

69th Annual NECPUC Annual Symposium

ETHICS HYPOTHETICALS

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Hypothetical #1 – Rule 3.3 (Candor to Tribunal) and Rule 3.4 (Fairness to Opposing Party)

Attorney Young is representing his client, Bob Gold, during a deposition. Gold is president of Dim Light Corp., a utility that is the subject of a Commission investigation into whether some capital investments were prudently incurred. Gold is asked by the Consumer Advocate whether, as part of the decision to proceed with the investment, the company had internal discussions during a specific time period on certain fuel price forecasts that could be relevant to whether the investment was prudent. Gold responds that the company conducted an economic analysis that had already been disclosed. The attorney repeats the question about internal discussions and Gold repeats his answer. The parties take a break and Attorney Young asks Gold about his response. Gold tells him that he was careful not to document potentially damaging information that came from some internal discussions during the relevant time period. He tells Young that their discussion is strictly confidential. When the deposition resumes and Gold is asked the same question again, Young objects on grounds of attorney-client privilege.

Query: Has Young engaged in unethical conduct? Does he have any remedial obligation and, if so, how can he accomplish it in light of his client's instruction? Does it make any difference if Young is in-house counsel for Dim Light Corp.?

Hypothetical #2 – Rule 3.9 (Advocate in Nonadjudicative Proceedings)

Attorney Law is hired by Gold's company to follow a PUC rulemaking proceeding. He attends public hearings on the proposed rules and signs an attendance sheet, identifying his law firm but not the company. Law does not speak during the hearings but files a comment letter before the deadline passes for submission of public comment. Law's letter, which is on his firm's letterhead, raises concerns that Gold's company has on the proposal -- but does not mention the company's name or that Law is writing in his representative capacity.

Query: Can Law submit the comments without disclosing that he is representing Gold's company? What would you recommend to Law if he asked you for advice on his client's threat to fire him if he disclosed the "confidential" representation? What should Law do if he later discovers that his comment letter, written by his client, contains inaccuracies?

Hypothetical #4 – Rule 4.2 (Represented Persons)

Attorney Long is a PUC staff attorney who has maintained contact with former colleagues who left the PUC to work for utilities regulated by the PUC. Long is friends with Annie, an accountant with Bright Light Corp., a utility involved in an ongoing PUC proceeding. Long is one of the staff attorneys in the proceeding. She has an accounting question on Bright Light's

position in the proceeding and considers calling Annie to ask her about it. Annie has made it clear that the company is trying to minimize legal fees in the matter.

Query: Can Long call Annie with her question? If Long asks you how to handle this, what would you suggest she do to get the information she needs?

Hypothetical #5 – Rule 4.3 (Unrepresented Persons)

Attorney Good represents a utility seeking PUC permission to lay a transmission line across public lands. Laura, an abutter to the subject land, calls Good to ask her whether she would have any opportunity to participate in the proceeding, as she would like to raise some concerns that she has with the project. Good tells Laura that there is definitely an opportunity but that she cannot advise her, as she represents the company. Laura asks Good if she can just direct her to the applicable rule and that she would take it from there. Good tells her the citation but recommends that she call a PUC staff attorney who could help her. Laura then calls the PUC staff attorney and asks her the same questions.

Query: Was there any problem with what Good told Laura? Can Good go any further in answering her questions? Can the PUC staff attorney answer Laura's questions?

Hypothetical #6 – Rule 1.11 (Special Conflicts - Current and Former Government Lawyers)

Commission White, an attorney, wants to leave government service for private practice and decides to get the word out by calling some attorneys whose firms regularly appear before the Commission. White lands a job at one of the firms and is immediately contacted by one of the firm's utility clients to for the purpose of seeking to modify an order that White had issued while Commissioner.

Query: Can Attorney White represent the utility in this matter? If not, can any of the attorneys in the firm take on the representation?

Hypothetical #7 – Rule 3.5(b) (Ex Parte Communications)

Attorney Jones was just appointed as Hearing Examiner in a Commission proceeding for which a docket was recently opened. Attorney Smith filed an appearance on behalf of her utility client and, because the hearing examiner appointment was circulated to the service list, was aware of Jones' role. The day before the hearing is to start, Smith runs into Jones at the local grocery store and strikes up a conversation about how nice the weather had been. As she left, Smith says "see you at the hearing tomorrow," to which Jones responds "yeah, let's keep it friendly."

Query: Has Smith violated Rule 3.5(b) by communicating ex parte with Jones? Has Jones engaged in any unethical conduct? Would it have made a difference if the hearing were not mentioned or if Jones did not reply?

Attachment (Select Rules)