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Ethics Matter!

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I. Bias, the Appearance of Bias, and the Appearance of Impropriety

In any given jurisdiction, the principles that govern the conduct of public utility regulatory commissions and their administrative law judges or hearing examiners might have a variety of sources, such as:

- the statute(s) that establish(es) the agency and define(s) its jurisdiction and authority,
- the agency's rules, and
- the jurisdiction's administrative procedures act, as well as
- the federal and state constitutions, especially due process principles.

The applicable principles may make distinctions between commissioners and ALJs. Those distinctions might be direct or indirect.

The applicable principles also may make distinctions between contested cases versus other kinds of matters, and within contested cases they may make further distinctions, such as whether the matter involves general principles, a particular utility's rates, or individual interests, and whether the contested case is one in which formal evidentiary proceedings must be conducted or as a matter of discretion are being conducted.

In any given jurisdiction, there may or may not be applicable law referring to the commission's role as "legislative" in nature, even in contested matters. That label is not necessarily conclusive as to whether, when, or to what extent principles that apply to judicial proceedings also apply to contested commission proceedings. *See, e.g., M. Scaparlanda, "Judicial Solecism Repeated: An Analysis of the Oklahoma Supreme Court's Refusal to Recognize the Adjudicative Nature of Particularized Ratemaking," 47 Okla. L.R. 601 (1994).*

When we talk about the "applicable" principles, it should be noted as well that they may be applicable in different senses. They may be aspirational, they may be for purposes of recusal or disqualification, or they may be for purposes of discipline. For example, in terms of aspirational principles, in 1977, NARUC itself adopted a Code of Ethics for Members of the National Association of Regulatory Utility Commissioners.

So, it's very difficult to make generalizations about principles that govern commission proceedings in contested cases. That being said, let's take a look at three possible principles, which may or may not be applicable under a given jurisdiction's law, that might come into play in our first hypothetical: (1) the principle of recusal or disqualification for bias, (2) the principle of recusal or disqualification for appearance of bias, and (3) the principle of recusal or disqualification for the appearance of impropriety.

In working through this hypothetical, I should note that it may or may not be the case, given what we've heard, that at the moment there is any particular proceeding pending before the Nirvana Public Utility Commission involving Sunny Skies Electric Company, and if there is a pending proceeding it may or may not be a contested case and it may or may not be one in which there are evidentiary hearings. Some of the principles I am going to discuss apply only in the context of a contested case, while others are more general.

Determining which principles, if any, apply, is one of the basic steps in analyzing the hypothetical. In most jurisdictions, bias or prejudice in a contested case is likely to be inconsistent with aspirational principles and to be a grounds of recusal or disqualification. For example:

- 1977 NARUC Ethics Code Canon III(6) indicates that a Commissioner should recuse themselves when their impartiality might reasonably be questioned, and subsection (a) includes the grounds of personal bias or prejudice.
- All or nearly all states have adopted an administrative procedures act. Most have worked in whole or in part from the various Model State Administrative Procedures Acts of the National Conference of Commissioners on Uniform State laws. NCCUSL has adopted Model State APAs in 1946, 1961, and 1981, and is working on a new version as we speak.
 - Section 4-202(b) of the 1981 Model State APA provides: “(b) Any person serving or designated to serve alone or with others as presiding officer is subject to disqualification for bias, prejudice, interest, or any other cause provided in this Act or for which a judge is or may be disqualified.”
 - The Nov. 2008 working draft contains the same provision. New Section 4-408 on top of that would incorporate the state’s administrative law judge code of ethics.

Whether any given jurisdiction also recognizes a principle of appearance of bias or appearance of impropriety might be likely to be a more open question.

- 1977 NARUC Ethics Code Canon II provides that a Commissioner should avoid impropriety and the appearance of impropriety in all activities. As noted above, its Canon III(6) applies where impartiality might reasonably be questioned.
- As I indicated, the Model State APA incorporates principles of judicial disqualification.
- When I searched utility commission decisions for the term “appearance of impropriety”, I found many orders taking seriously “appearance of impropriety” issues, but many of them involved recusals to avoid the appearance of impropriety, rather than actual litigation of whether it is a governing standard.

Now, let’s go back to our hypothetical. Assuming the Chairman’s correction of the facts, he and his wife sit on the Board of the Beautiful Neighborhood Foundation, Sunny Skies has made a \$1 million donation to the Foundation, but its not clear whether or to what extent the Chairman or his wife requested or solicited the donation.

So, one piece of this question is whether the Chairman properly may sit on the Board of the Foundation in the first place. Now, it seems plausible to me that any given jurisdiction might well have specific statutes or rules on the extent to which ALJs and Commissioners may have other jobs or serve on Boards. If we assume, however, that we have to fall back on general principles of judicial ethics, we do have some guidance. However, we have to keep in mind that judicial ethics principles may apply generally, in part, or not at all in any given jurisdiction and in any given fact pattern. For example:

- In 2007, the ABA adopted a new version of its Model Code of Judicial Conduct. Rule 3.1 applies to extrajudicial activities in general. Rule 3.1 provides:

RULE 3.1

Extrajudicial Activities in General

A judge may engage in extrajudicial activities, except as prohibited by law* or this Code. However, when engaging in extrajudicial activities, a judge shall not:

- (A) participate in activities that will interfere with the proper performance of the judge's judicial duties;
 - (B) participate in activities that will lead to frequent disqualification of the judge;
 - (C) participate in activities that would appear to a reasonable person to undermine the judge's independence,* integrity,* or impartiality;*
 - (D) engage in conduct that would appear to a reasonable person to be coercive; or
 - (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.
- Rule 3.7 applies to participation in educational, religious, charitable, fraternal, or civic organizations and activities. Rule 3.7(A) states that:

RULE 3.7

Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities

(A) Subject to the requirements of Rule 3.1, a judge may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice, and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

- (1) assisting such an organization or entity in planning related to fund-raising, and participating in the management and investment of the organization's or entity's funds;
- (2) soliciting* contributions* for such an organization or entity, but only from members of the judge's family,* or from judges over whom the judge does not exercise supervisory or appellate authority;
- (3) soliciting membership for such an organization or entity, even though the membership dues or fees generated may be used to support the objectives of the organization or entity, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice;
- (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice;
- (5) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities, but only if the organization or entity is concerned with the law, the legal system, or the administration of justice; and
- (6) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

**(a) will be engaged in proceedings that would ordinarily come before the judge; or
(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.**

- The ABA also has model codes for federal (1989) and state (1995) ALJs, and, as you might expect, they are based to a large degree on the MCJC as of the time they were formulated. One might consider to what extent those model codes should be thought as of operative, even though they remain official ABA documents. The passage of time and the amendments to the MCJC have to be considered. Moreover, the MCJC specifically applies to “the administrative law judiciary”. On the other hand, the MCJC cites the two model codes in a footnote without suggesting they are in whole or in part obsolete or out of date.

So, taking the 2007 ABA MCJC as the framework, while there are a number of general principles that must be observed, there may not be a per se prohibition of the Chairman’s serving on the Board of the Foundation.

However, if the Chairman solicited the Sunny Skies contribution, that would have to be evaluated under 2007 ABA MCJC Rule 3.7(A)(2), and if he did so in a coercive manner that could be difficult to reconcile with 2007 ABA MCJC Rule 3.1(D). The recognition of a judge’s soliciting charitable contributions as a potential problem goes all the way back the ABA’s first model code of ethics for judges, which it adopted in 1924.

Another potential issue is whether state property was used in making the solicitation.

In the grand scheme of things, it appears that there are not all that many decisions talking in much detail and with detailed conclusions about how judicial ethics principles apply to utility commission ALJs and Commissioners. In terms of regular courtroom judges, there have been cases finding a judge’s conduct inconsistent with the judicial ethics rules where the judge used official stationery to solicit charitable contributions for crime prevention and Law Day programs, items for a charity auction, school supplies for the homeless, and funds from former law school classmates for a gift to their alma mater. R. McKoski, “Ethics Considerations in the use of Judicial Stationery for Private Purposes”, 112 Penn. St. L. Rev. 471 (Fall 2007). One recent case reportedly involved a judge reportedly disciplined for, among other things, directing a lawyer to donate \$100 to help underwrite a party for the judge.

Now, assuming that there is a pending proceeding involving Sunny Skies, then, whether or not the Chairman solicited the Sunny Skies contribution, you also would need to think through the principles relating to bias and the appearance of bias or the appearance of impropriety in terms of whether recusal or disqualification is permitted or required. You might or might not consider whether the Chairman made the solicitation as a factor. You also would need to think through the same principles, but from the other side, if the Chairman demanded or requested the contribution and Sunny Skies declined.

This week, there was a potential major development on this general subject. The United States Supreme Court decided to accept jurisdiction in the case of *Caperton v. A.T. Massey Coal Co.*, where the question has been raised of whether due process was violated where a member of the W. Va. S. Ct. reportedly refused to recuse himself from participation in the appeal of a very large jury verdict where, reportedly, the CEO of the lead defendant had donated or spent millions of dollars to or on the Justice's election campaign while the company was planning to appeal. Whether or not you think that particular case crosses "the line", a difficult question is what is the line.

By the way, if we change the hypothetical to one where the Chairman is soliciting contributions for his wife's political campaign, then there are other provisions of the 2007 ABA MCJC that would come into play. In particular, Rule 4.1(A)(4) says that, except as permitted by law or certain other Rules, a judge or judicial candidate shall not "solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office...." The other Rules don't appear to carve out an exception to the solicitation prohibition.

One final point about the appearance of impropriety standard: Some ethics authorities contend that it is unconstitutionally vague. There was much controversy over whether to retain the standard during the process that led to the 2007 ABA MCJC, but ultimately it was retained.

II. Ex Parte Contacts and the Appearance of Bias or the Appearance of Impropriety

Public utility commissions in many contexts are allowed to act in an ex parte manner.

Where the issues arise typically is when the applicable law contains a prohibition or limitation on ex parte contacts, a right to notice and the opportunity to be heard, or a requirement that the contacts be made of record or otherwise publicly memorialized in some manner. Utility commissions are likely to have some sort of applicable law on ex parte contacts, whether in their organic statute, their rules, their state's APA, or other state law.

Here, we have several potential issues, including: (1) whether the ex parte contacts were of the types that were prohibited or reportable, (2) whether the ex parte contacts may have included information not in the record about contested matters being conducted as formal contested cases, and (3) whether the sheer number of ex parte contacts is so great that it constitutes or is evidence of bias or the appearance of bias or the appearance of impropriety.

If the Chairman is correct in the hypothetical that none of the ex parte contacts was about anything other than "personal stuff", then at least in theory whether the contact was prohibited or reportable might be questioned.

In the Illinois case that involved a large number of ex parte contacts, in brief, the Appellate Court held that the state's judicial conduct rules should be applied because of the pendency of formal rate case proceedings, and the Commissioner should have recused himself because his impartiality was reasonably questioned. *Business and Professional People for the Public Interest v. Barnich*, 244 Ill. App. 3d 291 (Ill. App. Ct. 1st Dist. 1993). Interestingly, the Court did not make express findings about whether the ex parte contacts were prohibited or reportable.

FERC has had the issue raised of whether it has violated principles regarding ex parte communications. FERC commissioned a paper from a noted administrative law scholar, Prof. Richard Pierce, that concluded that FERC was in compliance with the law and had actually adopted ex parte rules that in some respects were more stringent than those required by the APA. You can find the paper on the web.

III. Privilege

Question of how the attorney-client privilege applies within the commission.

In re a Witness before the Special Grand Jury 2000-2, 288 F.3d 289 (7th Cir. 2002)

- Chief Legal Counsel (CLC) of Secretary of State; former personal lawyer
- Grand Jury sought as to communications as CLC
- D. Ct. ordered; 7th Cir. aff'd
- Not decide whether successor office holder could waive

~ opposite in *In re grand Jury Investigation*, 399 F.3d 527 (2d Cir. 2005)

- Former CLC in Governor's office
- Recognized that contra to 7th Cir. (above) and in sharp tension with D.C. Cir. and 8th Cir. decisions