

Ethics for Regulatory Counsel in a High Profile Media Environment

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Presented
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Disclaimer: The materials in this presentation are for informational purposes only and not for the purpose of providing legal advice. Contact your attorney to obtain advice with respect to any particular issue or problem.



Topics in This Presentation:

- Introduction — The Distinct Ethics of Utility Regulatory Practice
- Core Ethical Framework as Tensions (ER 1.1, 1.6, 2.1, 3.3)
- High-Risk Areas in Practice — Expert Testimony, Models, Ex Parte, and More
- The ACC Code of Ethics — What Attorneys Need to Know
- Arizona-Specific Considerations
- Hypotheticals and Discussion
- Practical Guidance and Conclusion

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Introduction



What Makes This Practice Area Special

- Repeat interactions with the same decision-makers over many years
- Technically complex subject matter — cost of capital, demand forecasts, revenue requirements
- Outcomes that directly and visibly affect the public — ratepayers, not just the client
- A quasi-judicial forum that also serves as policy-maker and regulator
- **The risk is not of an overt violation — it is of misjudging gray areas.**

Why this audience specifically:

- Attorneys who appear regularly develop relationships and informational access that can become ethical liabilities
- Commissioners in some jurisdictions, like Arizona, have their own codes of ethics and it is incumbent on practitioners to understand those obligations



Core Ethical Framework as Tensions



Tension 1 — Candor vs. Persuasion (ER 3.3, 3.4)

▪ **ER 3.3 – Candor Toward the Tribunal**

- An attorney may not “knowingly (1) make a false statement of fact or law” (2) “fail to disclose” controlling legal authority or (3) “offer evidence that the lawyer knows to be false.”
- In an ex parte proceeding, “a lawyer shall inform the tribunal of all material facts known to the lawyer which enable the tribunal to make an informed decision *whether or not the facts are adverse.*”

▪ **ER 3.4 – Fairness to Opposing Party and Counsel**

- Attorneys may not, among other things: (1) “unlawfully obstruct” or alter evidence or “counsel or assist another person to do any such act” (2) “counsel or assist a witness to testify falsely” (3) disobey an obligation under the rules of a tribunal.



Tension 2 — Competence in Technical Contexts (ER 1.1)

ER 1.1 – Competence requires the “knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Comment [6]: A lawyer shall keep abreast of changes in practice “including the benefits and risks associated with relevant technology.”

- Regulatory lawyers routinely rely on expert models and forecasts
- Ethical competence requires understanding the work sufficiently to identify its weaknesses
- In a rate case, competence means understanding what the components of the revenue requirement are and not just the final proposed increase.

Competence also requires knowing when you are out of your depth

- Retaining a qualified expert is itself an act of competence — but delegation does not extinguish responsibility
- If you present work you cannot minimally evaluate, you assume the risk of its errors



Tensions 3 & 4 — Confidentiality and Loyalty (ER 1.2, 1.6)

ER 1.2 – “[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by ER 1.4, shall consult with the client as to the means by which they are to be pursued.”

ER 1.6 – “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted” by rule.

Confidentiality vs. Transparency

- Proceedings are public-facing, yet involve sensitive infrastructure or market data
- Protective orders must be actively sought and maintained — confidentiality can be inadvertently waived
- ACC transparency obligations (Code Rules 7.1, 7.2) mean Commissioner calendars and official communications are ultimately public

Loyalty vs. Public Interest Overlay

- The lawyer represents a client — but the forum is designed to serve the public interest
- Rate cases affect ratepayers who are not represented in the proceeding
- Advocacy that consistently ignores ratepayer impact erodes forum credibility over time



High-Risk Areas in Practice



A. Expert Testimony (ER 3.4(b), 8.4(c))

- **ER 3.4(b)** – Prohibits falsifying evidence, counseling or assisting a witness to testify falsely, or offering an inducement prohibited by law.
- **ER 8.4(c)** – Makes it professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- **The Prepared Witness Problem:**
 - Preparing an expert is not coaching one — the record should reflect what the expert actually believes
 - Most expert testimony is shaped in collaboration with counsel — this is expected
 - Substituting legal judgment for the expert’s technical judgment crosses the line
- **The Rotating Expert:**
 - Same experts appear for different parties across proceedings — prior ACC testimony is public record and fair game for cross-examination
- **Staff Witnesses:**
 - Staff witnesses are not neutral — treat interactions with the same formality as any testifying witness



B. Models and Assumptions (ER 3.3; 8.4(c))

- **ER 3.3** – Candor toward the tribunal regarding false statements of fact or evidence the attorney knows to be false.
- Utility cases hinge on assumptions embedded in models — they can dramatically influence outcomes while remaining technically defensible
- **Key risk: presenting a selective assumption set without acknowledging the range**
 - **Cost of Capital Cases:** DCF, CAPM, and comparable earnings models can vary by several hundred basis points depending on inputs — present the range, not just the point
 - **Demand Forecasts:** Load forecasting errors compound over time — omitting uncertainty bands when justifying capital expenditures is selective advocacy
 - **The ‘Black Box’ Problem:** If the model cannot be explained to the Commission in plain terms, you cannot adequately supervise it — and you cannot honestly represent conclusions you cannot explain
 - **Sensitivity Analysis:** If you commission an analysis with unfavorable results and decline to file it, the omission may require disclosure depending on how the favorable analysis is presented



C & E. Omission as Advocacy / Staff Interactions

C. Omission as a Form of Advocacy (ER 3.3(a)(1))

- Failing to disclose sensitivity analyses, known limitations, or alternative scenarios can mislead even when all presented information is accurate
- Duty of candor extends to the record as a whole — not just individual statements
- If record error is discovered post-filing, ER 3.3 may require supplementing — have a protocol for this

E. Interactions with Commission Staff (ER 4.3, 8.4)

- When Staff is a party: communicate in writing, on the record
- When Staff is advisory: informal interactions carry access-asymmetry risks — guidance that benefits your position may need to be placed on the record
- Unequal access to Staff is itself an ethical concern — processes unavailable to all parties should not be used by any party



D. Ex Parte Communications (ER 3.5(b); ACC Code Rule 7.3; A.A.C. R14-3-113)

ER 3.5(b) – Prohibits ex parte communications with a judge or other official of a tribunal during the proceeding unless authorized to do so by law or court order.

ACC Code Rule 7.3: Ex parte communications are prohibited from the time a matter is “set for public hearing” through denial of an application for rehearing.

- **Know when the window opens and closes for each docket**
 - Agents of Commissioners — including policy advisors and interns — are covered by the prohibition.
 - A communication with a member of a Commissioner’s office about substantive merits is an *ex parte* communication
- **Consequence is automatic: violation requires “immediate recusal” by the Commissioner — even if inadvertent**
 - What is not ex parte: procedural inquiries (scheduling, docketing, filing issues) — but the line between procedural and substantive is thin
- **Conference risk:** Know the status of your pending matters before attending any event where Commissioners may be present (NARUC, NAWC, workshops, stakeholder meetings)



The ACC Code of Ethics Attorney-Facing Provisions



Why a PUC Code of Ethics Matters to Practitioners

A PUC Code is directed at Commissioners – but it defines what attorneys can and cannot do.

- **ACC Conflicts of Interest and Recusal (Rules 4.1–4.4)**
 - Commissioners must disqualify themselves where they cannot be impartial – as counsel, you should understand recusal rules well enough to raise concerns when appropriate
 - Rule 4.3 prohibits Commissioners from accepting meals or things of value from regulated utilities or parties – attorneys must not create situations that put Commissioners in jeopardy
 - Rule 4.4 prohibits use of position to secure benefits that reflect “substantial and improper influence” – counsel who offer explicit or implicit benefits are violating their own rules and potentially the Commissioner’s
 - A narrow exception permits Commissioners to attend educational events (e.g., NARUC conferences) where benefits are provided to all attendees



Campaign Contributions (ACC Code Rules 6.1–6.2)

This is one of the most operationally important sections of the Code for practicing attorneys.

- **Rule 6.2(A) — Prohibited contributions:**
 - Commissioners may not accept contributions from any regulated utility, registered lobbyist, or intervenor to a pending case
- **Rule 6.2(B) — Declaration obligation:**
 - Commissioners must declare known contributions from parties before voting — declaration due at least two business days before the vote
- **Practice Point 1:**
 - If your client or its affiliates have contributed to a Commissioner’s campaign — that fact is public, documented, and will be disclosed at the open meeting. Plan for it.
- **Practice Point 2:**
 - Independent expenditures from entities associated with your client trigger the same disclosure obligations — indirect does not mean invisible
- **Practice Point 3:**
 - Consider whether a contribution — even a lawful one — creates an appearance problem affecting your client’s credibility



Lobbyist Registration & Post-Employment (ACC Rules 5.2, 4.5)

Lobbyist Registration (ACC Rule 5.2)

- Anyone communicating with a Commissioner to influence a decision or rulemaking — representing an industry or utility — must register as a lobbyist with the ACC
- Attorney carve-out: licensed attorneys advocating “in the course of Commission proceedings” are excluded — but this carve-out has limits outside formal proceedings
- Communications at conferences, in informal meetings, or in generic rulemaking contexts may not be covered

Post-Employment / Cooling-Off (ACC Rule 4.5)

- Former Commissioners: one-year prohibition on appearing before the Commission
- Sitting Commissioners: may not meet with a former Commissioner employed by a utility regarding pending issues — for one year after departure
- **Practice Point: if you are considering hiring a former Commissioner — the one-year prohibition applies immediately and cannot be circumvented by limiting formal appearances**



Public Records & Official Calendars

ACC Rule 7.2: Electronic messages on government-issued devices with a “substantial nexus to Commission activities” are public records. Commissioners “cannot use private devices and accounts for the purpose of concealing official conduct.”

- **Practice Point:** Your communications with Commissioners — and theirs with staff about your matter — may ultimately be public records. Document your own contacts accordingly.
- Do not assume informality provides cover — informal communications with Commission officials about pending matters carry the same documentation risks as formal filings
- Open Meeting Law (ACC Rule 7.1) limits off-agenda discussions — Commissioners cannot dialogue with presenters on non-agenda items at public meetings



Hypotheticals Discussion Scenarios



Hypothetical 1 — The Revised Testimony

Scenario: A utility files a rate case with a 10-year capital forecast. Before hearing, a Commission policy advisor flags concern with growth rate assumptions. Utility counsel receives informal feedback from that policy advisor — over coffee, between proceedings — that the Commission finds the forecast “hard to defend as filed.” Counsel revises testimony and files an errata.

Discussion Questions:

- Was the informal policy advisor communication permissible — was the matter “set for public hearing” at the time?
- Was this an ex parte contact regarding substantive merits under ACC Code Rule 7.3?
- Was the errata filing appropriate — should other intervenors have been notified of the substantive change in advance?
- Would the course of action here have been different if Commission staff (versus a policy advisor) had communicated with utility counsel?



Hypothetical 2 — The Sensitivity Analysis That Wasn't Filed

Scenario: An engineering consultant prepares a cost-benefit analysis supporting a proposed infrastructure investment, with three scenarios. Counsel reviews all three, determines the middle scenario is most defensible, and files only that one. The high and low scenarios produce materially different conclusions about the investment's cost-effectiveness.

Discussion Questions:

- Was the decision not to file the other scenarios defensible? What, if anything, might require disclosure?
- If Staff independently requests the full analysis during discovery, what are counsel's obligations?
- If intervenors never request it — does the omission still raise candor concerns under ER 3.3?
- Does the answer change if the filed analysis is expressly presented as a “base case”?



Hypothetical 3 — The Commissioner’s Conference

Scenario: Scenario: An attorney for a regulated utility attends the annual winter NARUC conference. A sitting ACC Commissioner is also attending. They share dinner with several other industry participants. The attorney mentions that her client’s rate case is scheduled for hearing in six weeks and that she “hopes the Commission will approach the cost of capital issue with an open mind.” The Commissioner changes the subject.

Discussion Questions:

- Was this an ex parte communication — what is the test under ACC Code Rule 7.3?
- Does it matter that other people were present?
- What should the attorney have done differently? What should the Commissioner have done?
- Does the attorney have an affirmative duty to disclose the contact?



Hypothetical 4 — The Former Commissioner

Scenario: A law firm hires a former ACC Commissioner six months after his tenure ends. The firm represents a utility in a rate case currently before the Commission. The former Commissioner does not formally appear in the proceeding but is consulted informally on strategy and participates in client meetings where the case is discussed.

Discussion Questions:

- Does ACC Code Rule 4.5 (one-year prohibition) apply — does informal consulting constitute an “appearance”?
- Do Arizona conflict-of-interest rules or ER 1.9 (former client) apply independently?
- What disclosure, if any, should the firm make to the Commission?
- How should the firm structure the arrangement to minimize risk — and is any structure permissible within the one-year window?



Practical Guidance — Before Filing and During the Proceeding

Before the Case Is Filed

- Conduct an honest assessment of your evidence — find weaknesses before opposing counsel does
- Know which dockets are in contested proceedings before any informal Commissioner contact
- Review your firm's and client's campaign contribution history relative to sitting Commissioners
- Screen for revolving-door issues if your team includes former Commissioners or Staff

During the Proceeding

- Document all substantive contacts with Commissioners and Commissioner staff
- If you receive a potential ex parte communication — even inadvertently — consider whether it needs to be disclosed
- Test your own case rigorously: if opposing counsel asked the hardest questions, could your clients answer them?



Practical Guidance — Advising the Client

- **An Applicable PUC Code of Ethics is your client's problem too:**
 - Regulated utilities have sophisticated government affairs functions — coordinate with them on Commissioner interactions, contributions, and informal lobbying
- **Set clear expectations:**
 - Campaign contributions while a proceeding is pending, informal Commissioner contact, and Staff communications all require careful management
- **Advise clients that credibility with the Commission is a long-term asset:**
 - Regulatory relationships are not single transactions — positions taken today become precedent for tomorrow's proceedings
- Document key judgment decisions — when you make a close call on disclosure, ex parte risk, or evidence framing, record your reasoning
- **Ethical risks in regulatory practice are most often risks of omission — failing to disclose, failing to qualify, failing to ask the hard question**
- Build a practice culture that rewards raising ethics concerns — not suppressing them



Conclusion

- Ethical practice in utility regulation is not merely compliance — it is strategic
- The PUC Code of Ethics, the Rules of Professional Conduct, and the structural features of utility regulation converge to create a practice environment where the costs of missteps are both professional and reputational
- **What makes this practice area demanding is that the gray areas are the norm:**
 - The hardest decisions are not between right and wrong — they are between two defensible positions, where the difference lies in degree, disclosure, or candor about uncertainty
 - *The attorneys who navigate this environment best ask not only “Can I do this?” — but “Should I do this?” and “What does it say about my credibility if I do?”*
- Credibility with regulators compounds over time — the best practice advice is also the best ethical advice



Conclusion



Key Rules Reference

Rule	Subject	Source
ER 1.1	Competence, incl. technical competence	AZ Rules of Prof. Conduct
ER 1.6	Confidentiality of client information	AZ Rules of Prof. Conduct
ER 2.1	Advisor — candor to client	AZ Rules of Prof. Conduct
ER 3.3	Candor toward the tribunal	AZ Rules of Prof. Conduct
ER 3.5(b)	Improper ex parte communications	AZ Rules of Prof. Conduct
ER 8.4(c)	Misconduct — dishonesty, fraud, deceit	AZ Rules of Prof. Conduct
Rule 4.3	Commissioner prohibition on gifts from regulated utilities	ACC Code of Ethics
Rule 4.5	One-year post-employment cooling-off period	ACC Code of Ethics
Rule 5.2	Lobbyist registration; attorney carve-out	ACC Code of Ethics
Rule 6.2	Campaign contribution prohibitions and disclosure	ACC Code of Ethics
Rule 7.3	Ex parte prohibition — scope and consequences	ACC Code of Ethics



Questions?



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