

72nd Annual NECPUC Symposium

June 3, 2019
Hartford, Connecticut

Legal Ethics Panel



Hon. Martin Honigberg, Esq.
Chair, NH Public Utilities Commission

Linda L. Randell, Esq.
Attorney and Consultant

Today's Discussion

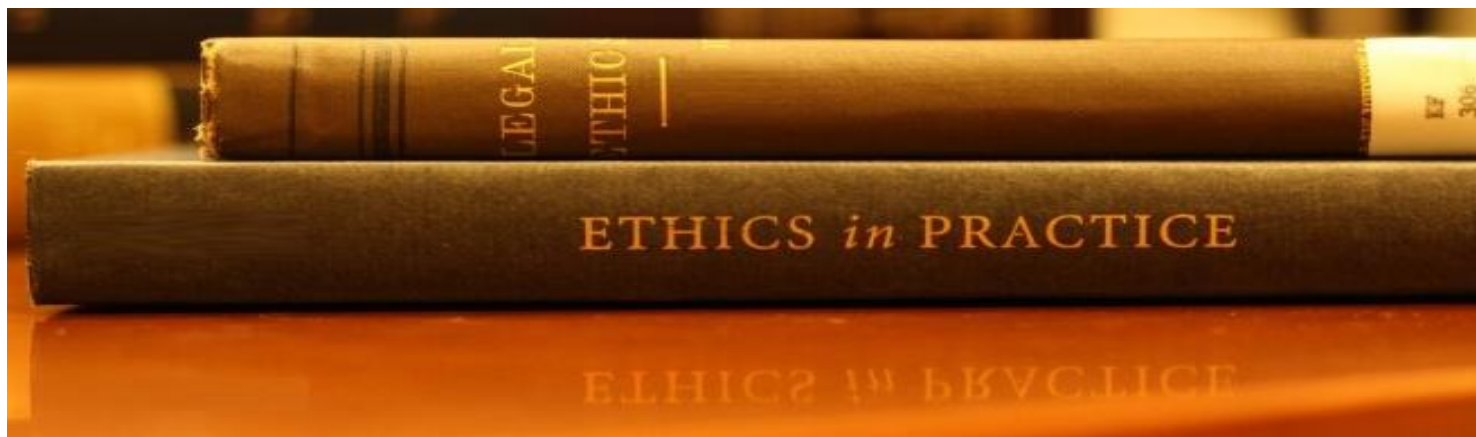
- Focus on Issues Surrounding a Lawyer's Responsibilities and Duties Relative to **Communications and Candor**
- Identify Applicable **Model Rules** of Professional Conduct
- Provide Practical **Hypotheticals**



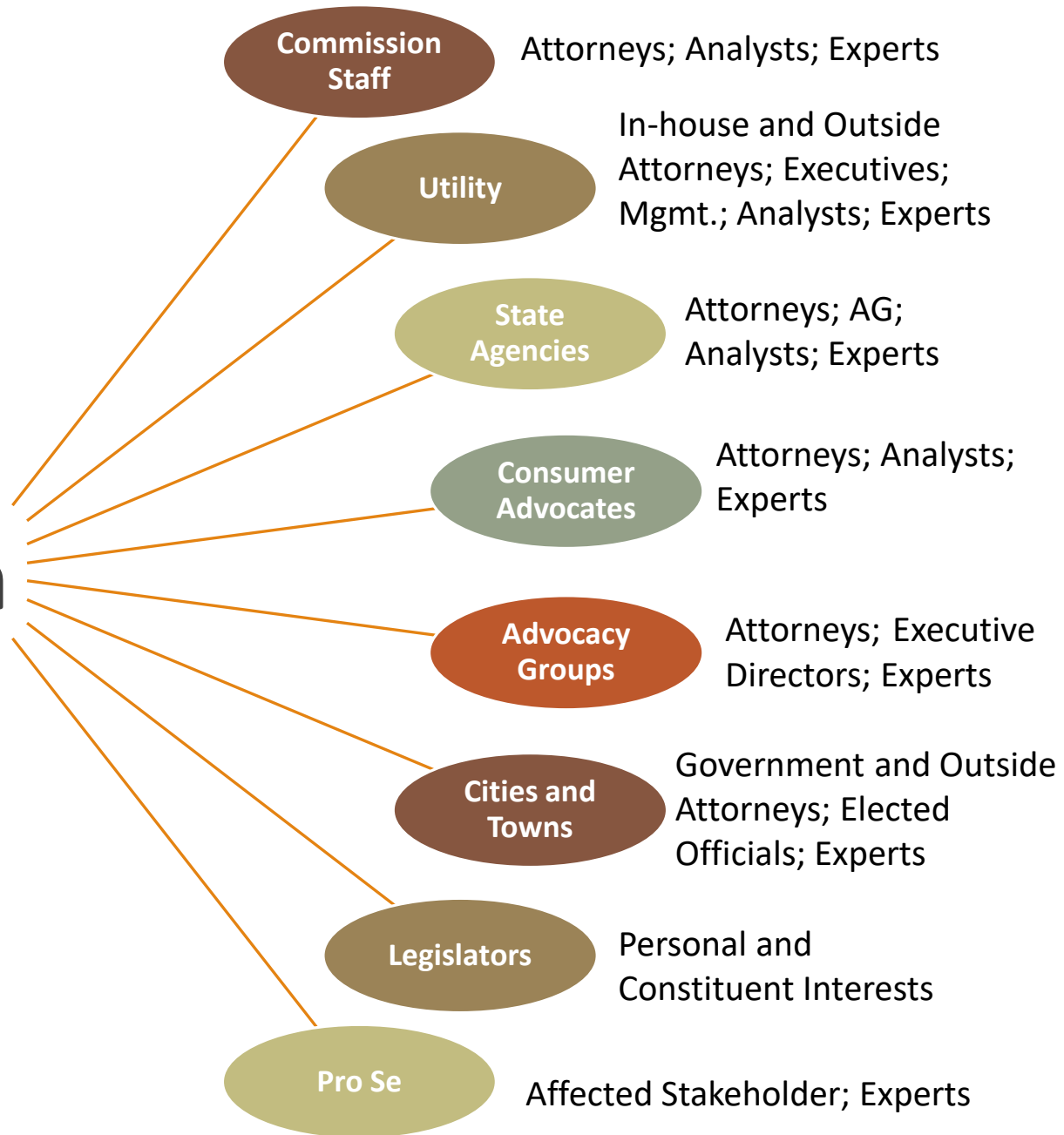
Communications

Guidance for Good Utility Practice

- Regulatory attorneys practicing before state utility commissions frequently communicate with a wide array of stakeholders including non-lawyers
- **When do rules apply to these communications?
Which rules?**

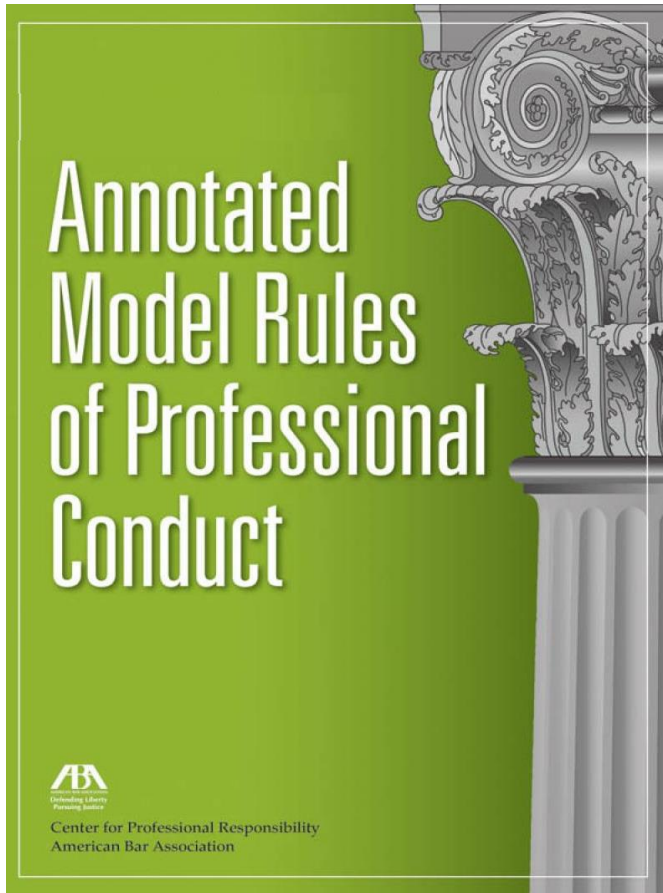


Potential Communication Paths



Model Rule 4.2

Communication with Person Represented by Counsel

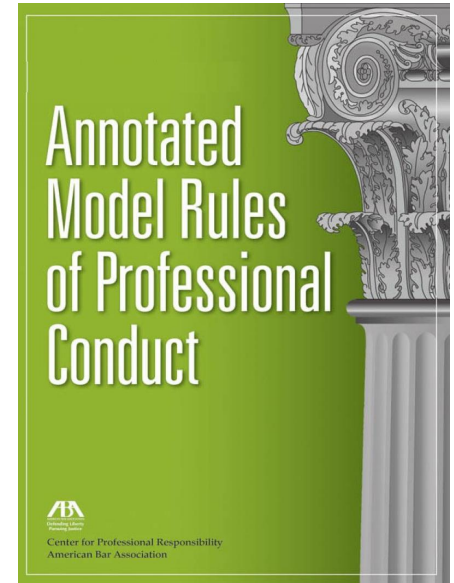


- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter
- Unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order

Model Rule 4.3

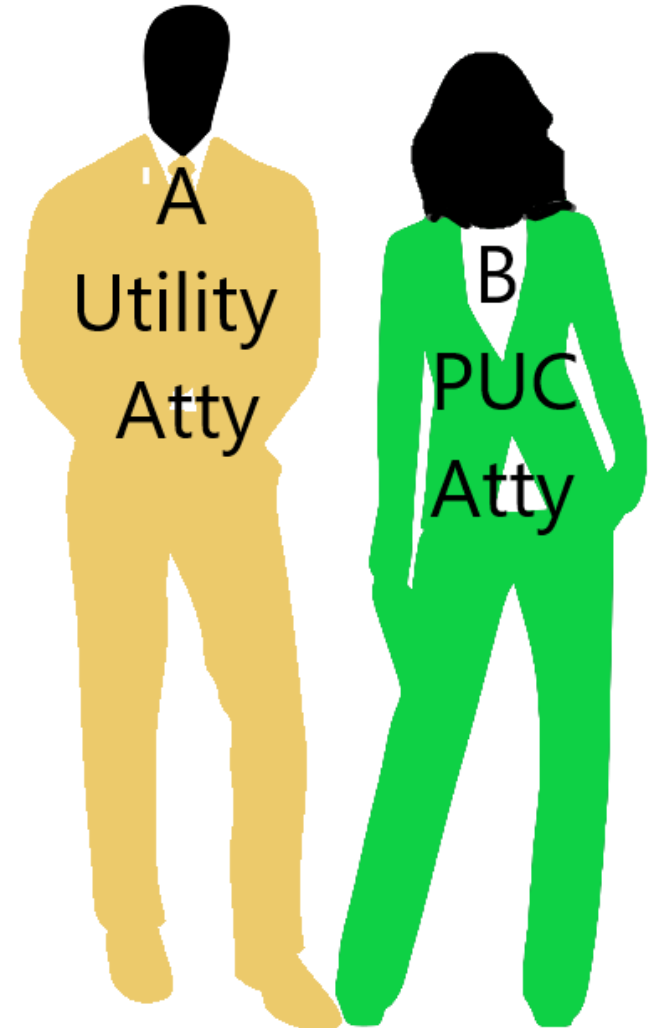
Dealing with Unrepresented Person

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



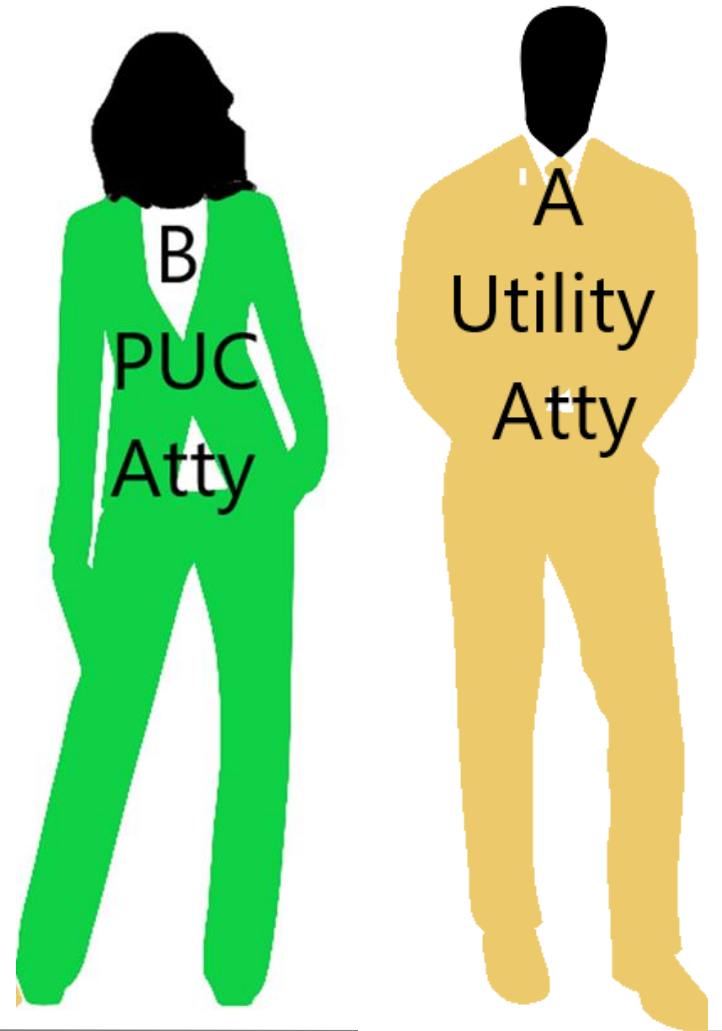
Hypotheticals: Put Ethics to Test (1)

- 1. Person A calls Person B to ask what the Commission's position is with respect to the application of a new statute impacting the utility.**
2. Person B calls Person A to ask what the Utility's position is with respect to the application of a new statute impacting the utility.

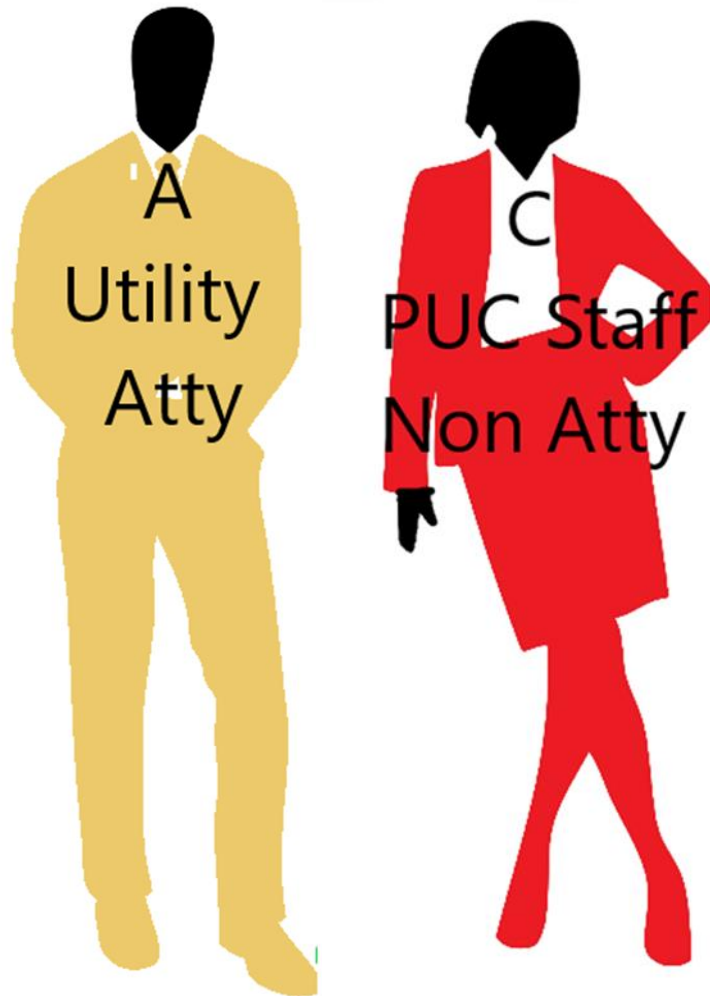


Hypotheticals: Put Ethics to Test (2)

1. Person A calls Person B to ask what the Commission's position is with respect to the application of a new statute impacting the utility.
2. Person B calls Person A to ask what the Utility's position is with respect to the application of a new statute impacting the utility.

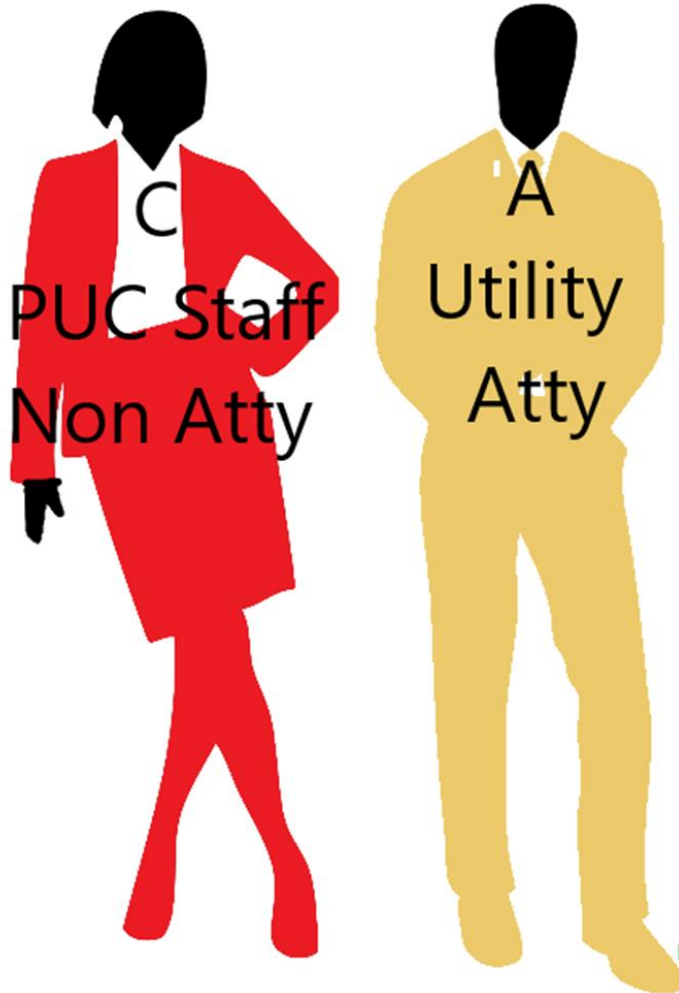


Hypotheticals: Put Ethics to Test (3)



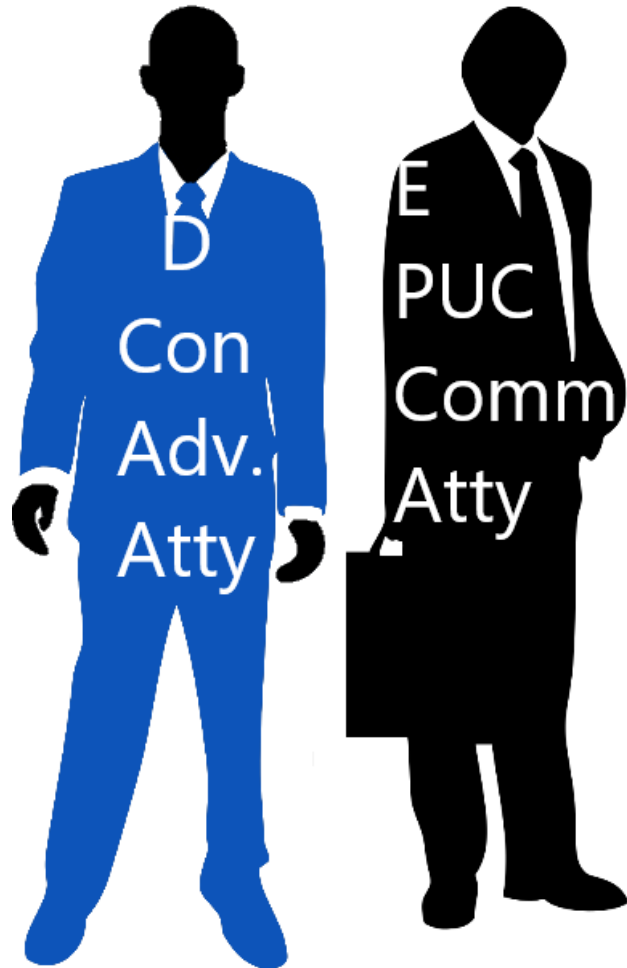
- 3. Person A runs into Person C outside of a hearing room, and mentions that one of the witnesses for Utility in a recent proceeding inadvertently provided incorrect numbers in answer to a question.**
- 4. Person C runs into Person A outside of a hearing room, and mentions that Person A's witness in a recent proceeding appears to have provided incorrect numbers in a hearing.**

Hypotheticals: Put Ethics to Test (4)



3. Person A runs into Person C outside of a hearing room, and mentions that one of the witnesses for Utility in a recent proceeding inadvertently provided incorrect numbers in answer to a question.
4. **Person C runs into Person A outside of a hearing room, and mentions that Person A's witness in a recent proceeding appears to have provided incorrect numbers in a hearing.**

Hypotheticals: Put Ethics to Test (5)



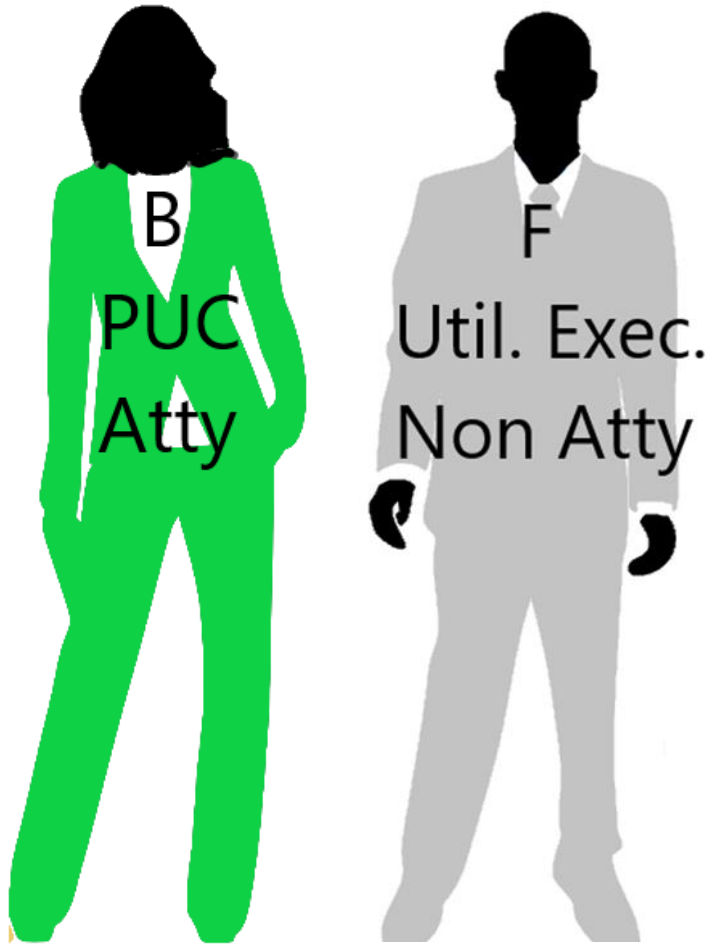
5. **Person D sees Person E (Commissioner who is an attorney) outside of the hearing room and argues that the Commissioner should adopt the Consumer Advocate's position in a generic rulemaking proceeding.**

Hypotheticals: Put Ethics to Test (6)

6. Person D calls Person F, to make a settlement proposal regarding a proceeding pending at the Commission.



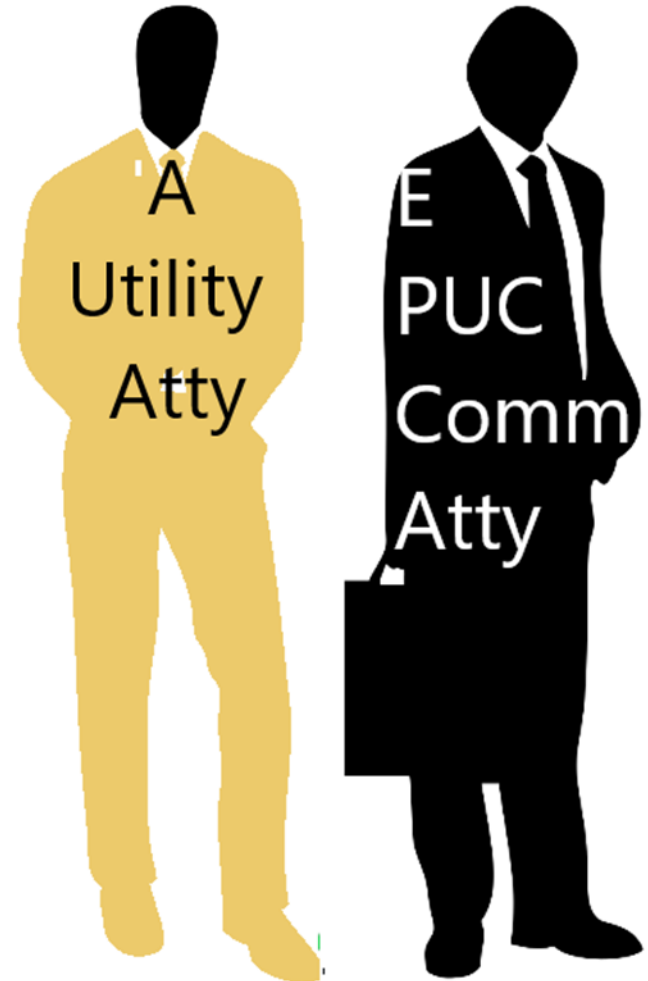
Hypotheticals: Put Ethics to Test (7)



7. Person B emails Person F to make a settlement proposal regarding a pending Commission proceeding.

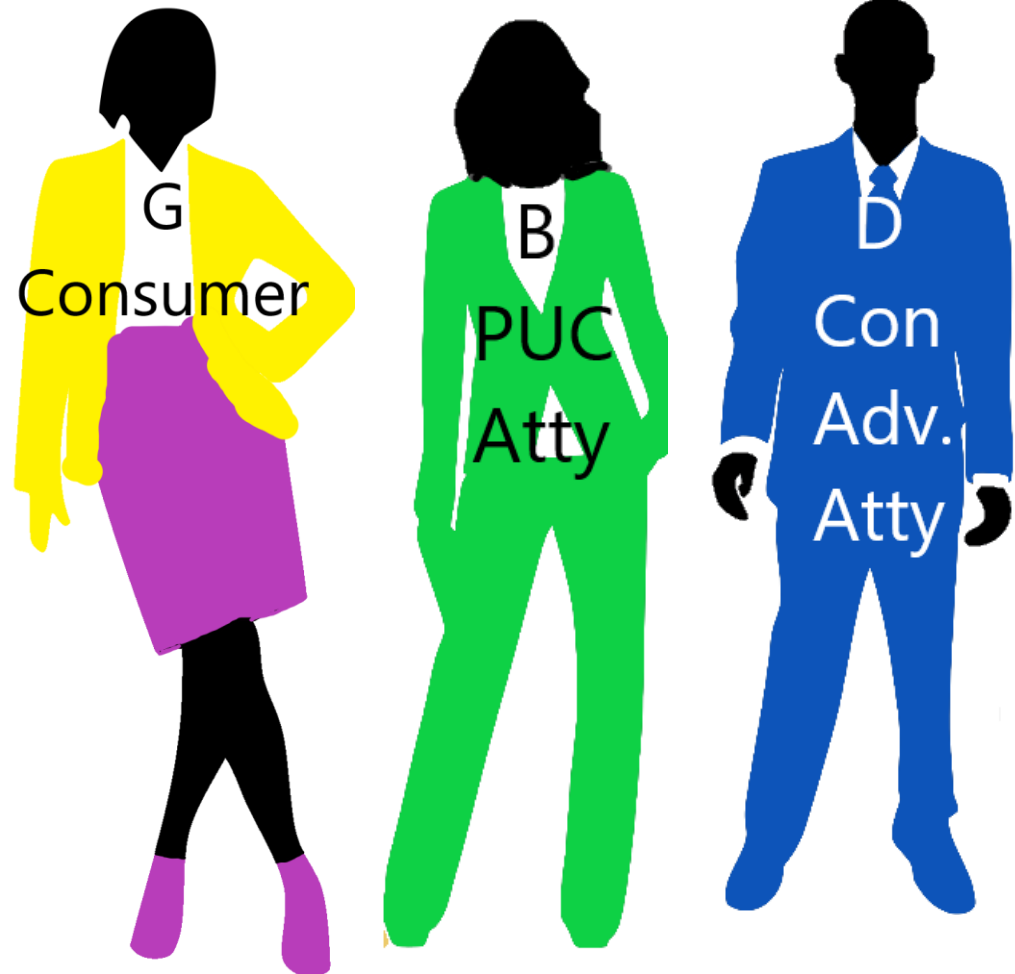
Hypotheticals: Put Ethics to Test (8)

- 8. Utility and Commission are in settlement discussions. Person A calls Commissioner who is an attorney to discuss settlement.**



Hypotheticals: Put Ethics to Test (9)

9. Person G has requested participant status in a rate proceeding. G calls Person B and Person D to ask what they would like G's written testimony to cover. G asks them to look at the testimony before it's filed.



Candor



Candor

- The regulatory process includes lawyers making arguments, filing briefs and other pleadings, and proffering witnesses' testimony on behalf of their clients
- Professional Responsibility Questions:
 - When does spin/opinion end and lack of candor begin?
 - How much is an attorney responsible for the candor and accuracy of a witness?
 - Who determines when there is a problem?
 - When there is a problem, inadvertent or otherwise, how and when to correct?



Model Rule 3.3

Candor Toward the Tribunal

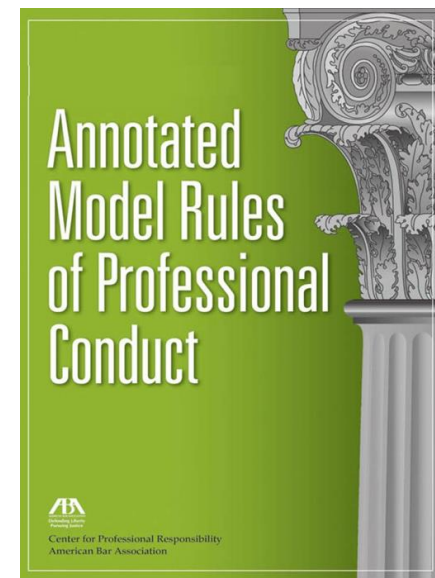
(a) A lawyer shall **not** knowingly:

(1) **make a false statement of fact or law** to a tribunal or **fail to correct a false statement** of material fact or law previously made to the tribunal by the lawyer;

(2) **fail to disclose to the tribunal legal authority** in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) **offer evidence that the lawyer knows to be false.**

If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable **remedial measures**, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false



(Note: Emphasis Added)

Model Rule 3.3

Candor Toward the Tribunal (cont.)

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [confidentiality of information]

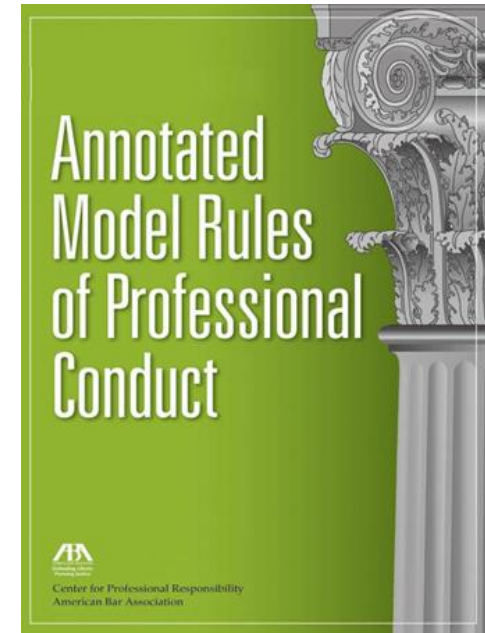
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision whether or not the facts are adverse

(Note: Emphasis Added)

Model Rule 3.9

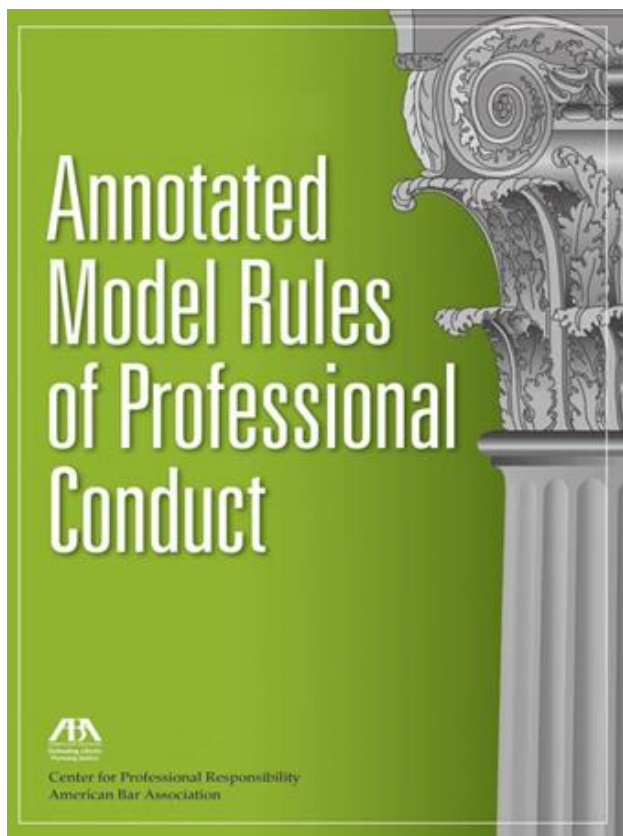
Advocate in Nonjudicative Proceedings

- A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules
 - 3.3 (a) through (c)
 - 3.4 (a) through (c) [Fairness to Opposing Party and Counsel]
 - 3.5 [Impartiality and Decorum of the Tribunal]



Model Rule 3.5

Impartiality and Decorum of the Tribunal



- A lawyer shall not:
 - Seek to influence a judge, juror, prospective juror or other official by means prohibited by law
 - Communicate *ex parte* with such a person during the proceeding unless authorized to do so by law or court * * *
 - disrupt a tribunal

Hypotheticals: Put Ethics to Test (10)



- 10.** An attorney is submitting a brief in a Commission proceeding. The brief cites a state court decision. Someone working for or with the attorney wrote this section of the brief, and there was no time to cite-check the brief. However, the attorney knows from prior experience that the description of the case holding, included in parentheses in the brief after the citation, is misleading.

Hypotheticals: Put Ethics to Test (11)

11. After a hearing has concluded, but before the record is closed, a witness talks about how he is glad that no one followed up on the witness's testimony about the cost of a program. The attorney asks what the witness is talking about, and the witness says that the cost data is not accurate, but there was no time to get the right information without delaying the hearing or looking bad.

12. Same as 11, but the record is closed and the Commission has issued its decision.



Hypotheticals: Put Ethics to Test (12)

11. After a hearing has concluded, but before the record is closed, a witness talks about how he is glad that no one followed up on the witness's testimony about the cost of a program. The attorney asks what the witness is talking about, and the witness says that the cost data is not accurate, but there was no time to get the right information without delaying the hearing or looking bad.

12. Same as 11, but the record is closed and the Commission has issued its decision.



Hypotheticals: Put Ethics to Test (13)



13. A witness for a party is preparing written pre-filed testimony for an adjudicative proceeding. The witness shares the draft testimony and obtains comments from a consultant for the party and an attorney for the party. The attorney's comments include some suggested changes to the testimony. The witness knows some of these comments are not factually accurate, but files testimony with the suggested changes.

14. Same as 13, but the proceeding is non-adjudicative.

Hypotheticals: Put Ethics to Test (14)

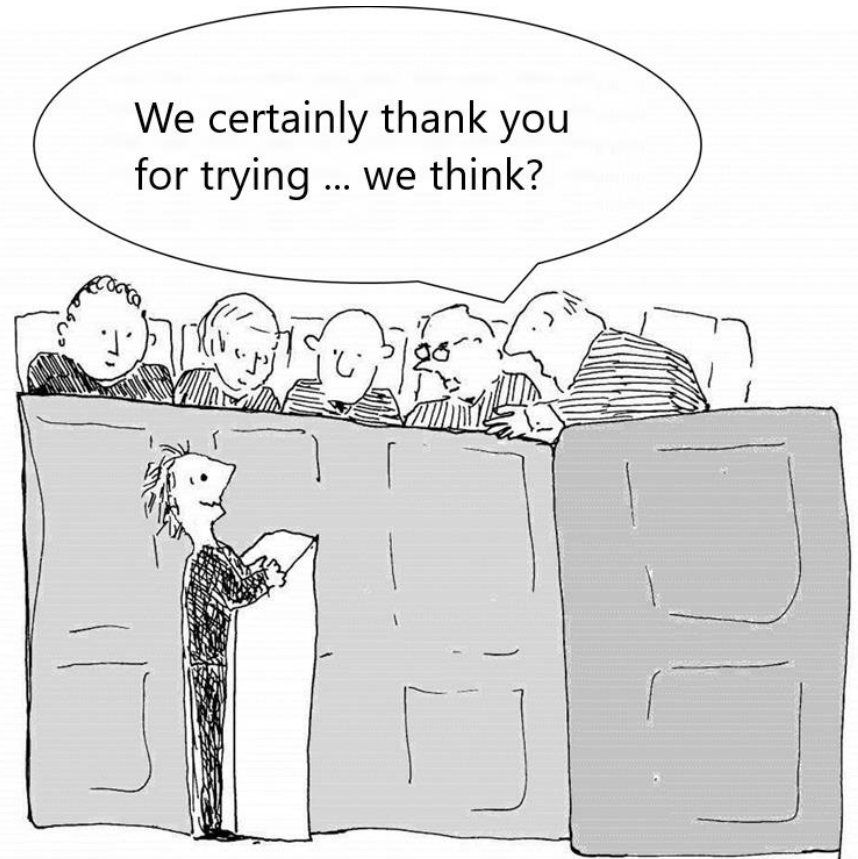


13. A witness for a party is preparing written pre-filed testimony for an adjudicative proceeding. The witness shares the draft testimony and obtains comments from a consultant for the party and an attorney for the party. The attorney's comments include some suggested changes to the testimony. The witness knows some of these comments are not factually accurate, but files testimony with the suggested changes.

14. Same as 13, but the proceeding is non-adjudicative.

Hypotheticals: Put Ethics to Test (15)

15. An attorney is presenting oral argument. When asked a question about the law, the attorney provides an answer. The attorney isn't certain the answer is correct, but tried to get it right.



Hypotheticals: Put Ethics to Test (16)

- 16.** A party's brief makes statements about what is in the administrative record, but does not include citations to where in the record the statements are supported.



Hypotheticals: Put Ethics to Test (17)



“You feel like a fake? Man, I wrote the book on faking it. Not really, but that’s what I tell everyone.”

17. An attorney recognizes that the person testifying for the attorney’s client may be winging it, but the client is only an intervenor in the proceeding.

Related Resource: New England States' Rules of Professional Conduct

New Hampshire

www.courts.state.nh.us/rules/pcon/index.htm

Maine

https://www.mebaregulators.org/regulation/maine_conduct_rules.html

Vermont

www.vermontjudiciary.org/sites/default/files/documents/VermontRulesofProfessionalConduct.pdf

Massachusetts

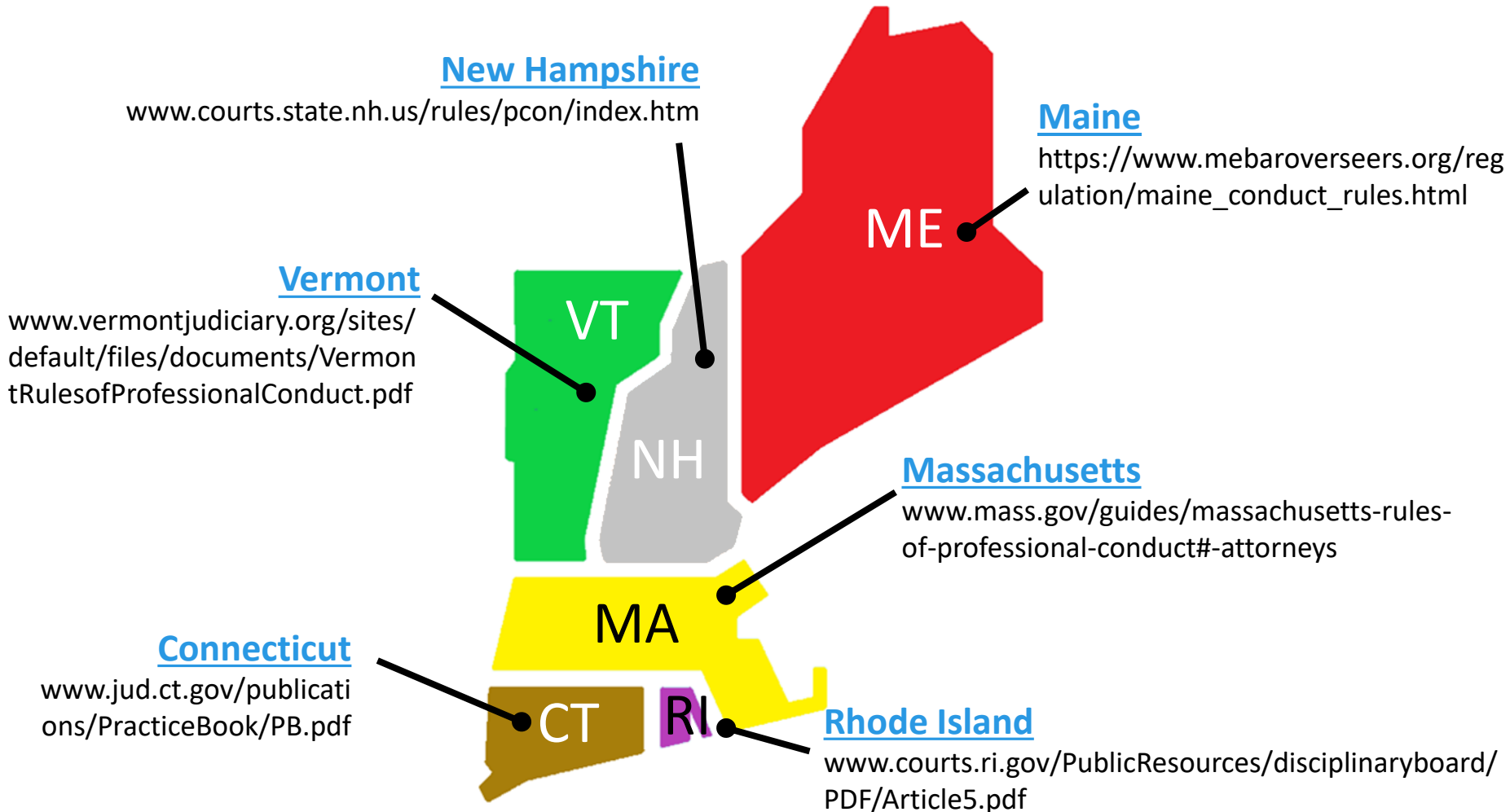
www.mass.gov/guides/massachusetts-rules-of-professional-conduct#-attorneys

Connecticut

www.jud.ct.gov/publications/PracticeBook/PB.pdf

Rhode Island

www.courts.ri.gov/PublicResources/disciplinaryboard/PDF/Article5.pdf



Related Resource: American Bar Association's Model Rules of Professional Conduct

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/

The screenshot displays a web browser window with the URL https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/. The browser's address bar and search field are visible at the top. Below the browser window, the American Bar Association website header is shown, featuring the ABA logo and navigation links for Events, CLE Marketplace, Shop ABA, Member Directory, Join, and Log In. A secondary navigation bar highlights Professional Responsibility, with sub-links for Membership, Resources, and More. The main content area includes a breadcrumb trail: / ABA Groups / Center for Professional Responsibility / Publications. A sidebar on the left lists navigation options: 2. Implementation of Mo..., 3. A Legislative History, 4. Other Links of Interest, 5. Restatement Compari..., and 6. Multistate Professiona... The main content area features the title "Model Rules of Professional Conduct" dated April 02, 2019, with social sharing icons for Facebook, Twitter, LinkedIn, and Email. Below the title is the text "About the Model Rules".

Helpful Hint from John Wooden

"Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are"
-John Wooden

