance, the attorney may face his or her own challenges in this scenario. These challenges, however, are vastly different. While many such attorneys may be seasoned veterans with a breadth of experience, they may not have negotiated a ninety-nine-year lease for the construction and operation of a utility-scale electrical generation facility funded by a mezzanine financing syndicate either. Thus, this Article will focus on two issues faced by rural attorneys. First, it will address the technical knowledge these attorneys need to obtain to competently evaluate these agreements. Second, it will evaluate some of the common ethical issues that arise in representing clients with wind energy matters and how those issues can be resolved. The Article will conclude with recommendations for how the legal community can proactively address the needs of clients in this particular area of practice.

Throughout the Article, the ethical issues will be evaluated under the official language of the American Bar Association's Model Rules of Professional Conduct (MRPC). With the exception of California, all states have adopted professional rules that follow at least the format of the MRPC, with many adopting them in largely the original form, including the MRPC comments.[7]

II. A LAWYER SHALL PROVIDE COMPETENT REPRESENTATION TO A CLIENT EVEN IF THEY HAVE NEVER SEEN A WIND ENERGY LEASE BEFORE

Attorneys in rural areas are, often by necessity, general practitioners who find themselves confronted by a wide array of matters on any given day ranging from basic criminal defense to commercial litigation. Conversely, effectively negotiating a wind energy development agreement requires a significant depth of

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7. *See* CPR POLICY IMPLEMENTATION COMM., AM. BAR ASS'N, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

knowledge in areas with which an attorney may not be familiar, particularly if they do not routinely practice in energy, utility, or resource law. These factors can combine to present a problem of technical knowledge that can become an ethical problem as well.

The rule that most law students learn first thing in their first day of professional responsibility is, unsurprisingly, MRPC 1.1: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8] Most attorneys seldom give a second thought to the rule, wrongly assuming that by graduating from law school, passing the bar exam, and keeping up their continuing education requirements, they are "competent."[9] This, however, is a dangerous assumption, particularly in a world where technological issues permeate almost every aspect of legal practice.

The particular danger of assuming that one "knows enough" to evaluate a wind energy development agreement is highlighted in Comment 2 to the aforementioned rule: "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."[10] Indeed, the Comment may more succinctly state the problem better than the rule in this particular case. Attorneys unfamiliar with the electrical utility industry or the wind power industry may be in that dangerous position where they not only do not know, but also are not aware that they do not know. Attorneys have an affirmative obligation to identify their weaknesses and must either acquire the needed expertise, associate with someone who already has such expertise, or decline the representation and defer it to someone else.[11]

This is not to say that an attorney inexperienced in these fields must necessarily decline the representation. Rather, a lifeline is extended by the second portion of Comment 2: "A lawyer can provide adequate representation in a wholly novel field through necessary study."[12] As a result, MRPC 1.1 and Comment 2 suggest two vital objectives for the attorney seeking to represent clients in reviewing a wind energy lease: (1) Obtain sufficient technical background in the

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8. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2009).
9. *See id.* R. 1.1 cmts. 1–6.
10. *Id.* R. 1.1 cmt. 2.
11. *See* Attorney Grievance Comm'n v. Brown, 517 A.2d 1111, 1117 (Md. Ct. App. 1986) ("a general practitioner 'who wades into that thicket . . . without associating with an expert, does so at his peril.'"); *In re* Richmond's Case, 812 A.2d 1023, 1028 (N.H. 2005) ("Rule 1.1 mandates that a general practitioner must identify areas in which the lawyer is not competent and acquire sufficient knowledge about the specific area of law in which the lawyer is practicing in order to avoid harm to the client.").
12. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2.

wind energy industry and its legal implications so that (2) the attorney can determine what legal problems the agreement may pose and prepare accordingly.[13] When approached by a client wishing to engage the attorney to evaluate a wind energy development agreement, the question for the attorney comes down to whether the attorney reasonably believes that he or she has the knowledge and skill necessary for the representation.[14] If the answer is no, the attorney must ask whether he or she can acquire that knowledge and skill through study in a manner that is cost-effective for both the attorney and client.[15] Before undertaking such study, the attorney should be advised that "the client should not have to pay for every minute of the lawyer's preparation"[16] and "clients should not be expected to pay for the education of a lawyer."[17] Alternatively, the attorney may associate with someone who has the requisite level of skill,[18] or refuse the representation.[19]

A. *Unique Aspects of the Wind Energy Industry*

To determine what skills are needed for an effective review of a wind energy development agreement, one must examine the novel aspects of such agreements. Noting how such agreements differ from other contracts for resource development can help attorneys avoid the temptation of drawing unwarranted or invalid analogies that can impair their ability to effectively evaluate the wind energy agreement.

This temptation is particularly prevalent in areas with a history of oil and gas development. Facially, the analogy between a wind energy development agreement and an oil and gas lease may be compelling, as the attorney sees a company that wants to enter a landowner's property, construct facilities, extract an energy resource, and send that resource to market. To be sure, valid analogies between oil and gas development and wind energy development do exist,[20] and

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13. *Id.*
14. *Id.* R. 1.1 cmt. 1.
15. *See id.* R. 1.1 cmts. 2, 4 (indicating that effective representation can be accomplished through issue-spotting and appropriate research and preparation).
16. Robert L. Wheeler, Inc. v. Scott, 777 P.2d 394, 396 (Okla. 1989).
17. *In re* Estate of Larson, 694 P.2d 1051, 1059 (Wash. 1985).
18. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2.
19. *See id.* R. 1.1 cmts. 1, 2, 4 (discussing when an attorney may take a case).
20. *See* Judon Fambrough, *Wind Rights and Wrongs*, TIERRA GRANDE, Apr. 2008, at 1–3, *available at* http://recenter.tamu.edu/pdf/1856.pdf. (Fambrough notes the parallels between "bonus payments" in the oil and gas industry and what are often termed "option payments" in the wind energy industry. *Id.* Interestingly, he also notes the use of horizontal and vertical Pugh clauses in oil and gas leases and shows how such clauses could be adapted to wind energy development agreements. The ability to see these creative opportunities is one reason that attorneys with

oil and gas attorneys can become highly effective advocates for their clients in wind-related matters, through study and understanding of the wind energy industry. Indeed, some of the foremost experts in wind energy law are experienced oil and gas attorneys who have done just that.

There are, however, important differences between oil and gas leases and wind energy development agreements. First, and perhaps foremost, the oil and gas lease comes with a century of case law, statutes, regulations, and industry custom imputed to it,[21] while the wind energy development agreement has no such experiential benefits and is often cut from whole cloth. (As a caveat, though, the author has seen some elements of old cellular tower agreements and substation easements cut-and-pasted into some of the more poorly drafted agreements). Second, while the landowner on property subject to an oil and gas lease must allow access to the mineral developer, the relationship between the wind power developer and landowner is much more complex.[22] This relationship must be, or at least should be, spelled out in detail within the agreement.[23] Third, the typical financing arrangements for an oil and gas well differ starkly from those for a wind power project, and a great deal of the language and terms contained in the wind energy agreement may be dictated by lenders or investors rather than the developer itself, complicating the negotiation process.[24] Fourth, while an oil

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oil and gas experience can, with study, become excellent client advocates in the wind energy arena. *Id.*

21. *See generally* W. W. THORNTON, THE LAW RELATING TO OIL AND GAS (1904) (for an interesting view on just how long the American oil and gas industry has been at work, and the evolution of its legal landscape).

22. *Compare* Hunt Oil Co. V. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979) (citing Union Producing Co. v. Pittman, 146 So.2d 553 (Miss. 1962)) (noting that the conveyance of a mineral estate gave rights to the mineral estate owner, but limited rights of access to the surface, stating "the mineral estate owner has no right to use more of, or do more to, the surface estate than is reasonably necessary to explore, develop, and transport the minerals"), *with* Fambrough, *supra* note 20, at 3 ("the lessee [wind energy developer] has no automatic right to use the surface. Permission springs from the terms of the lease.").

23. *See* Fambrough, *supra* note 20, at 3 ("the lessee [wind energy developer] has no automatic right to use the surface. Permission springs from the terms of the lease."). This is another reason attorneys must be particularly cautious in reviewing wind energy leases. Since there is little to no established doctrine regarding what rights of surface access are implied in a wind energy development agreement, developers may sometimes overreach and take for themselves uses that can cause serious impairment of the economic use of the property for the landowner.

24. *See* ERICH HAU, WIND TURBINES: FUNDAMENTALS, TECHNOLOGIES, APPLICATIONS, ECONOMICS 751–74 (Horst von Renouard trans., 2d ed. 2006) (discussing the fundamental economics of wind turbine manufacturing, construction, and operation); *see also* Edward D. Einowski, *Project Finance for Wind Power Projects, in* THE LAW OF WIND: A GUIDE TO BUSINESS AND LEGAL ISSUES 9-1 to -13 (6th ed. 2010), *available at* http://www.stoel.com/webfiles/LawOfWind.pdf (discussing the various financing structures and investment strategies that can be used to capitalize wind power projects).

and gas lease may functionally serve as more of an easement, a wind energy development agreement may purport to be an option, easement, and lease simultaneously.[25]

Beyond the oil and gas analogy, wind energy development agreements carry a number of easements that many attorneys have never seen before. Three of these easements include a non-obstruction easement, an overhang/encroachment easement, and a noise/nuisance easement.[26] The non-obstruction easement will generally state the landowner will not construct any improvements that could interfere with airflow patterns on the property, nor permit obstructions to occur.[27] The overhang easement consists of an acknowledgement that turbine rotor discs may overhang property lines or improvements on the property and requires the landowner to permit such trespasses.[28] Noise and nuisance easements (which may include not only noise, but also vibrations, electromagnetic fields, shadow-flicker from the turbine blades, and other potential nuisance items) will generally require the landowner to waive any right of suit against the developer for such issues.[29]

Beyond the hazards of trying to pigeonhole wind energy development agreements into compartments with which the attorney is already familiar, attorneys may also fail to understand some of the unique aspects of the industry itself. These misunderstandings may, at a minimum, deprive the attorney of his or her ability to negotiate the best possible agreement and, at worst, can lead the attorney to unwittingly fail in serving the client's best interest. While there are a myriad of peculiarities to the wind energy industry, this Article will concentrate on three main areas of these attributes: the physical and technical aspects of the industry, the nature of wind project finance, and the factors that lead to the substantial duration of wind energy agreements.

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25. Because wind energy development agreements often entail all of these elements simultaneously, they are frequently given different names, ranging from "wind energy lease" to "wind easement" to "wind energy facility agreement." Hence, this article will refer to all agreements between a wind energy developer and a landowner to build, operate, and maintain a wind energy conversion facility as a "wind energy development agreement."

26. NARDI & DANIELS, *supra* note 6, at 3.

27. *Id.*

28. *Id.*

29. *See, e.g.*, JESSICA A. SHOEMAKER ET AL., FARMERS' LEGAL ACTION GROUP, INC., FARMERS' GUIDE TO WIND ENERGY: LEGAL ISSUES IN FARMING THE WIND 3–9 (Karen R. Krub ed., 2007).

B. *Physical and Technical Aspects of the Wind Energy Industry.*

It is an unfortunate reality that to properly understand the wind power industry an attorney may have to engage in some mathematics and a dab of engineering. Why bother attorneys with math, much less engineering? It makes them better at their job. Most lawyers who deal extensively in development of a natural resource (oil and gas, water, forestry, etc.) have deliberately—or perhaps unintentionally—developed a working understanding of the fundamental physical and technical processes that influence the industry and affect its profitability. This knowledge makes these attorneys much more adept at understanding the technical and business factors driving the legal questions at issue in their representations and enables them to devise "win-win" strategies for the parties involved. It would serve those attorneys performing wind energy lease reviews well to gain this understanding within the wind energy industry as well.

There is good news, though: if the attorney can grasp one equation and its implications, they can make tremendous progress in understanding how and why the industry works and behaves as it does.[30] That equation is the equation that predicts the theoretical power production from a turbine:[31]

$$P = \frac{1}{2}\rho v^3 \Pi r^2$$

In this equation P represents the power available from the wind and is primarily a function of three variables.[32] The variable ρ (the Greek "rho") is the density of the air, which is largely a function of a location's elevation and temperature.[33] Since the impact of this factor compared to the other two is negligible, it will not be discussed at further length for the purposes of this Article.[34] The variable v represents the velocity of the wind.[35] While one intuitively expects a faster wind to carry more power than a slower one, the magnitude of that difference may come as a surprise. Since v is cubed—taken to the third power—

30. *See generally* PAUL GIPE, WIND ENERGY BASICS: A GUIDE TO HOME- AND COMMUNITY-SCALE WIND ENERGY SYSTEMS 39 (2d ed. 2009) (giving information regarding how the formula works and what it means in relation to wind energy).

31. *See id.* Gipe's equation is $P=1/2\rho AV^3$; this author substituted πr^2 for A, which represents the area intercepting the wind.*Id.*

32. *See id.* The variables are (1) air density, (2) the area intercepting the wind, and (3) the instantaneous wind velocity. *Id.*

33. *Id.* at 39–40.

34. *Cf. id.* at 40 ("But the effect of changes in temperature or elevation on wind power can be dwarfed by changes in wind speed.").

35. *Id.* at 39.

the power carried by the wind increases as a cube of its speed.[36] In other words, if the wind speed increases from ten miles per hour to twenty miles per hour—a doubling in speed—then the resulting increase in power is cubed (2 x 2 x 2), or eight times the power of the original wind. This means that wind speed has a tremendous impact on the amount of power one can generate from the wind, which is why locating a site with an optimal range of wind is crucial to the economic viability of a project.[37] Factors such as regional geography impact average wind speeds, but highly localized factors such as the topography of the turbine site and its elevation above the ground's surface can have significant effects as well.[38] As a result, siting decisions are of paramount importance to the profitability of a wind power project, and drive many wind energy agreement terms.[39]

To estimate the wind velocity profile for a client's parcel, attorneys can consult a number of resources. The U.S. Department of Energy's Office of Energy Efficiency and Renewable Energy maintains wind resource maps for the entire United States, which are available through their website.[40] There are also private consulting firms that can provide estimates of wind speed for a client's land either through direct measurement or by higher-resolution estimation tools. For example, the 3Tier service allows users, for a subscription fee, to access site assessment data for their particular land.[41] Since this data can be expensive, clients may wish to pool resources to acquire this data, particularly if they own contiguous land or multiple parcels in close proximity.[42] If high-resolution data is not available for the specific area in which the client is located, attorneys or their clients may use the best available data, coupled with topographic information from the Natural Resources Conservation Service (NRCS) or another agency,

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36. *Id.* at 40.

37. *Id.* at 41.

38. *See* J.F. MANWELL ET AL., WIND ENERGY EXPLAINED: THEORY, DESIGN AND APPLICATION 46−52 (2d ed. 2009) (explaining the impact that both large-scale regional features and localized features have on wind velocity); *see also* HAU, *supra* note 24, at 463 tbl.13.9 (describing the impact of terrain surfaces on velocity).

39. *See generally* AM. WIND ENERGY ASS'N, WIND ENERGY SITING HANDBOOK (2008), *available at* http://www.awea.org/sitinghandbook/downloads/AWEA_Siting_ Handbook_Feb2008.pdf.

40. *See* Office of Energy Efficiency & Renewable Energy, U.S. Dep't of Energy, *Utility-Scale Land-Based 80-Meter Wind Maps*, WIND POWERING AM., http://www.windpoweringamerica.gov/wind_maps.asp (last updated Feb. 8, 2012) (showing the overall wind profile for the United States and allowing a user to select individual state maps).

41. *See generally* 3TIER, http://www.3tier.com/en/ (last visited June 10, 2012) (no endorsement of this or any private contractor, explicit or implied, is meant by this reference).

42. *See, e.g.*, *Wind Prospecting Tools*, 3TIER, http://www.3tier.com/en/package_detail/wind-prospecting-tools/ (last visited June 10, 2012) (showing monthly subscription fee of $500 or one year pass for $5000 to access wind and direction data for specific property).

with the knowledge that developers often seek long, contiguous areas of land at elevations greater than its surroundings. For local topographic map resources, attorneys or clients may consult their local NRCS office or visit the NRCS Geospatial Data Gateway online.[43]

The second variable in the equation, r, represents the radius of a circle.[44] If one looks at the path of the turbine's blade tips as forming a circle (called the turbine's "rotor disc"), then the length of a blade is the radius of that circle. Since the familiar formula for the area of a circle, πr^2, demonstrates that the area of a circle varies as the square of its radius, one can see that doubling the length of a blade ($2 \times$) gives us 2×2, or four times more area in the rotor disc.[45] Since a bigger rotor disc represents the ability to capture more wind, turbine manufacturers have constantly sought means to make turbines bigger.[46] Advances in composite materials and computer control technology in the mid-to-late 1990s made these large turbines possible and enabled the industry to become cost-competitive with other electrical generation sources.[47]

This variable means that developers will tend to seek the largest affordable turbine equipment so as to maximize potential power production from a given site. This can impact the number of turbines that can be situated on a particular landowner's property, since turbines must be spaced apart from each other to prevent the turbines from interfering with each other.[48] This minimum spacing is usually a function of the turbines' physical dimensions, specifically the diameter of the turbines' rotor discs.[49] Efficiency losses due to turbulence caused by neighboring turbines are generally less than ten percent if turbines are spaced eight to ten disc diameters apart in the prevailing downwind direction and five disc diameters apart in the crosswind direction.[50] The American Wind Energy Association estimates the total "land use" per megawatt of capacity is sixty acres,

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43. *Geospatial Data Gateway*, NATURAL RES. CONSERVATION SERV., USDA, http://datagateway.nrcs.usda.gov/ (last visited June 10, 2012).

44. GIPE, *supra* note 30, at 40.

45. *Id.* at 40–41.

46. *See generally id.* at 52–55 (discussing the efficiency of large turbines compared to microturbines).

47. ROBERT THRESHER & ALAN LAXSON, NAT. RENEWABLE ENERGY LAB., ADVANCED WIND TECHNOLOGY: NEW CHALLENGES FOR A NEW CENTURY 1–2 (2006), *available at* http://www.nrel.gov/docs/fy06osti/39537.pdf.

48. Upwind turbines can affect wind speeds at downwind turbines and can increase turbulence. Optimal spacing can reduce these wake effects. *See, e.g.*, MANWELL ET AL., *supra* note 38, at 422–23 (citing P.B.S. Lissamen et al., *Critical Issues in the Design and Assessment of Wind Turbine Arrays*, *in* PROCEEDINGS OF THE 4TH INTERNATIONAL SYMPOSIUM ON WIND ENERGY SYSTEMS (1982)) (explaining relationship between wind farm output power and turbine spacing).

49. *See, e.g.*, *id.* at 423 (measuring optimal spacing in terms of "rotor diameters").

50. *Id.*

with three acres physically occupied by the project, and the remaining fifty-seven acres used only as an unobstructed clear area to preserve wind flow to the turbine array.[51]

While not an element of the *production* of power, the *transmission* of the power generated by a wind energy project is also a significant technical piece in a successful wind energy project. The proximity of the project to large utility transmission lines that can handle the power generated by the project carries much weight as well.[52] These are large lines that form the "backbone" of the electrical system—capable of carrying three-phase power at sixty-nine kilovolts or more, depending on the size of the project—and not the small "distribution lines" that are much more commonly seen near individual residences.[53]

Transmission capacity of the scale needed for a large wind energy project can be extremely expensive to build. Projects that must build significant lengths of transmission lines face larger capital costs, which will in turn affect the cash flows of the project in which landowners can participate. Transmission build-out can be accomplished by a number of arrangements, ranging from lines built at the sole expense of the developer to lines that are built at the sole expense of the transmission/retail utility. The type of arrangement will obviously affect how the project costs are capitalized, which in turn drives cash flows for the project. Since it can be quite expensive to build high-voltage lines to connect a wind power project to the electrical grid, project developers must balance the location of a prime wind resource against its distance from existing utility lines.[54] One can think of this problem as a see-saw: tilting one way, a developer may be willing to locate a project further away from transmission lines if it means reaching a superlative wind resource—tilting the other way, the developer may be willing to

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51. *See Wind Energy and the Environment*, AM. WIND ENERGY ASS'N, http://archive.awea.org/faq/wwt_environment.html (last visited May 10, 2012).

52. *See WINDUSTRY*, *Interconnection—Getting Energy to Market*, *in* COMMUNITY WIND TOOLBOX 14-3 (2008), *available at* http://windustry.advantagelabs.com/sites/windustry.org/files/Interconnection.pdf. ("If you cannot find available land for lease to develop wind energy that is close to transmission or distribution lines, it will probably be too expensive . . . .". *Id.*

53. *Id.* at 14-2.

54. *See, e.g.*, ANDREW MILLS ET AL., THE COST OF TRANSMISSION FOR WIND ENERGY: A REVIEW OF TRANSMISSION PLANNING STUDIES 15, 24 (2009), *available at* http://eetd.lbl.gov/ea/ems/reports/lbnl-1471e.pdf (One study has estimated the median cost of connecting transmission capacity to wind energy projects at $300/kW ($3000/MW), or approximately fifteen percent of the cost of building the wind energy project itself. *Id.* It should be noted that this study did not allocate costs between those borne by the developer and those borne by the transmission utility; rather, it considered the total cost of such transmission build out. *Id.* The study also revealed a wide range in such estimates, from no cost to over $1500/kW ($15,000/MW). *Id.*

locate within a less-exceptional resource area if it is in tight proximity to transmission capacity.

Perhaps ironically, much of the best wind resources in the United States are located in areas with the lowest density of transmission lines,[55] as heretofore transmission lines appeared where electrical demands were greatest, not where potential generation resources could be found. Regional electrical transmission organizations have instituted plans to add transmission lines in those areas with high wind resources to enhance grid reliability while tapping into this new resource.[56]

C. *Project Finance in the Wind Energy Sector*

Wind energy projects face a dichotomy: while a project's ongoing "fuel" costs consist only of payments to landowners for access to the wind resource, they face tremendous initial capital costs.[57] A general industry "rule of thumb" estimates the cost of installing one megawatt of turbine capacity at approximately $2 million of capital.[58] Given the significant up-front capital costs involved in purchasing and installing turbine equipment, roads, operation and maintenance facilities, and transmission lines, developers may incur significant debt to finance the project.[59] As a result, the developers may have to involve a number of equity investors.[60] The addition of additional investors likely adds complexity to the wind energy lease agreement, as all investors must be satisfied that their interests will be protected.

Understanding the mixture of debt and equity is an important negotiation tool. If a project is financed primarily with debt, a large proportion of project

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55. Viewing the U.S. wind resource maps with overlays of the electrical transmission grid illustrates this concept. *Compare* Office of Energy Efficiency & Renewable Energy, *supra* note 40, *with Visualizing the U.S. Electric Grid*, NAT'L PUBLIC RADIO, http://www.npr.org/templates/story/story.php?storyId=110997398 (last visited June 10, 2012).

56. *See, e.g.*, *Priority Projects*, SW. POWER POOL, http://www.spp.org/section.asp?pageID=125 (last visited June 10, 2012) (describing plan to construct transmission lines in Kansas, Oklahoma, Texas, Nebraska, and Missouri).

57. *See generally* Audio tape: University of Texas Wind Energy Institute Seminar, Roundtable on Wind Deals (June 1, 2006) (on file with the author) (noting up-start costs could be around $2 million dollars).

58. *Compare id.* (estimating the costs at approximately $1.3 to $1.7 million per megawatt of capacity), *with How Much do Wind Turbines Cost?*, WINDUSTRY, http://www.windustry.org/how-much-do-wind-turbines-cost (last visited June 10, 2012) (indicating the range of such costs may have spread from $1.2 million to $2.6 million/MW range).

59. *See* SHOEMAKER, *supra* note 29, at 8-2 to 8-7.

60. *See id.* at 8-8 (discussing equity investments, typically from farmers and small investors, for preconstruction development).

revenues in its early years may be devoted to debt service. This means that the landowner may have a better chance of larger participation in project revenues in the later years of the project (hence the frequent use of escalators). Thus, giving up some revenues now for more later may be a viable strategy. Conversely, if the project is funded largely through equity and under a Power Purchase Agreement (PPA), project revenues may be (but are not always) more evenly distributed. This allows landowners to move revenues forward in time, increasing the present value of the project to the landowner.

To this point, the discussion has centered on the costs of developing a wind energy project, but what about the revenues it can create? A major source of revenue for a wind energy project comes from the sale of electrical power.[61] Understanding that revenue stream and how landowners may participate therein requires knowing what type of power marketing the developer will use for the sale of the power.

PPAs are frequently used for the sale of power from a wind energy project to a utility.[62] PPAs are generally long-term contracts between the operator of the wind energy project and an electrical utility, and frequently state that the utility will take all of the power produced by the facility (though not all PPAs are this type of "output" contract).[63] Typically, such agreements last for approximately twenty years and are meant to provide the utility with a means of "locking in" a price of power to their customers.[64] An advantage to the developer, and thus to the landowner, of PPAs is the stable pricing created by the contract, which gives at least some revenue stability to the developer, and hopefully to the landowner as well.[65] Conversely, since PPAs are meant to set prices for a given term, they may cap the ability of the landowner to get increased revenues from the developer unless the lease contains an "escalator" clause that permits increased royalty percentages to the landowner.[66] Some PPAs contain renewals or escalators themselves that may or may not allow for price adjustments.[67] If the PPA affecting the project at issue permits this escalation of prices received by the

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61. *Id.* at 9-1.

62. Daniel A. Yarano & Christina Brusven, Windustry, *Power Purchase Agreement*, *in* COMMUNITY WIND TOOLBOX 13-2 (2008), *available at* http://windustry.advantagelabs.com/sites/windustry.org/files/PowerPurchaseAgreement.pdf.

63. *See* Teresa A. Hill et al., *Power Purchase Agreements and Environmental Attributes*, *in* THE LAW OF WIND 7-1 to 7-2 (6th ed. 2010), *available at* http://www.stoel.com/webfiles/LawOfWind.pdf.

64. *Id.* at 7-1, 7-3; *see also* Yarano & Brusven, *supra* note 62, at 13-2.

65. *See* Yarano & Brusven, *supra* note 62, at 13-2.

66. *Id.* at 13-3.

67. Hill et al., *supra* note 63, at 7-3.

developer, attorneys should consider negotiating for the ability to increase landowner participation in the revenues.

An alternative to the PPA is a merchant power arrangement.[68] Rather than selling power under a PPA, a developer may choose to sell power to the open market under such an arrangement. While this may enable the developer to capture much higher revenues, it also exposes them to much greater market volatility.[69] If a developer chooses this marketing arrangement and landowners are paid according to a royalty basis, they too should be prepared for extreme variability in payments unless they have made arrangements for payment on some fixed basis with a "bonus" if power sales exceed a given mark.[70]

Importantly, wind energy projects generate revenues beyond those for the sale of electrical power. The most important of these additional revenues sources are renewable energy credits (RECs), also known as "green tags," or "environmental attributes."[71] In some states with renewable portfolio standards (RPS), utilities may be required to provide a certain proportion of their power from renewable resources.[72] If the utility cannot provide that power themselves, the RPS may allow them to offset non-renewable power generation with energy from another source.[73] The payment made to another generation source for producing a unit of power from renewable resources is often referred to as a Renewable Energy Certificate.[74] While these payments will be only a fraction of electrical sales revenues, they can still be a significant source of revenue, and landowners should attempt to have them included in the amount from which their payments are calculated.

Transferable tax credits may provide yet another revenue source, although such credits are more rare than the RECs referenced above. Most of the federal tax credits, including the Production Tax Credit (PTC), are not freely transferable (in the sense that they cannot be openly bought and sold to any party, although they may be transferred among equity participants in the project itself).[75] However, some state-level tax credits, such as Iowa's Renewable Energy

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68. Andy Redinger & Dan Brown, *Assessing the Viability of Merchant Wind Power*, N. AM. WINDPOWER, May 2010, *available at* https://www.key.com/pdf/nws-energy-na-wind.pdf.

69. *Id.*

70. *See* Einowski, *supra* note 24, at 9-8 n.6 (royalty payment subject to market volatility can have variable changes in payments to anyone associated with that project).

71. Hill et al., *supra* note 63, at 7-4.

72. K.S. CORY & B.J. SWEZEY, NAT. RENEWABLE ENERGY LAB., RENEWABLE PORTFOLIO STANDARDS IN THE STATES: BALANCING GOALS AND IMPLEMENTATION STRATEGIES 1 (2007), *available at* http://www.nrel.gov/docs/fy08osti/41409.pdf.

73. *Id.* at 3.

74. *Id.*

75. *The Bottom Line on Renewable Energy Tax Credits*, WORLD RES. INST. 1 (Apr. 2008) http://pdf.wri.org/bottom_line_renewable_energy_tax_credits_10-2010.pdf; *see also The*

Production Tax Credit, are transferable.[76] Though the revenues from the sale of these credits are often excluded from the definition of "gross revenues" upon which landowner payments are based,[77] the inclusion of these credits obviously impacts the potential royalties received by landowners.

D. *Factors Influencing the Duration of Wind Energy Development Agreements*

One of the facets of a wind energy development agreement that may be shocking to the client upon first look is the purported duration of the agreement. In many cases, these agreements last between twenty and forty years, with some leases extending up to ninety-nine years (and in some extreme cases, agreements have purported to have a term in excess of 100 years).[78] Why so long?

While many well-planned and well-run projects will pay themselves off within a few years of their operation,[79] developers have an economic incentive to make the agreement last as long as they can to be sure they maximize their returns on fixed investments. The average turbine is designed to have an operational life span of twenty years.[80] Many developers believe that advances in materials science will enable turbines of greater generation capacity to occupy the same towers as the current turbine assemblies.[81] Hence, having a lease life of approximately two times the lifespan of the turbines would allow the developer to deploy two generations of turbine equipment with only one lease. In any case, a developer is highly unlikely to agree to a lease term that is shorter than the de-

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Role of Tax Equity Partnership Financing in Facilitating the Development of Wind Farms, TAXAND (Jan. 18, 2012), http://www.taxand.com/news/newsletters/ ("[T]he financer of a wind project can be made a partner . . . and allocated as much tax benefits as possible.").

76. IOWA CODE § 476B.7(2) (2011).

77. Steven J. Herzog, *Wind Energy: Power and Policy*, 67 APPRAISAL J. 24, 26 (1999), *available at* http://www.appraisalinstitute.org/library/bok/windenergy.pdf

78. NARDI & DANIELS, *supra* note 6, at 5.

79. OKLA. WIND POWER INITIATIVE, COMMUNITY WIND: A GUIDEBOOK FOR OKLAHOMA, 1−2 (2006), *available at* http://www.seic.okstate.edu/owpi_old/Oklahoma_Community_Wind_Guidebook.pdf. (describing project taking advantage of tax incentives and other financing sources has a typical payback period of eight to twelve years).

80. *See* ELSAM ENG'G A/S, LIFE CYCLE ASSESSMENT OF OFFSHORE AND ONSHORE SITED WIND FARMS, 7 (Vestas Wind Systems A/S trans., Oct. 20, 2004), *available at* http://www.vestas.com/Files/Filer/EN/Sustainability/LCA/LCAV90_juni_2006.pdf.

81. *E.g.*, James C. Watson & Juan C. Serrano, *Composite Materials for Wind Blades*, WIND SYSTEMS MAGAZINE, Sept. 2010, at 46, 48–49, *available at* http://windsystemsmag.com/media/pdfs/Articles/2010_Sept/0910_PPG.pdf; *see also* E. GUTIÉRREZ ET AL., A WIND TURBINE TOWER DESIGN BASED ON THE USE OF FIBRE-REINFORCED COMPOSITES (2003), *available at* http://elsa.jrc.ec.europa.eu/publications/JRC25806.pdf (outlining test results of various composite materials for use in wind tower design).

sign life of the turbine equipment to be used, which means that landowners are unlikely to see lease terms of less than twenty years, and frequently longer.[82]

Most wind energy development agreements are not posed to the landowner in one durational term, but rather are often phrased as having a lengthy initial term followed by a sequence of renewals that may be exercised only at the option of the developer.[83] Since it may be difficult to negotiate a shorter initial term for the reasons given in the preceding paragraph, there may be opportunity for negotiating the terms of lease renewals. Thus, the first step for the practitioner is to fully dissect the agreement's durational terms. Some agreements are quite forthright in defining a duration, but others may be laced with a number of contingencies:

> [I]f the project developer is unwilling to negotiate the overall length of the agreement, it may be possible to negotiate a "reopener" term that allows for negotiation of some commercial terms at renewal periods. It is important that such reopeners be coupled with the compensation terms of the agreement to minimize downside risk with a price floor for the landowner if electrical markets should trend downward at the time of lease renewal. The landowner may also wish to reopen the entire agreement if the project is to be "repowered" (that is, existing project turbines are removed and replaced with new larger or more efficient turbines).[84]

The long duration of wind energy development agreements create another oft-unforeseen consequence. "[M]any landowners and practitioners alike may overlook the fact that entering into a wind energy agreement may impact their estate plans. The length of these agreements makes it quite possible that successors to the land in question will take the property subject to the agreement."[85] If the successors plan to continue operation of the property as a farm or ranch, are they willing to do so under the restrictions imposed by the agreement? If they do not plan to continue agricultural operations, but rather plan to "cash out" the inheritance, how will the presence of the wind energy project affect their ability to sell or rent the property? Given these questions, clients should be advised that they may need to involve those successors in discussions about the agreement as part of their succession planning efforts.

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82. ROGER A. MCEOWEN, IOWA STATE UNIV., WIND ENERGY PRODUCTION: LEGAL ISSUES AND RELATED LIABILITY CONCERNS FOR LANDOWNERS 23 (2011), *available at* http://www.calt.iastate.edu/briefs/CALT%20Legal%20Brief%20-%20Wind%20 Energy%20Production.pdf.

83. SHOEMAKER ET AL., *supra* note 29, at 3-13.

84. Shannon L. Ferrell, *Wind Energy Agreements in Oklahoma: Dealing with Energy's New Frontier*, 80 OKLA. B.J. 1015, 1022 (2009) (citing WINDUSTRY, WIND ENERGY EASEMENTS AND LEASES: BEST PRACTICES AND POLICY RECOMMENDATIONS 2 (2005), *available at* www.windustry.org/sites/windustry.org/files/LandEBestPractices.pdf).

85. *Id.*

E. *Closing Thoughts Regarding Rule 1.1 and Wind Energy Development Agreements*

If the reader has garnered nothing else from the preceding discussion, it is hoped that he or she understands that representing wind energy clients can be a tremendously complex task, but it is also of vital importance to so many rural landowners. Fortunately, there is an ever-growing number of resources available to explain many of the technical, financial, and legal issues within the wind energy industry.

III. BEYOND RULE 1.1: ADDITIONAL ETHICAL ISSUES IN WIND ENERGY LEASE REVIEWS

To this point, the Article's discussion has focused on the unique aspects of the wind energy industry, and their implications for attorneys reviewing the wind energy lease in the context of the attorney's obligation to provide competent representation. There are, however, a number of other potential ethical issues that may flow from the challenges of representing rural clients in these matters.

A. *Joint Representation of Landowners*

Though MRPC 1.1 may be the first rule students encounter in their professional responsibility class, the rule often given more weight is Rule 1.5:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.[86]

Given the preceding discussion regarding the complexities of both the wind energy industry and wind energy development agreements, factor (1) alone could be construed as an argument heavily in favor of charging a considerable

86. MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2009).

fee for wind energy lease review.[87] Doing so, however, could also price the service beyond the reach of many clients who need it unless there were some means of mitigating that impact. This could also exacerbate the pronounced reluctance of many rural landowners to seek legal services, even in matters of such gravity as a potentially multi-generational agreement worth hundreds of thousands of dollars.

Landowners have tried various methods of reducing the expense of wind energy development agreement reviews. One of the more frequent client-initiated approaches to financing wind energy lease reviews is joint representation. In order to help defray the costs of engaging an attorney to review the wind energy lease, a number of landowners who have been offered the same lease may seek to jointly engage the attorney.[88] This may happen more frequently with family members who may also be co-tenants or hold some other form of shared interest in the property (for example, the holder of a life estate and remaindermen). When dealing with such joint representation, attorneys should bear in mind MRPC 1.7, dealing with conflicts of interest among 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, confirmed in writing.[89]

Conducting a wind energy lease review for cotenants of a property may not create a conflict of interests, since, with respect to the representation, their interests are almost by definition aligned. Nevertheless, disclosure of the potential conflict should be provided to each client in writing, and written consent to the representation should also be obtained.[90] However, the same may not be true

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87. *Id.* R. 1.5(a)(1).

88. *See* ROCKY MOUNTAIN FARMERS UNION, LANDOWNER WIND ASSOCIATIONS: A COOPERATIVE MODEL FOR LARGE INDUSTRIAL ENERGY DEVELOPMENT 1 (2009), *available at* http://www.rmfu.org/pdfs/Landowner_Wind_Associations.pdf (indicating that members of landowner associations can seek out "expertise" together).

89. MODEL RULES OF PROF'L CONDUCT R. 1.7.

90. *Id.* R. 1.7(b)(4).

when dealing with present and future interest owners. While the interests of present and future interest owners are, to some extent, aligned, in some ways they are also in direct juxtaposition, since the economic incentive for the present interest holder is to maximize the present value of the asset with no regard to the future value thereof. Thus, undertaking joint representation of such clients poses a much greater hazard than the representation of cotenants.[91] Disclosure of this conflict and obtaining written consent is a must in such a scenario.[92]

Representing multiple independent clients in a joint context may not necessarily lead to conflicts, but such conflicts can certainly arise as negotiations progress. For example, if some clients are more likely to have turbines placed on their property than others, negotiating additional compensation for turbine payments may well result in decreased compensation for those landowners in "buffer zones" or landowners under a lease who do not receive turbines. This can lead to direct conflicts among the clients. Again, the attorney must disclose these conflicts and receive written consent in this situation.[93]

Another approach aimed at both lowering the costs of legal representation and enhancing landowners' negotiating power is the "landowner wind energy association."[94] With a landowner association, a group of landowners agree to "pool" their acreages together as one block and to negotiate collectively for one wind energy agreement that encompasses that entire acreage.[95] In some cases, the landowner organization may act, in some respects, as a developer itself, conducting site assessments, transmitting RFPs for development, and contracting with power purchasers.[96]

Organizing landowners into a landowner organization can help reduce the costs of legal representation.[97] It can also change the scope of the representation depending on how the entity is organized and the roles it wishes to assume.[98] In such circumstances, it is important that the attorney inform the landowner association members that the *association* is the client, rather than the individual

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91. *See id.* R. 1.7(a), Concurrent conflict exists if there are directly adverse client interests or a conflict between the interests of the lawyer and the client. *Id.*

92. *Id.* R. 1.7(b)(4).

93. *See id.* Informed consent is required where there is a direct conflict. *Id.*

94. *Introduction to Landowner Wind Energy Associations*, WINDUSTRY, 2, http://www.windustry.org/sites/windustry.org/files/Introduction_%20to_LWEA_0.pdf (last visited June 10, 2012).

95. *Id.* at 1.

96. *Id.*

97. *Id.* at 2.

98. *See id.* Generally landowner wind associations are organized as LLCs. *Id.*

landowners.[99] MRPC 1.13 holds: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[100] Such arrangements can also hold implications for both the attorney and the landowners represented if the landowners should enter into litigation with one another.[101]

B. *Reimbursement Programs*

It may surprise some readers to know that wind energy developers have also expressed concerns regarding the costs of landowners evaluating their agreements. There is logic to this concern. Wind energy development agreements are indeed very long and complex documents. Many landowners balk at executing them and may simply refuse to even consider entering such agreements. This can render the developer unable to obtain strategically important land resources. Thus, some developers have attempted to facilitate landowners obtaining counsel to help them evaluate their agreements. For example, several wind energy companies have created programs that will either reimburse landowners for the expense of having a lease reviewed by an attorney (often up to some fixed dollar amount) or provide an attorney to review the lease for the landowner and pay that attorney directly, with no out-of-pocket expense to the landowner.[102]

Neither reimbursement nor direct-payment programs violate the MRPC per se, but both raise potential issues, particularly direct payment programs.[103] MRPC 1.8(f) provides:

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99. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 10 (indicating that the lawyer may need to clarify to an individual that the lawyer represents the organization and not the individual, especially when the interests of the organization and the individual conflict).

100. *Id.* R. 1.13(a).

101. *See id.* R. 1.7, cmts. 30–31 ("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 . . . . 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.").

102. *E.g.*, *Cooperative Bargaining by Landowners for Wind Farm Agreements*, ENERGY-FARMER.ORG (Aug. 10, 2010), http://www.energy-farmer.org/?tag=reimburse-attorney-wind.

103. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (2009) (allowing third party payers if several conditions are met).

> A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6.[104]

Moreover, comment 11 is particularly important in this context, indicating:

> Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.[105]

1. *Landowner Reimbursement Programs*

Intuitively, reimbursing clients for their expenses in having an attorney evaluate the wind energy development agreement can fit well within the confines of MRPC 1.8, so long as such reimbursement is not made contingent upon the selection of a lawyer chosen by the developer, there is no breach of confidentiality, and as long as there is informed consent.[106] There is a notable distinction between this arrangement and an arrangement whereby the wind power developer pays the attorney directly, or in more extreme cases, specifically selects an attorney and will only pay for agreement reviews by that attorney. From the attorney's perspective, there is no third party involved in the first scenario; the landowner has engaged them alone, and their only reimbursement comes from the landowner. This avoids many of the concerns giving rise to the need to comply with MRPC 1.8(f).[107]

2. *Direct Attorney Payment Programs*

Conversely, programs in which the developer directly pays the attorney for reviewing a landowner's wind energy agreement trigger exactly the concerns

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104. *Id.*

105. *Id.* R. 1.8 cmt. 11; *see also id.* R. 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who "recommends, employs, or pays the lawyer to render legal services for another").

106. *See id.* R. 1.8(f); *see also id.* R. 1.6, 1.7 (rules regarding confidentiality and conflict of interest, respectively).

107. *See id.* R. 1.8(f) (only prohibiting third-party compensation).

addressed by MRPC 1.8(f), but go even further.[108] MRPC 1.8(f) contemplates indemnitors and co-clients as third party payers.[109] It is less clear whether MRPC 1.8(f) contemplates the payment of the attorney by a third party who is at least on the opposite side of a transaction from the client, and at most adverse to the client.[110] MPRC 1.7 raises the question of whether such arrangements represent an irreconcilable conflict, as it prohibits an attorney from representing a client if such representation involves a concurrent conflict of interest unless several conditions are met.[111] The rule defines a concurrent conflict as a situation in which:

> (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.[112]

At first blush, representing both the landowner and wind energy developer in negotiating their agreement would appear to fit squarely within this definition. Further, comment 28 to MRPC 1.7 notes:

> "Whether a conflict is consentable depends on the circumstances. For example, *a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other*, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them."[113]

Comment 28 implies that this permissive statement is targeted at situations in which the interests of two clients may not be perfectly aligned, but can end in mutual benefit:

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108. *See id.* R. 1.8 cmt. 11. The rules are concerned with third party payers because the interests of payers may differ from the interests of clients. *Id.*

109. *See id.* (referencing likely third-party payers such as liability insurance companies and co-clients such as a corporation and one of its employees); *see also* State ex rel. Okla. Bar Ass'n v. Watson, 897 P.2d 246, 253–54 (Okla. 1994) (finding attorney violated ethical rules when he accepted payment from a co-client but did not disclose); Nancy J. Moore, *Ethical Issues in Third Party Payment: Beyond the Insurance Defense Paradigm*, 16 REV. LITIG. 585 (1997) (analyzing propriety of third-party payers in the context of insurance defense, employers for employees, parents for their children, and public interest lawyers).

110. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(f). The MRPC, though, contemplates that concurrent clients may be "adverse" even in transactional matters. "Directly adverse conflicts can also arise in transactional matters. For example, if a 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." *See id.* R. 1.7 cmt. 7.

111. *Id.* R. 1.7.

112. *Id.*

113. *Id.* R. 1.7 cmt. 28 (emphasis added).

> Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.[114]

This means that an attorney would not be permitted to represent both the landowner and developer in a wind energy development agreement negotiation.[115] This raises the question: does an attorney participating in a direct payment program "represent" the party paying the bill, for example the developer?

At this point in the discussion, it is important to stop for a moment and discuss who the client actually is in such arrangements. While the MRPC do not explicitly define "client," or specifically what circumstances give rise to an attorney-client relationship, other sources provide illumination.[116] For example, the Restatement (Third) of Law Governing Lawyers states:

> A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services . . . .[117]

Given this model, it seems clear that even in a direct attorney payment program, the wind energy developer would not be a "client," and thus the attorney participating in such a program would not be "representing" directly adverse parties in the transaction.[118] Thus, the attorney would not have a concurrent con-

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114. *Id.*

115. *See id.*

116. *See generally id.* R. 1.0 (lacking a definition "client" and "attorney-client relationship").

117. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 (2000); *see generally* Ronald Friedman, *The Creation of the Attorney-Client Relationship: An Emerging View*, 22 CAL. W. L. REV. 209 (1986) (prolonging a more detailed discussion of the factors considered in determining whether an attorney-client relationship has been created); Catherine Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147 (1999) (discussing the circumstances in which a lawyer-client relationship forms through communications in cyberspace).

118. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (wind energy developer does not manifest intent to be represented, and therefore no attorney-client relationship forms).

flict of interest under MRPC 1.7.[119] While it appears that direct payment programs are not prohibited by the MRPC, this is not to say they are free from ethical strictures. MRPC 5.4(c) builds upon the warning of 1.8(f) discussed above: "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."[120]

Thus, even though they may be permissible under the MRPC, programs that provide for the selection of an attorney by the wind energy developer to provide lease reviews for landowners or for the direct compensation of the landowner create numerous risks. Perhaps most importantly, they run the risk of causing confusion as to who the client is, whether consciously or subconsciously. They can also cause the attorney to fear that they will not be paid if they are "too aggressive" in representing the landowners' interests. Anecdotally, the author has observed some of these programs and noted that they actually generated more suspicion toward the wind developer (the opposite of the outcome sought by the developer). To a lesser extent, they also heightened landowner suspicion of the attorney selected by the developer.[121] Programs that allow the landowner to select any attorney they want, pay for that review out-of-pocket, and to seek reimbursement may be preferable, in that they provide an attorney-client relationship uncluttered by pecuniary relationships with third parties.

Attorneys who want to create and participate in direct payment programs must take a number of steps to protect themselves, their clients, and potentially their disciplinary records. The overarching rule in this situation is to follow the mantra of the author's legal ethics professor, which is likely the mantra of all such professors: "*disclose, disclose, disclose!*"

First and foremost, MRPC 1.8(f) and 5.4(c) *require* that the attorney disclose the proposed payment arrangement and secure the informed consent of the client before such arrangements are made.[122] Further, given that the third-party payer in such circumstances is on "the other side" of a transaction from the actual

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119. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (prohibiting some concurrent conflicts between clients and between the lawyer and client).

120. *Id.* R. 5.4(c).

121. Further, on one occasion the author had the opportunity to compare reviews of the same lease conducted by an attorney in a direct payment program with those of an attorney who was paid by the landowner. It became immediately clear that the attorney paid by the landowner had engaged in a much more thorough evaluation of the lease and was more aggressive in negotiating its terms than the attorney directly paid by the developer. This, of course, represents only one instance, and as discussed in the first portion of this article, the differences in the reviews may have been due to the relative experience and knowledge of the attorneys. Nevertheless, these circumstances are illustrative of precisely the concerns raised by such arrangements.

122. MODEL RULES OF PROF'L CONDUCT R. 1.8(f), 5.4 cmt. 2.

client, i.e. the landowner, there is at least a potential semblance of the impropriety governed by MPRC 1.7.[123] Thus, it is highly advisable that the aforementioned consent be in writing.[124] The attorney must also ensure that information obtained from the landowner is kept confidential from the developer.[125]

Given these strictures, it is highly advisable for the attorney to have two written engagement agreements. The first such agreement should be with the developer, explaining that the landowner is the only client in the representation, and that the developer will *not* be a client. It should also state the developer may not exercise any influence over the attorney's professional judgment, nor may the developer have any access to information obtained from the landowner by the attorney.[126] The second should be with the landowner, again indicating that the landowner will be the client, disclosing the arrangement for payment via the developer, affirming that the attorney will not disclose any confidential information to the developer, and containing the other content needed for a sound engagement letter.[127]

An argument may be raised that landowners under financial stress may be unable to afford paying an attorney and awaiting reimbursement from a developer, and thus direct payment programs may be the only way for such landowners to secure the legal services they need. The MRPC however, afford attorneys some options in dealing with this outside of direct payment programs.

3. *Other Potential Payment / Reimbursement Options*

One option is to simply bill the client for the services but defer collection until the client has received reimbursement from the developer. The attorney may be concerned that this raises issues under MRPC 1.8(e), which prohibits providing financial assistance to a client in connection with pending or contemplated litigation.[128] It is unlikely, however, that MRPC 1.8(e) would be applied to

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123. *See id.* R. 1.8 cmt. 12 (indicating fee arrangement may be limited by rule 1.7 if representation would be materially limited by lawyer's own interests).

124. *See id.* R. 1.7(b)(4) (requiring written consent where a 1.7 conflict of interest exists).

125. *Id.* R. 1.8(f)(3); *see also id.* R. 1.6 (outlining rule governing lawyer's duty of confidentiality).

126. *See generally id.* R. 1.6, 5.4(c). To best inform the parties involved, an attorney would be wise to state it in writing. *Id.* R. 1.5 cmt. 2.

127. *See Do the Right Thing, Inside and Out: Ethics for Transactional Attorneys*, AM. BAR ASS'N (Mar. 15, 2007), http://apps.americanbar.org/buslaw/newsletter/0060/materials/pp4.pdf (example of an engagement letter); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 00-418, 7 (2000) [hereinafter Formal Op. 00-418] (stating the "better practice" is "to set forth the salient features of the transaction in a written document").

128. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) provides: "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

such situations. First, both the rule and its comments clearly contemplate *litigation* as opposed to a transactional negotiation.[129] Second, the rule comments imply the rule contemplates the direct advancement of funds to a client (i.e. paying expenses for a client), not the mere deferral of collection from the client.[130] Third, if ethics boards viewed a failure to timely bill and collect from clients as a disciplinary action, there would likely be less than one dozen attorneys in the United States with a clean disciplinary record.

Another option is a contingency fee arrangement, whereby the attorney defers payment until the client is paid under the lease. Contingency fee arrangements are governed by MRPC 1.5(c), which requires that any such agreements must be (1) in writing, (2) signed by the client, (3) state how the fee will be calculated, (4) state what expenses will be deducted in calculating the fee, and (5) state the expenses for which the client will be directly liable regardless of the outcome of the matter.[131] While contingency fees are most frequently thought of

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(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.").

129. *See id.*

("A lawyer shall not provide financial assistance . . . in connection with pending or contemplated litigation."); *id.* R. 1.8 cmt. 10 ("Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients . . . because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation.").

130. *See id.*

R. 1.8 cmt. 10 (prohibiting lawyers from subsidizing expenses, not from delaying collection); *see also* State ex rel. Okla. Bar Ass'n v. Smolen, 17 P.3d 456, 459 (Okla. 2000) (noting majority of states follow the rule allowing contingent payments but not advances for living expenses); State Bar of S.D., Ethics Op. 2000-3 (2000) (providing examples of when an attorney advanced not only litigation expenses, but also living expenses, medical expenses not related to litigation, and other necessary client expenses).

131. MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) provides:

A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in a writing signed by the client and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. The agreement must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party. Upon conclusion of a contingent fee matter, the lawyer shall provide

in the realm of litigation, they may also be used in the transactional context.[132] Still, their use in a situation where the client is trying to determine *whether* they should engage in a transaction (as opposed to having already decided to do so), and thus seeking assistance in *how* (not *if*), they should engage in said transaction, may cause clients to question whether the attorney is using their best objective professional judgment. Since, presumably, such an arrangement would mean the attorney was only paid if the landowner signed the wind energy development agreement, the client could rightfully worry whether the attorney would properly consider whether the agreement should be signed at all. This leads back to the issues of an impairment of the attorney's professional objectivity deriving from his or her payment arrangements.

Some attorneys may consider a third option of taking an interest in the lease itself, for example to be paid a portion of the revenues from the project in a manner akin to an "overriding royalty" in the oil and gas context.[133] However, overriding royalties are almost universally carved from the *lessee's* interest, not the lessor's.[134] This would mean reversing the analogous arrangement in the wind energy context—carving an attorney interest out from the landowner's interest (i.e. the "lessor"). This raises the same concern as the contingency fee arrangement in that overriding royalties may influence the attorney's judgment toward encouraging the landowner to sign an agreement with the developer, since that is the only way for the attorney to be compensated for his or her services.[135] Nevertheless, the taking of an interest in the property of a client in payment for services is allowed under MRPC 1.5,[136] though due to the concerns addressed in

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the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

132. *See* CAL. BUS. & PROF. CODE § 6147 (2012) (permitting contingency fees for clients, not just plaintiffs). Previously, this section had been limited to litigation matters. *See* Act of Feb. 24, 1994, ch. 479, sec. 2, § 6147, 1994 Cal. Stat. 2630–31 (amending previous language to replace the term "plaintiff" with the more general "client"); Arnall v. Superior Ct., 118 Cal. Rptr. 3d 379, 384 (Ct. App. 2010) (citing Franklin v. Appel, 10 Cal. Rptr. 2d 759, 891 (Ct. App. 1992)) (noting that the statute was amended subsequent to the Franklin decision to address confusion over its applicability to transactional matters). For more information on California's treatment of contingency fees in transactional matters, see Ellen Peck, *Making Sure Fee Agreements are Enforceable*, CAL. B.J. (July 2011), http://apps.calbar.ca.gov/mcleselfstudy/mcle_home.aspx?testID=51.

133. *See* JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 45 (Pauline M. Simmons ed., 4th ed. 2002) (discussing the concept of overriding royalties).

134. *Id.*

135. *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (discussing contingent fees); *id.* R. 1.8(a) (discussing conflicts of interests in business transactions).

136. *Id.* R. 1.5 cmt. 4 (2009) provides

the preceding sentence, such transactions are subject to the restrictions of MRPC 1.8(a).[137]

C. *The Problem with Practicing on the Frontiers of New Law*

There are "pros" and "cons" to practicing in a very new area of law such as the law governing the wind energy industry. On the pro side, since there is relatively little law directly on the topic, one can become an "expert" relatively quickly.[138] A con is that one finds him or herself continually having to forge new law by making the best arguments available given the existing rules and precedent.[139] Further, there are few guidelines, forms, and checklists to aid in this endeavor.

Clearly, both the ethics rules and the procedural rules of American jurisdictions contemplate that attorneys will have to expand the frontiers of law and prescribe how attorneys are to do so. When confronted by a situation in which there is not a clearly-defined "right answer" as to the proper legal course of ac-

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> "A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(i). However, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.".

137. *Id.* R. 1.8(a) provides

> "A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless: (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client; (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."; Formal Op. 00-418, *supra* note 127, at 3 (discussing acquirement of ownership in a client in connection with performing legal services).

138. This clearly "tongue-in-cheek" comment refers solely to those areas of law dealing directly with wind energy projects, and ignores the centuries of law dealing with interests in real property, the decades of law governing electrical utilities and land use, and numerous other areas.

139. *See* Troy A. Rule, *A Downwind View of the Cathedral: Using Rule Four to Allocate Wind Rights*, 46 SAN DIEGO L. REV. 207, 213 (2009) (describing the limited case law and statutory law related to wind rights).

tion, MRPC 1.2(d) permits attorneys to "discuss the legal consequences of any proposed course of conduct with a client and [to] counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."[140]

Perhaps in no area of the law of wind energy is this concept so vital as in discussing precisely what property rights a landowner has in the wind flowing across his or her property. There is little law on the topic. Although California, through one case, has held that "wind rights" are indeed a property right and may be severed from the surface,[141] Montana, [142] Wyoming,[143] North Dakota,[144] South Dakota,[145] Oklahoma,[146] and Nebraska[147] have prohibited or severely limited the severance of wind energy rights from the surface estate. Therefore, if an attorney

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140. MODEL RULES OF PROF'L CONDUCT R. 1.2(d); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 85-352 (1985)

> " [1] A lawyer . . . may advise a statement of positions most favorable to the client if the lawyer has a good faith belief that those positions are warranted in existing law or can be supported by a good-faith argument of an extension, modification, or reversal of existing law. [2] A lawyer can have a good faith belief in this context even if the lawyer believes the client's position will not prevail. [3] Good faith requires that there be some realistic possibility of success if the matter is litigated.".

141. Contra Costa Water Dist. v. Vaquero Farms, Inc., 68 Cal. Rptr. 2d 272, 277 (Ct. App. 1997) (holding that "one may have a right to use windpower rights without owning any interest in the land.").

142. MONT. CODE ANN. § 70-17-404(1) (2011) providing "A wind energy right in the wind resource located on and flowing over the real property, including without limitation a royalty, if applicable, associated with the production of wind energy may not be severed from the real property . . . .".

143. WYO. STAT. ANN. § 34-27-103(b) (2011) providing "Wind energy rights shall not be severed from the surface estate, except that wind energy may be developed pursuant to a wind energy agreement.".

144. N.D. CENT. CODE § 17-04-04 (2009) providing "an interest in a resource located on a tract of land and associated with the production of energy for wind power on the tract of land may not be severed from the surface estate."

145. S.D. CODIFIED LAWS § 43-13-19 (2011) providing "No interest in any resource located on a tract of land and associated with the production or potential production of energy from wind power on the tract of land may be severed from the surface estate as defined in § 45-5A-3, except that such rights may be leased for a period not to exceed fifty years."

146. OKLA. STAT. tit. 60, § 820.1(F) (2011) providing "No interest in any resource located on a tract of land and solely associated with the production or potential production of wind or solar-generated energy on the tract of land may be severed from the surface estate except that such rights may be leased for a definite term pursuant to the provisions of this act.".

147. NEB. REV. STAT. § 76-3002 (Supp. 2011) (functionally prohibiting the permanent severance of wind energy rights because: "A wind agreement shall run with the land benefited and burdened and shall terminate upon the conditions stated in the agreement, except that the initial term of a wind agreement shall not exceed forty years.").

is approached by a client seeking to sever wind rights to their property in one of the "undecided" jurisdictions, the attorney should proceed with caution. First, the attorney should advise the client that the law on the matter is unsettled, and that the severance may not survive if contested.[148] Second, the attorney should carefully review the property law of the jurisdiction to understand what restrictions, if any, attach to the use or rights of one's airspace, as "wind rights" may not be recognized as distinct from the mere occupancy of the space over the property.[149] Third, the attorney should draft a severance instrument with a broad term that covers all potential uses a future wind developer might need to make profitable use of the property (and thus increasing the likelihood that whoever holds the severed right has a right of at least some prospective economic value), and specifically providing what rights are included thereunder.[150]

While much of the first section of this article has been devoted to discussing MRPC 1.1 in the context of technical knowledge, as this discussion shows, there is plenty of room for that rule to have its traditional legal implications in an arena where much remains to be settled.

IV. RECOMMENDATIONS AND CONCLUSION

The wind energy industry has been, and will likely continue to be, the fastest-growing segment of the electrical power industry.[151] Since it is also the segment that will likely have the most profound impact on the most rural landowners, the bar in areas where wind energy development is occurring likely owes these landowners, and the profession, a duty to both facilitate landowners' ability to secure competent legal assistance and to equip its members to provide it. This can be accomplished by providing well-crafted professional training programs dealing with both the technical and legal elements of this burgeoning industry. Attorneys can assist in this effort by availing themselves of the ever-increasing body of educational materials that can aid in developing their technical and legal

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148. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (2009) (identifying standards for appropriate communications with clients); Lisa Chavarria, Presentation at the Wind Energy Institute: Undertaking the Severance of Wind Rights 4 (Feb. 19–20, 2008), *available at* http://sbaustinlaw.com/library-papers/Chavarria-The_Severance_of_Wind_Rights%20(Final).pdf (indicating that where a state does not have case law or legislation to provide guidance, "anyone who undertakes a severance does so with no assurances that the severance will be upheld if challenged.").

149. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (requiring the attorney to provide competent representation).

150. *See* Chavarria, *supra* note 148, at 5–6 (suggesting the use of broad terms of conveyance and a detailed description of numerous rights in a wind agreement).

151. *See* U.S. ENERGY INFO. ADMIN., *supra* note 1, at 1 tbl.ES1.

knowledge in this arena. To this end, Appendix A to this article contains a bibliography of resources to address many of the issues broached by this article.

The bar must also go to greater lengths to help those in search of legal assistance in this arena. While every bar obviously works to assure a minimum level of competence through its exams, accreditations, and continuing education efforts, there is great disparity beyond that point. There could be significant merit in recognizing that many areas of the law require a greater depth of specific knowledge both of the legal doctrines in those areas and the technical issues specific to them. As this Article has demonstrated, wind energy is one of those areas. Nevertheless, of the top ten states in terms of installed wind energy capacity,[152] only three recognize legal specializations: Texas,[153] California,[154] and Minnesota.[155] Of these, only Texas and Minnesota recognize areas of specialization that could be considered to encompass some of the issues most important in evaluating wind energy development agreements.[156] Of the remaining states, each allows attorneys to at least indicate that they do or do not practice in specific areas of law, but provide no means of state-sanctioned authentication of such.[157]

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152. These states in order are Texas, Iowa, California, Minnesota, Illinois, Washington, Oregon, Colorado, Oklahoma, and North Dakota. *See* AM. WIND ENERGY ASS'N., *supra* note 2, at 4.

153. *Specialty Areas*, TEX. BD. OF LEGAL SPECIALIZATION, http://www.tbls.org/SpecialtyAreas.aspx (last visited May 10, 2012).

154. *Legal Specialty Areas*, STATE BAR OF CAL., http://ls.calbar.ca.gov/LegalSpecialization/LegalSpecialtyAreas.aspx (last visited May 10, 2012).

155. *About the MSBA Certified Legal Specialist Program*, MINN. STATE BAR ASS'N, http://www2.mnbar.org/certify/about.asp (last visited May 10, 2012).

156. *See* TEX. BD. OF LEGAL SPECIALIZATION, *supra* note 153 (recognizing specialties in Oil, Gas, and Mineral law, which includes "ownership, conveyance, production and financing of oil, gas and minerals as well as land titles," and in Real Estate law which includes the "purchase, sale, rental and financing of residences, commercial buildings and rural land."); MINN. STATE BAR ASS'N, *supra* note 155 (recognizing real property specialization, which includes "matters relating to real property transactions including but not limited to, real estate conveyances, title searches, leases, condominiums, mortgages, and other liens, property taxes, real estate development, real estate financing, and determination of property rights, all with consideration to related fields of law."), *but see* STATE BAR OF CAL., *supra* note 154 (recognizing eleven specialty areas, none of which include real property or energy matters).

157. With the exception of Oregon, the remaining states—Colorado, Iowa, Illinois, North Dakota, and Oklahoma—base these requirements and restrictions on some version of MRPC 7.4. *See* MODEL RULES OF PROF'L CONDUCT R. 7.4 (2009) (allows an attorney to "communicate the fact that the lawyer does or does not practice in particular fields of law"); COLO. RULES OF PROF'L CONDUCT R. 7.4(a), (d), (e) (2008) (allows attorneys to communicate that they do or do not practice in particular fields of law, and also allows the lawyer to indicate a specialization if the lawyer has been granted such specialization by another state authority or by the American Bar Association, so long as such statement also notes that "Colorado does not certify lawyers as specialists in any

State bars should be encouraged to investigate sanctioned specializations in a number of areas, including renewable energy law. This facilitates clients finding attorneys suited to the needs of their specific matter by allowing the attorneys to clearly represent their training and qualifications in that subject matter. It also allows the bars to provide some minimum assurance that clients can find the legal counsel they need and that such counsel is built on a foundation of at least some basic training and knowledge.

Rural practitioners owe it to themselves and to their clients to achieve a basic technical knowledge of this industry and the unique challenges of its legal transactions. If they can do so, they stand to provide an important service to their clients and can play an integral role in shaping this important industry.

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field."); ILL. RULES OF PROF'L CONDUCT R. 7.4(a), (c) (2010) (allows attorneys to communicate that they practice in a particular area of law, but may not hold themselves out as "specialists" unless certified as such by some other agency); IOWA RULES OF PROF'L CONDUCT R. 32: 7.4(e)(2) (allows an attorney to use the terms "practice limited to" or "practicing primarily in" so long as the attorney has devoted 400 hours or 40% of the attorney's time in the indicated in the area for the preceding calendar year); N.D. RULES OF PROF'L CONDUCT R. 7.4 (2006) (allows attorney to state that they do or do not practice in a particular area of law, and to communicate specializations conferred by an organization so long as the communication states that North Dakota has no procedure for approving such certifications); OKLA. RULES OF PROF'L CONDUCT R. 7.4(a), (b) (2002) (allows attorneys to communicate that they do or do not practice in particular fields and may communicate that they are specialists under the rules prescribed by the state's supreme court). *But see* OR. RULES OF PROF'L CONDUCT R. 7.1(a)(4) (2012) (rule is stated in the negative: an attorney or firm cannot state or imply that the firm specializes in a particular area "if the statement or implication is false or misleading").

APPENDIX A:

Wind Energy References

For additional information about the wind energy industry and considerations when reviewing wing energy leases, please consult the following references. Additionally, a more exhaustive and continuously-updated list of references can also be found at http://agecon.okstate.edu/wind/links.asp.

Ten Helpful References for Attorneys Reviewing a Wind Energy Lease:

PAUL GIPE, WIND ENERGY BASICS: A GUIDE TO HOME- AND COMMUNITY-SCALE WIND ENERGY SYSTEMS (2d ed. 2009). Recently updated from the 1999 original edition, this book is an easy-to-read primer on wind energy. Though targeted at home-based and community wind projects, this book is an excellent place to start in learning the fundamentals of wind and electrical technology.

ERNEST E. SMITH ET AL., TEX. WIND L. (Matthew Bender & Co. eds., 2011). Although targeted at Texas, much of its material can be applied to a number of U.S. wind energy projects. This volume represents the most comprehensive publication regarding wind energy leasing and legal issues in the wind industry.

STOEL RIVES, LLP, THE LAW OF WIND: A GUIDE TO BUSINESS AND LEGAL ISSUES (6th ed. 2010), *available at* http://www.stoel.com/webfiles/LawOfWind.pdf. Rives provides another excellent volume with comprehensive coverage of issues both in evaluating wind energy lease agreements and in developing wind energy projects.

Jessica A. Shoemaker et al., Farmers' Legal Action Group, Inc., FARMERS' GUIDE TO WIND ENERGY: LEGAL ISSUES IN FARMING THE WIND (Karen R. Krub ed., 2007), *available at* http://www.flaginc.org/topics/pubs/wind/FGWEcomplete.pdf. This book provides an excellent background in developing wind energy projects; although targeted more toward the development of community projects, landowners and attorneys can learn a great deal from these materials that can be applied to privately developed utility-scale projects as well. It includes a chapter titled, "Negotiating Wind Energy Property Agreements."

WINDUSTRY, COMMUNITY WIND TOOLBOX (2008), *available at* http://www.windustry.org/sites/windustry.org/files/Full_CWT.pdf. A broad and detailed collection of resources designed to help landowners wishing to develop their own community wind projects, the Community Wind Toolbox contains

excellent background materials on wind energy project planning, the electrical power market and transmission system, the finances of wind energy projects, and wind energy leases. Individual Toolbox components are available at http://www.windustry.org/your-wind-project/community-wind/community-wind-toolbox/download-the-toolbox/download-the-community-.

J.F. MANWELL ET AL., WIND ENERGY EXPLAINED: THEORY, DESIGN AND APPLICATION (2d ed. 2009). Manwell et al. provide a more technical text for landowners and attorneys seeking a deeper knowledge of wind energy technology and electrical generation systems.

ROBERT R. NARDI & JOHN H. DANIELS, WINDUSTRY, WIND ENERGY EASEMENT AND LEASE AGREEMENTS (2005), *available at* http://www.windustry.org/sites/windustry.org/files/LandEMain.pdf. This book provides an excellent outline and checklist for reviewing wind energy lease agreements.

WINDUSTRY, WIND ENERGY EASEMENT AND LEASES: COMPENSATION PACKAGES (2005), *available at* http://www.windustry.com/sites/windustry.org/files/LandECompPackages.pdf. This publication provides the widest range of publicly-available data on wind turbine lease compensation packages, but note that numbers can vary greatly depending on the local market. Also, since this data was first published in 2005, many developers are now offering better compensation terms.

Leasing Your Land to a Developer, WINDUSTRY, *available at* http://www.windustry.com/leases (last visited June 3, 2012). This web page presents a compilation of leasing resources, including a link to Windustry's leasing bibliography.

Introduction to Landowner Wind Energy Associations, WINDUSTRY, http://www.windustry.org/sites/windustry.org/files/Introduction_%20to_LWEA_0.pdf (last visited June 3, 2012). This website provides a discussion of how landowners can join together in a landowner wind energy association (LWEA) to increase their bargaining power and/or develop their own wind energy project.