

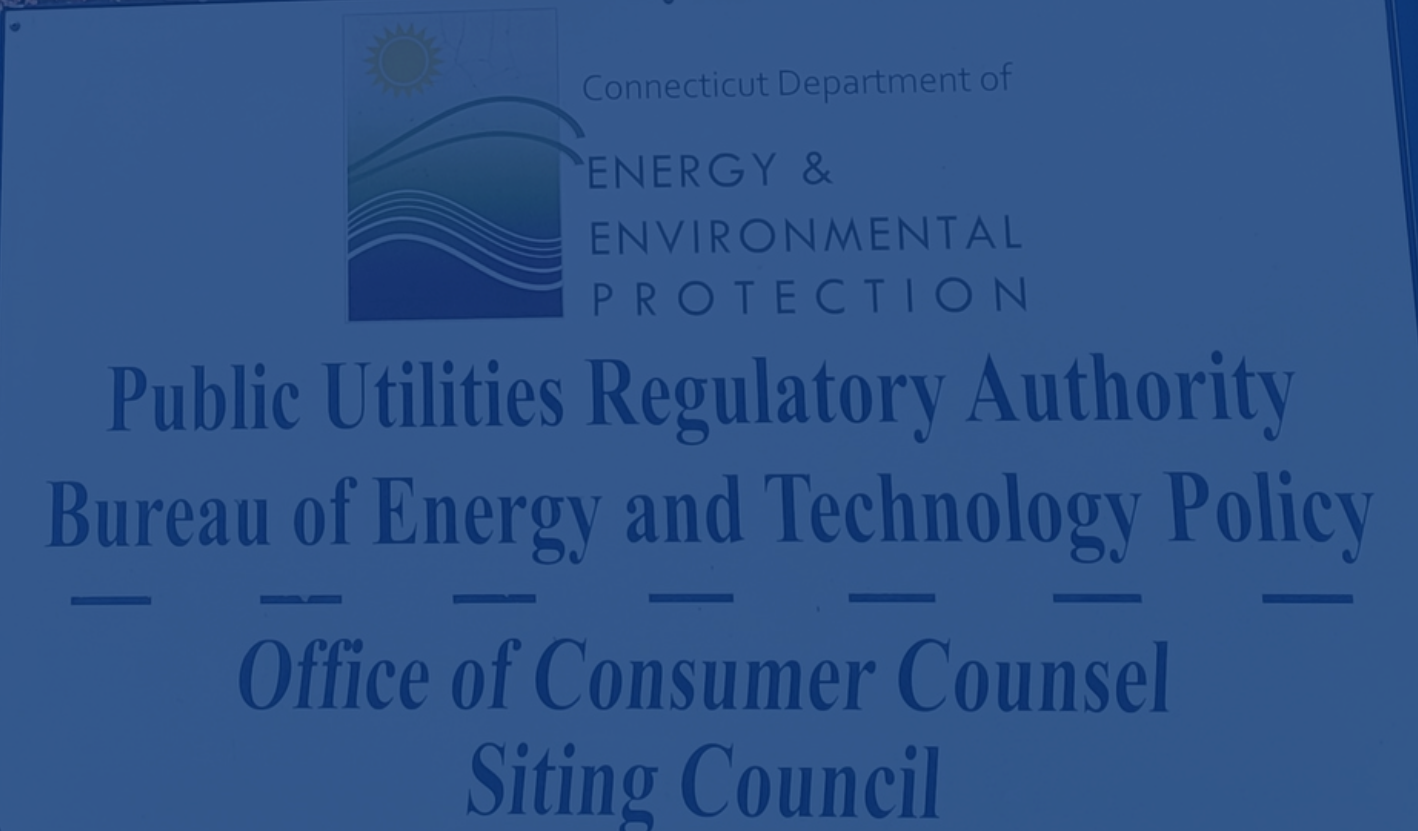


**CT Office of  
Consumer Counsel**

## **Legal Issues in Utility Practice**

Legal Issues regarding  
Restrictions on Ex Parte Communications  
&  
Limits on Post-Public Employment  
Activities

**NECPUC 2025 Symposium  
May 19, 2025**



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Has practiced administrative law since 2000 and in Connecticut state service since 2008.



# Goals and Outcomes

- **Ex Parte Communications**
  - Definition
  - State-by-State limits on what constitutes ex parte communications
  - Discussion of inflection points when ex parte communications could occur
- **Revolving Door Restrictions**
  - Ethical limitations on lawyers in client representations
  - Broader limits on post-public service employment
  - State-by-State explanations of revolving door restrictions

# What is your role in utility regulation?



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# What are the reasons behind the prohibition on ex parte communications?



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# What are the reasons behind the prohibition on ex parte communications?

Violation of  
Procedural Due  
Process – Fairness

Incomplete  
record of “facts”  
before decision  
maker

Inability of opposing  
party to introduce  
facts to rebut those  
communicated  
ex parte

Undue influence on  
administrative  
decision makers (e.g.  
“regulatory capture”,  
executive)

# Ex Parte Communications

- Overview of Ex Parte Communications
  - “Ex parte” means “on or from one side or party only.”
  - Basic definition of ex parte communications drawing on its Latin roots:
    - *a communication with a decision-maker that is on behalf of or from one party only.*
- For parties represented by attorneys in a judicial proceeding, an ex parte communication may be a communication that occurs between counsel and the court when opposing counsel is not present.
  - This is the most common form of ex parte communication.

# Prohibitions on Ex Parte Communications

Sources:

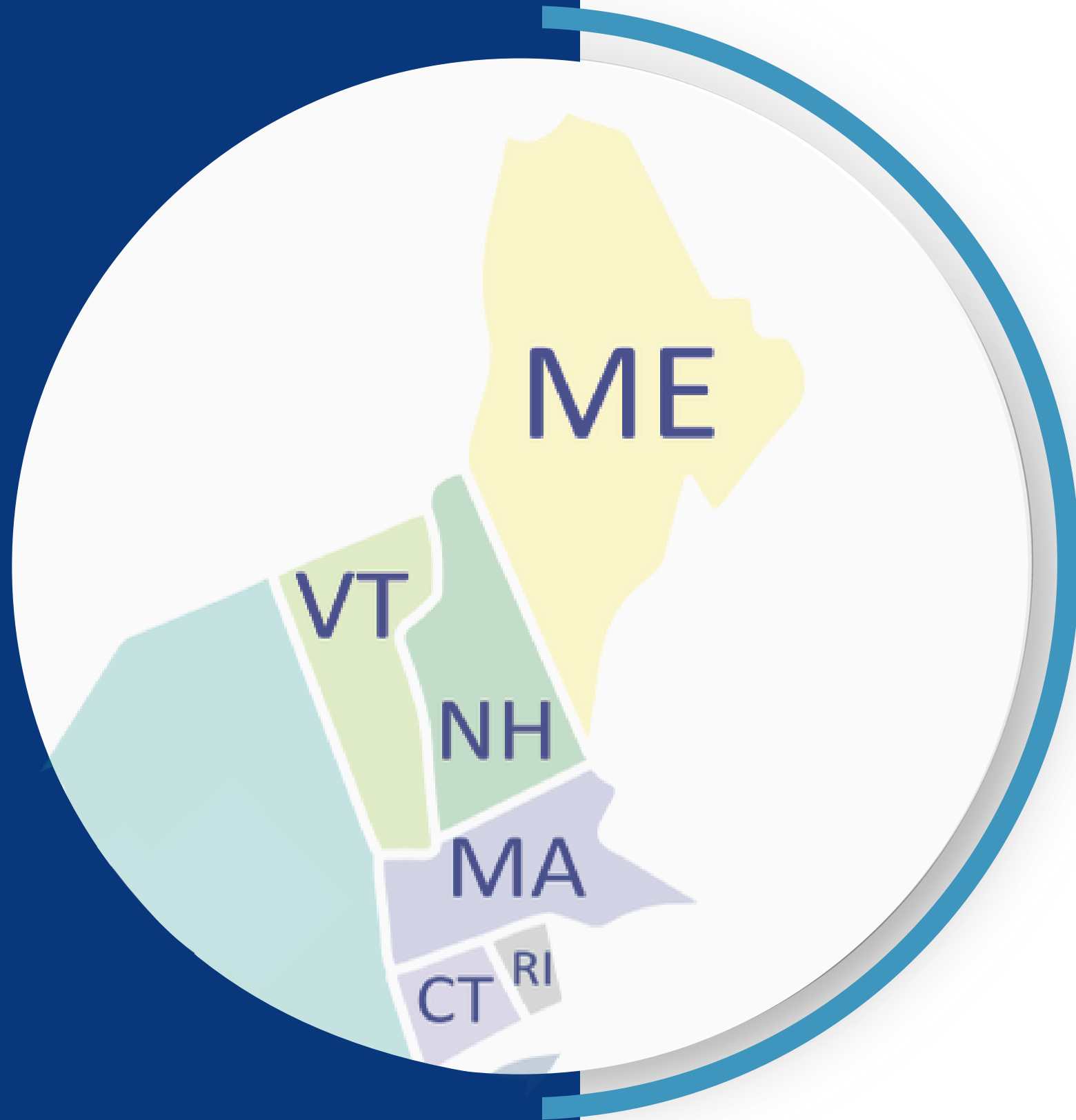
**Statutes**

**Regulations**

**Caselaw**

**Ethical canons**





# New England State Tour: **Ex Parte**

- |                         |                         |
|-------------------------|-------------------------|
| <b>01</b> Maine         | <b>04</b> Massachusetts |
| <b>02</b> New Hampshire | <b>05</b> Rhode Island  |
| <b>03</b> Vermont       | <b>06</b> Connecticut   |

# Maine

- **General definition:**

- Communication prohibited: in any adjudicatory proceeding, no agency members authorized to take final action or presiding officers designated by the agency to make findings of fact and conclusions of law may communicate directly or indirectly **in connection with any issue of law or fact, law or procedure, with any party or other persons legally interested in the outcome of the proceeding**, except upon notice and opportunity for all parties to participate.
- Communication permitted. This section shall not prohibit any agency member or other presiding officer described in subsection 1 from:
  - A. Communicating in any respect with other members of the agency or other presiding officers; or
  - B. Having the aid or advice of those members of the agency member's or other presiding officer's own agency staff, counsel or consultants retained by the agency who have not participated and will not participate in the adjudicatory proceeding in an advocate capacity.

# Maine PUC

- Throughout any adjudicatory proceeding, limits on ex parte communications apply to communications initiated by both commissioners and staff as well as parties
- Anyone engaging in ex parte communication must report communication within 48 hours
- Prohibits communications by a “person” to any commissioner, presiding officer, or other advisory staff member after issuance of presiding officer’s report
- Some communications are exempted from ex parte prohibition, including:
  - internal agency communications
  - inquiries regarding procedural schedule
  - individual communications between party and members of Commission’s advocacy staff or between any party and any staff members in non-adjudicatory proceeding.

# New Hampshire

- Unless required for the disposition of ex parte matters authorized by law, official or employees of an agency assigned to render a decision or make findings of fact and conclusions of law in a contested case shall not communicate, directly or indirectly, in connection with any issue before the agency, with any person or party, except upon notice and opportunity for all parties to participate.
- **Exceptions:**
  - I. Communications between or among agency personnel, or between the agency and legal counsel.
  - II. Communications between or among the presiding officer and one or more personal assistants.

# New Hampshire PUC

## Ethical Conduct Required

In addition to any other type of behavior or activity of a commissioner that is proscribed by RSA 363, a commissioner shall conduct himself and his affairs in accordance with a code of ethics that shall include, but not be limited to, the following elements:

...

III. Avoidance of all ex parte communications concerning a case pending before the commission;



# Vermont

- Unless required for the disposition of ex parte matters authorized by law, members or employees of any agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case **shall not communicate, directly or indirectly, in connection with any issue of fact, with any person or party,** nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate. An agency member:
  - (1) may communicate with other members or employees of the agency; and
  - (2) may have the aid and advice of one or more personal assistants.

# Vermont PUC

- Prohibited communications – Upon filing of contested case of a complaint, petition, application or other filing that the Commission has treated as the same, the Commission may not communicate, directly or indirectly, in connection with any issue of fact with any party or any person, or in connection with any issue of law with any party or any employee, agent, or representative of any party, unless:
  - Consent given;
  - Notice and opportunity for all parties to participate; or
  - Communication is required for disposition of *ex parte* proceedings authorized by law.

# Vermont PUC (cont.)

- Allowed communications
  - “Non-substantive *ex parte* communications” related to procedural, scheduling, or administrative matters. Also, certain emergency communications are authorized provided:
    - (a) the Commission reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication regarding the emergency, and
    - (b) the Commission promptly notifies all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

Participation in Decision – in general, commissioner, commission employees or commission agents may not participate in decisions if they have communicated about facts with another party or person.

# Vermont PUC (cont.)

- A party that engages in improper communications may be disqualified from participating in the matter, may be dismissed as a party, may be held in “contempt of the Commission,” and may be deemed to have waived any subsequent objection to a decision from the Commission in the matter.
- Commissioners may communicate with other commissioners and commission staff and agents.
- Employees or agents may also attempt to facilitate mediation of matters but will then not be permitted to participate in rendering a decision in the matter.

# Massachusetts

- **(6) Ex Parte Communications**

- Apply to “any adjudicatory proceeding”
- Members of agency, presiding officer, and other employees reasonably expected to be involved in “decisional process” expected to refrain from making and receiving ex parte communications regarding the merits of the proceeding
- If received or made, expected to add to record of proceeding:
  - communications or memoranda of oral communications in the record
  - and a statement as to whether the communication disqualifies the individual from further participation in the proceeding.



# Massachusetts DPU

- Limits on Ex Parte Communications at Department of Public Utilities
  - **Timeframe** – from the initial filing in an adjudicatory proceeding until the rendering of a final decision
  - **Who is covered** – Commissioner, presiding officer, or staff member of the Department with a party or interested person
  - **Topics** – Any substantive issue of fact, law, or policy

# Massachusetts DPU (cont.)

- If occurs, DPU commissioner, presiding officer, or staff member must terminate communication
- Within two days of determination that communication has occurred, must serve on each party and place in docket file:
  - Written statement, including whether disqualifies person making statement from ongoing participating in adjudicatory process.
  - Written or electronic documentation of communication
  - “The above documents to be placed in the docket file shall not be made part of the evidentiary record.”

# Massachusetts DPU (cont.)

- **Curing ex parte communication**
  - DPU may, upon motion or sua sponte, accept or require additional evidence of the substance of the ex parte communication
  - If the communication came from a party, DPU may – “to the extent consistent with the interests of justice” – require a party to show cause why they should not be adversely affected because of the violation – e.g., dismissal, denial, disregard of claim
  - If party violated ex parte rules, DPU or presiding officer may also “take such action as is deemed appropriate within the circumstances.”

# Rhode Island

- Similar to basic administrative law statutes in other New England states:
  - members or employees of an agency assigned to render an order or to make findings of fact and conclusions of law in a contested case shall not, directly or indirectly, in connection with any issue of fact, communicate with any person or party, nor, in connection with any issue of law, with any party or his or her representative, except upon notice and opportunity for all parties to participate;

# Rhode Island PUC

- **Ex Parte Communications.**

- 1. Except as permitted below, no person who is a party to or a participant in any proceeding pending before the Commission, or the person's counsel, employee, agent, or any other individual acting on the person's behalf, shall communicate ex parte with any Commissioner about or in any way related to the proceeding, and no Commissioner shall request or entertain any such ex parte communications.
- 2. The prohibitions contained above do not apply to a communication from a party or participant or counsel, agent or other individual acting on the person's behalf, if the communication relates solely to general matters of procedure or scheduling and is directed to the Clerk or the Commission Counsel.



# Rhode Island PUC

- Curious side note
  - Appearances and practice before the commission
  - “**Contumacious** conduct at any hearing before the Commission or a presiding officer shall be ground for exclusion of any person from such hearing and for summary suspension for the duration of the hearing by the Commission or the presiding officer.”
- Potential basis for exclusion for engaging in ex parte communications?

# Connecticut

- Similar to UAPA language adopted in other New England states
  - no hearing officer or member of an agency who, in a contested case, is to render a final decision or to make a proposed final decision shall communicate, directly or indirectly, **in connection with any issue of fact, with any person or party, or, in connection with any issue of law, with any party or the party's representative,** without notice and opportunity for all parties to participate.
- Exemptions created for discussions among commission members, staff and assistants.

# Connecticut PURA

## Sec. 16-1-28. Ex parte communication

- Unless required for the disposition of ex parte matters authorized by law, neither the commissioners nor any member of the Authority staff designated as a presiding officer shall communicate directly or indirectly with any person or party concerning any issue of fact or law involved in any contested case that has been commenced under these rules, except upon notice and opportunity for all parties to participate. The Authority staff member designated as presiding officer and the commissioners may severally communicate with each other ex parte and may have the aid and advice of such members of the Authority staff as are designated to assist them in such contested case. This rule shall not be construed to preclude such necessary routine communications as are necessary to permit the Authority staff to investigate facts and to audit the applicable records of any party in a contested case at any time before, during and after the hearing thereof.

# Ex Parte Rule Scenarios

1

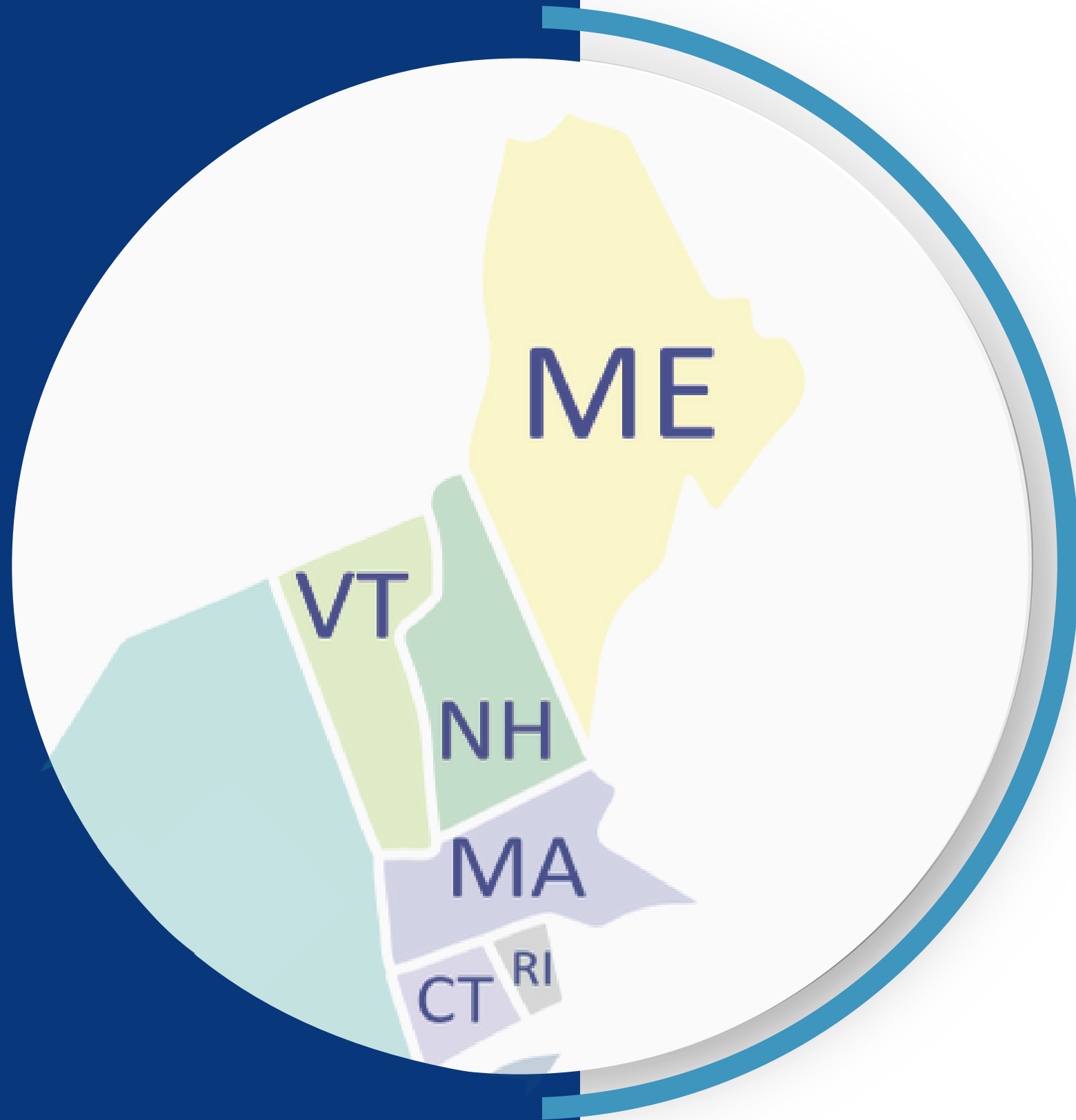
A journalist calls a staff member of the commission about an issue of fact in an ongoing proceeding, to ensure accuracy. The staff member provides the relevant facts in the case. Would this be ex parte?

2

A commissioner becomes aware that a member of the commission has communicated with a party in the proceeding regarding the facts of the case. What are the commission's duties to respond?

3

A commission decision is appealed; parties want to negotiate a term that will impact a future commission proceeding. Does this impact ex parte rules?



# New England State Tour: Revolving Door Rules

- |                         |                         |
|-------------------------|-------------------------|
| <b>01</b> Maine         | <b>04</b> Massachusetts |
| <b>02</b> New Hampshire | <b>05</b> Rhode Island  |
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# **Revolving Door Rules: Limits on Post-State Service Representation/Employment**

- Two types of limits may apply to attorneys in state service
  - Limits on matters on which an attorney may represent a client
  - Limits on representing a client before a regulator for which an attorney formerly worked.
- Legal practice limits – matter specific
  - Forever
- Representations before former employer
  - May be time limited.

# Legal Ethics Restrictions on Representation

- Legal ethics rules prevent lawyers from representing new client in matter in which lawyer previously represented a former client in same or similar matter
- Does not expire –prohibition on representing new client in same or similar matter will remain forever.

Unless . . .

- Conflict is waived by former client. Former client must give informed consent in writing.

# Maine

- Former employees of Maine executive branch agencies are barred from appearing before their former agencies for 12 months after leaving state employment.
- May not work as “agent or attorney” for 12 months after leaving state service.
- Former employee may not appear related to a specific matter issue that was before the agency where employee used to work and that was directly within the responsibilities of that employee.

# New Hampshire

- State Employees:
  - Employees are banned from working as lobbyist for six months.
  - Former employees may not directly promote or oppose action or inaction on any matter, contract, license, permit, or administrative rule pending before the **executive branch** or with regard to any matter over which that **executive branch** official or classified **employee** had personal and direct responsibility while in state government. N.H. Rev. Stat. Section 21-G2:26
- PUC Specific Restrictions:
  - No commissioner, or former executive director, finance director, or general counsel of the commission shall accept any employment with any utility under the control of the commission until one year after he or she shall separated from the commission.
    - Only applies to management level employees
    - Lasts for one year

# Vermont

- **Newly adopted ethics laws**
  - Created ethics code for state employees in 2022
  - Addresses Executive Branch officials and prevents them from lobbying for one-year after leaving state service.
  - Restricts public servants from working on matters on which they had worked while in state service and in which the state is a party or has a direct and substantial interest.
- Lawyers would still have ethical considerations regarding former clients.

# Massachusetts

- Conflict of interest laws prevent former state employees from knowingly acting as agent or attorney before prior state agency employer and representing new entity in matter on which they previously worked.
- Also prevents former state employees from representing anyone other than the commonwealth for one year after leaving state employment in a matter on which they had worked in the prior two years before leaving state service.



# Rhode Island

- Generally, former Rhode Island state employees may not represent another party before a state agency at which they were formerly employed for one-year after severing employment.
- Same holds true for former employees of Public Utility Commission or Division of Public Utilities and Carriers or the Department of the Attorney General
  - Former employees of these agencies may not appear “personally or on behalf of any other person or act as an expert witness before the Commission” within one year after their employment has ceased.

# Connecticut

- State Employees

- **Lifetime Bans**

- Confidential Information: state employees may never disclose any confidential information learned during the course of state service for anyone's financial gain. General Statutes § 1-84a.
    - Side-Switching: State employees may never represent anyone other than the state regarding a particular matter in which the employee was personally or substantially involved while in state service and in which the state has a substantial interest.

- **One Year Bans**

- Cooling-Off: state employees may not represent anyone, other than the state, for compensation before their former agency for a period of one year after leaving state service. General Statutes § 1-84b(a)
    - Note this is a representation ban, not a total employment ban.
    - Employees who hold certain specifically-designated positions (with significant decision-making or supervisory responsibility) at certain state regulatory agencies – including the PUC and OCC – are prohibited, while still in state service, from negotiating for, seeking or accepting employment with any business subject to regulation by the individual's agency. Further, they may not accept employment with any such business within one year of leaving the agency. Note that there is an exception for ex[1]officio board or commission members. General Statutes § 1-84b (c).

# Connecticut (cont.)

- PUC Specific Restrictions

- **Employment**

- Section 16-2(K) states that “[n]o utility commissioner of the Public Utilities Regulatory Authority shall, for a period of one year following the termination of his or her service as a utility commissioner, accept employment: (1) By a public service company or by any person, firm or corporation engaged in lobbying activities with regard to governmental regulation of public service companies; (2) by a certified telecommunications provider or by any person, firm or corporation engaged in lobbying activities with regard to governmental regulation of persons, firms or corporations so certified; or (3) by an electric supplier or by any person, firm or corporation engaged in lobbying activities with regard to governmental regulation of electric suppliers.

- **Representation**

- No such utility commissioner who is also an attorney shall in any capacity, appear or participate in any matter, or accept any compensation regarding a matter, before the authority, for a period of one year following the termination of his or her service as a utility commissioner.”

**What is the purpose of the revolving door statutes that we reviewed today?**



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# Discussion Questions

- 1 What influences are revolving door provisions aiming to curb?
- 2 Are there downsides to strict revolving door statutes?
- 3 Of the New England states we've touched upon today, which do you believe has the most appropriate level of restrictions on post-state employment? Why?

# Thanks for participating!!

Feel free to contact either of us if you have questions or want specific citations to items mentioned in the presentation.



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