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Agenda

- Context
- *Ex Parte* Communications
- Conflicts of Interest
- Candor Toward the Tribunal
- Competence and Confidentiality
- Investigations
- Outsourcing, Including Vendors

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Why are we here?
Numerous ethics rules are rules of general applicability that do not refer to a particular forum.

E.g., Wis. R. Prof. Conduct (WRPC) (Wis. S. Ct. R., Ch. 20), Rule 8.4 (“Misconduct”): “It is professional misconduct for a lawyer to: … (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation[.]”

Some ethics rules refer to a “tribunal”, e.g., WRPC 3.3 (“Candor toward the tribunal”), but an administrative agency can be a tribunal when acting in an adjudicative capacity, WRPC 1.0 (“Terminology”), subsection(p).
Ex Parte Communications

PSSST...!
Ex Parte Communications

- General Definitions
- Wisconsin
- FERC
- Illinois
- Examples

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General Definitions

Four factors:
- Participants
- Substance
- Form
- Exceptions
WRPC Rule 3.5: “Impartiality and decorum of the tribunal”, subsections (a) and (b):

“A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order or for scheduling purposes if permitted by the court. If communication between a lawyer and judge has occurred in order to schedule the matter, the lawyer involved shall promptly notify the lawyer for the other party or the other party, if unrepresented, of such communication[.]”
Wis. Statutes, Ch. 227 (Admin. Procedure and Review), Section 227.50: “Ex parte communications in contested cases”:

“(1)(a) Except as provided in par. (am), in a contested case, no ex parte communication relative to the merits or a threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employee of the agency who is involved in the decision-making process, by any of the following:

1m. An official of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter. This subdivision does not apply to an advisory staff which does not participate in the proceeding.”
Section 227.50 CONTINUED:

“2. A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or an authorized representative or counsel.”

“(am) Paragraph (a) does not apply to any of the following:

1. An ex parte communication which is authorized or required by statute.

2. An ex parte communication by an official or employee of an agency which is conducting a class 1 proceeding.”
Section 227.50 CONTINUED:

“3. Any communication made to an agency in response to a request by the agency for information required in the ordinary course of its regulatory functions by rule of the agency.

4. In a contested case before the public service commission, an *ex parte* communication by or to any official or employee of the commission other than the hearing examiner, the chairperson, or a commissioner.”
FERC Rules of Practice and Procedure (18 CFR Part 385) re “Off-the-Record” communications:

- Between someone outside FERC and a FERC decision employee (Section 385.2201(b))
- Relevant to the merits of a contested case (Section 385.2201(c)(4))
- If written is not filed with the Secretary and not served in accordance with Rule 2010 [the general Rule on Service], or, if oral, is made without reasonable prior notice to the parties and without the opportunity for the parties to be present when made. (Id.)
- Exceptions for some procedural inquiries, etc. (Section 385.2201(c)(5))
- Exemptions for communications permitted by law and authorized by the Commission, certain emergencies, etc. (Section 385.2201(e))
Illinois

- **Business and Professional People for the Public Interest v. Barnich**, 244 Ill. App. 3d 291 (1st Dist. 1993)
- 220 ILCS 5/10-103 (PUA)
- 5 ILCS 100/5-165 (rulemakings), 10-60 (APA) (rules for matters other than authorized *ex parte* matters)
- 5 ILCS 430/5-50 (State Officials and Employees Ethics Act) (reporting)
Improper letter delays vote on huge SDG&E gas pipeline project

Letter delivered during ‘quiet period’ when groups are not allowed to comment

By ROB NIKOLEWSKI  JAN. 16, 2020  |  2:23 PM

CPUC Approves $97.5 Million Settlement Agreement in PG&E Ex Parte Proceedings

Today the CPUC adopted a settlement agreement totaling $97.5 million that resolves eight proceedings in which Pacific Gas and Electric Company (PG&E) admittedly failed to timely report ex parte communications from 2010 to 2014, and engaged in improper ex parte communications, in violation of CPUC rules.

Ex parte communications with the CPUC are subject to unique reporting rules, which require a party to a CPUC proceeding to disclose the nature of the communication in certain CPUC proceedings to maintain transparency and integrity of CPUC proceedings. PG&E’s failure to report these communications is an unacceptable violation of the CPUC’s rules and justifies the remedy provided in this case. Although these violations occurred more than four years ago, today’s decision is an affirmation that all parties to the CPUC’s proceedings must comply with the ex parte rules.

Under the settlement agreement, PG&E will make the following payments from shareholder funds:

- $12 million to the state’s General Fund
- $6 million to the City of San Bruno General Fund
- $6 million to the City of San Carlos General Fund
- $10 million in its next General Rate Case

In addition, PG&E will forgo collection of $63.5 million in revenue requirements for 2018 and 2019.

The settling parties are the City of San Bruno, the City of San Carlos, the CPUC’s Office of Ratepayer Advocates, the CPUC’s Safety and Enforcement Division, The Utility Reform Network, and PG&E.

The proceeding remains open to consider whether PG&E’s newly disclosed email communications violate the CPUC’s ex parte rules and should result in the imposition of additional fines.

Source: https://www.cpuc.ca.gov/cpucblog.aspx?id=6442457276&blogid=1551
Conflicts of Interest
Conflicts of Interest

◆ Current clients
◆ Former clients
◆ Former government service
◆ Prospective clients
◆ “Issue conflicts”
◆ Waivers and Screening
WRPC 1.7: “Conflicts of interest current clients”

“(a) Except as provided in par. (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.”
WRPC 1.7 CONTINUED:

“(b) Notwithstanding the existence of a concurrent conflict of interest under par. (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 a writing signed by the client.”
WRPC 1.9: “Duties to Former Clients”:

“(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.”
WRPC 1.9 CONTINUED:

“(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.”
WRPC 1.11: “Special conflicts of interest for former and current government officers and employees”:

“(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to SCR 20:1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.”

(b) [Imputed disqualification; screening]
WRPC 1.11 CONTINUED:

“(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. **** [Definition of confidential government information; screening]”

(d), (e), (f) [Current government service; definition of a matter]
WRPC 1.18: "Duties to prospective client":

“(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.”
WRPC 1.18 CONTINUED:

“(c) A lawyer subject to par. (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in par. (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in par. (d).”
WRPC 1.18 CONTINUED:

“(d) When the lawyer has received disqualifying information as defined in par. (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.”
Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. **A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case;** for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. **If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.**
Waiver and Screening

- **Waiver.** See, e.g.:
  - WRPC 1.7(b) and ABA Comments [18] – [25]
  - WRPC 1.9(a) and (b)
  - WRPC 1.11(a)
  - WRPC 1.18(b) and (d)

- **Screening.** See, e.g.:
  - WRPC 1.10
  - WRPC 1.11(b), (c), and (f)
WRPC 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.”
WRPC 3.3 CONTINUED:

“(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 pars. (a) and (b) apply even if compliance requires disclosure of information otherwise protected by SCR 20:1.6.”
Competence and Confidentiality
Competence and Confidentiality

- Principles – competence – as applied to technology
- Principles – confidentiality – as applied to technology
- Principles – confidentiality – inadvertent disclosure and disclosure to the government
- Principles – confidentiality – prospective clients
- Vulnerabilities and threats
- Viruses and extortion
- Data breaches (also governed by other law)
- Inadvertent receipt of confidential material

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Principles: Competence

WRPC 1.1: “Competence”:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

ABA Comment [8]:

“To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology ….”

Restatement (3d) of the Law Governing Lawyers, § 16: “A Lawyer’s Duties to a Client – In General”
WRPC 1.6: “Confidentiality of Information”:

WRPC 1.6(d): “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

Source: Image used via license from istockphoto.com

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ABA Comment [18]: “*** Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.”
Principles: Inadvertent Disclosure and Disclosure to the Government

- Inadvertent disclosure and disclosure to government
  - Wis. R. Ev. 905.03(5)(a) ("Effect of inadvertent disclosure"), (b) ("Scope of forfeiture")
  - Wis. Code Civ. Pro. Section 804.01(7) ("Recovering information inadvertently closed")
  - F. R. Ev. 502 ("Attorney-Client Privilege and Work Product; Limitations on Waiver")
  - Fed. R. Civ. Pro. 26(b)(5)(B) ("Claiming Privilege or Protecting Trial Preparation Materials – Information Produced")
**Top IS Vulnerabilities and Threats**


- **Top 3 vulnerabilities**: (1) 34% careless / unaware employees, (2) 26% outdated security controls, and (3) 13% unauthorized access (p. 10)

- **Top 4 threats**: (1) 22% phishing, (2) 20% malware, (3) 13% cyberattacks to disrupt, and (4) 12% cyberattacks to steal money (p. 9)
Lawyers Are Targets

- *E.g.*, “Maze Ransomware Attack Has Hit Small Law Firms in 3 States”
  - P. Smith, Law.com, Feb. 4, 2020
  - “The ransomware attack on three small South Dakota firms the hacker group touted online late last month follows previously announced hacks of firms in Texas and Oregon.”

  Source: https://www.law.com/americanlawyer/2020/02/04/maze-ransomware-attack-has-hit-small-law-firms-in-3-states/
Any Size Law Firm / Department Can Face Electronic Security Risks

Security Breaches (Ever) By Firm Size

Seriously?

Passwords most commonly shared by hackers in 2019

1. 123456
2. 123456789
3. qwerty
4. password
5. 1234567
6. 12345678
7. 12345
8. iloveyou
9. 111111
10. 123123

Source: SplashData data released Dec. 18, 2019
Passwords and Two Factor Authentication

◆ **Passwords**
  
  ◆ **Selection.** See, *e.g.*:
    
    
    

◆ **Two factor authentication**
  
  ◆ Who you are / what you have, *e.g.*, a fingerprint or fob, or your phone
  
  ◆ See, *e.g.*, above DHS links
Viruses and Extortion, p. 1

- **Ransomware and malicious code**
  - Protecting against Ransomware and Malicious Code (DHS): https://www.us-cert.gov/ncas/tips (DHS)
  - **Keep anti-virus software and operating systems up to date.** Windows 7 support ended January 14, 2020 (can purchase extended security updates). Office 2010 support ends October 13, 2020.
  - **Back up your data!**
New scam – *pretending* they hacked you

“The FBI is warning of a scam in which cyber criminals claim to have confidential or embarrassing information about you that will be released unless a ransom (typically Bitcoin) is paid. The latest version adds a new twist by including a reference to a password in the opening sentence that may in fact be an old password that you previously used.” (Hinshaw Cyber Alert Aug. 1, 2018) at https://www.hinshawlaw.com/assets/htmldocuments/Alerts/Cyber%20Alert%208_1_18_FINAL.pdf
Data Breaches

- Data breaches
  - Possible notification and other requirements under data breach laws and/or ethics rules. See, e.g.:
    - Wisconsin Statutes Section 134.98: “Notice of unauthorized acquisition of personal information”
    - ABA SCEPR Formal Opinion No. 483 (Oct. 17, 2018): “Lawyers’ Obligations After an Electronic Data Breach or Cyberattack”
    - “Data Breach Resources” on FTC web site at https://www.ftc.gov/data-breach-resources
Inadvertent Receipt of Confidential Material

◆ **WRPC 4.4(b):** “A lawyer who receives a document or electronically stored information relating to the representation of the lawyer’s client and knows that the document or electronically stored information was inadvertently sent shall promptly notify the sender.”


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Deception

- Limits on methods
  - See, e.g., WRPC 4.1(a), 4.2, 4.3(a), 4.4(a), 8.4(b); case law

- Use of subordinates and third parties
  - See, e.g., WRPC 5.3(b) and (c)(1), 8.4(a)

Recording

- Wisconsin Statutes Section 968.31 (interception and disclosure of wire, electronic, or oral communications)

- See, e.g., ABA SCEPR Formal Opinion No. 01-422 (June 24, 2011): “Electronic Recordings by Lawyers Without the Knowledge of All Participants”

- Potential alternative: “prover”
Investigations – Methods, p. 2

◆ Researching parties, witnesses

◆ Factual research by judges
  ◆ See, e.g., ABA SCEPR Formal Opinion 478 (Dec. 8, 2017): “Independent Factual Research by Judges Via the Internet”
WRPC 3.4: “Fairness to opposing party and counsel”:

“A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act[.]”

“Legal holds”


“Spoliation”

E.g., Wagner Dairy Farms, LLC v. Tri-County Dairy Supply, 315 Wis. 2d 396 (Wisc. Ct. App. 4th Dist. 2012) (plaintiffs’ lawsuit dismissed as sanction for spoliation of evidence [dairy equipment]; affirmed) (“A circuit court's initial determination as to whether spoliation has occurred will typically depend upon a series of factual findings about what, if any, steps were taken to preserve or destroy the evidence, and what effect the loss of evidence had upon the opposing party's ability to litigate the claim.”)
Outsourcing, Incl. Vendors, p. 1

- WRPC 1.1: “Competence”, ABA Comment [6]
- WRPC 5.5: “Unauthorized practice of law; multijurisdictional practice of law”, subsection (a)(2) and ABA Comment [1]
WRPC 5.3: “Responsibilities regarding nonlawyer assistance”, and ABA Comments [1], [3], and [4]

“With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) … a lawyer …shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”
Resources

- **Resources**: For general information and suggestions, see, e.g.:
  - ABA Ethics Hotline
    - [https://www.americanbar.org/groups/committees/audit/ethics-hotline/](https://www.americanbar.org/groups/committees/audit/ethics-hotline/)
  - ABA “Legal Technology Resource Center” at [https://www.americanbar.org/groups/departments_offices/legal_technology_resources.html](https://www.americanbar.org/groups/departments_offices/legal_technology_resources.html)
John P. Ratnaswamy
The Law Office of John Ratnaswamy, LLC
225 W. Washington St., Suite 2200
Chicago, Illinois 60606
Direct: 312-741-0997
john.ratnaswamy@law-energy.com
https://www.law-energy.com