

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MISSOURI**

In the matter of a Repository File for            )  
The Collection and Distribution of                )  
Documents Pertaining to the Ethics              )  
Review at the Missouri Public Service            )  
Commission    )

**File No. AW-2009-0313**

**HIGHLIGHTS OF COMPARATIVE  
STATE ETHICS COMPENDIUM**

On April 20, 2009, Hinshaw & Culbertson LLP filed an electronic Comparative State Ethics Compendium Database (“Ethics Database”), which collects ethics rules from more than fifty state and federal jurisdictions and divides those rules into more than thirty categories. In this Highlight document, Hinshaw provides a discussion of some of the information collected in the Ethics Database that may help guide formulation of new ethics rules for the Missouri Public Service Commission (“Commission”):

**Guidance on Specific Rules**

*Limits on ex parte communications and the flow of information to Commissioners.*

According to preliminary discussions, a concern driving development of proposed new ethics rules for the Commission relates to a need for a clearer, more workable standard regarding limits on *ex parte* communications. Relevant sub-issues relating to this concern include:

- a. How can Commissioners receive the information necessary to carry out their rulemaking function, and to fulfill their responsibilities to other government entities, without

compromising the due process rights and concerns of parties participating in contested cases?

- b. What types of matters should be subject to the limitations on *ex parte* communications that presently exist? and
- c. What relationship should Commission staff – in particular expert financial, legal, or technical staff – have with Commissioners, in particular when overlapping contested and rulemaking matters are pending?

During preparation of the Ethics Database, several jurisdictions were identified that employ quite distinct procedures to address such issues. States employ at least three different models for trying to regulate *ex parte communications* between commissioners and staff.

The first two systems focus on the staff role. Washington State, for example, automatically prohibits a presiding officer – and presumably a commissioner – from communicating with staff *ex parte* when those staff are involved in “any investigative or prosecutorial functions in the same or a factually related case.” This system benefits from consistency: it always prohibits *ex parte* communications between a decision-maker and an involved party. But there may be circumstances when this prohibition would be too broad, and it is unclear whether the “factually related” test would provide adequate clarity for Missouri’s regulatory system.

The second system focusing on staff role employs an elective system. Under the New Hampshire rules, in certain circumstances a party to a contested case (under New Hampshire law, an adjudicative proceeding) may elect to request that the New Hampshire

Public Utilities Commission designate employees as either adjudicative or decision-making staff. (The commission may also itself elect to make such a designation.) New Hampshire's limitations on *ex parte* communications then regulate communications only between the commissioners and adjudicative staff, not between commissioners and decision-making staff. The New Hampshire model allows a party to decide whether it will permit or object to *ex parte* communications, likely trading off ease of decision-making with transparency. If such a solution receives serious consideration, it should be determined whether (a) this type of system results in pressure on participating parties not to elect segregation, and (b) the circumstances allowing an election should be evaluated to see if they need to be tightened or loosened for Missouri's regulatory system.

A third solution would be to define more clearly when the prohibition on *ex parte* communications is in effect. California has a detailed regulatory system that limits *ex parte* communications in part based upon the nature of the proceeding. *Ex parte* communications are barred in adjudicatory proceeding, but permitted in legislative settings, and allowed in certain circumstances if reported in rate-setting proceedings.

Alternatively, Missouri may want to consider combining features of these systems, for example allowing or prohibiting *ex parte* communications in some types of proceedings, while allowing a party to elect to prohibit such communications in other types of proceedings.

*Additional guidance on avoiding conflicts of interest or bias.* In addition to this focus on *ex parte* communications, the Commission may benefit from improvements in other areas of its ethics regulations. The regulations for avoiding certain bias and conflicts of interest, for example, are regulated entirely or almost entirely through an

1992 executive order that could use additional refinement. The first five principles in this executive order, Executive Order 92-04, each indicate commissioners and staff should avoid certain conduct when that conduct is “improper” or “inconsistent with conscientious performance” of their duties, as follows:

- A. Employees shall avoid any interest or activity which *improperly* influences, or gives the appearance of *improperly* influencing, the conduct of their official duties.
- B. Employees shall act impartially and neither dispense nor accept special favors or privileges which might be construed to *improperly* influence the performance of their official duties.
- C. Employees shall not allow political participation or affiliation to *improperly* influence the performance of their duties to the public.
- D. Employees shall not engage in business with state government, hold financial interests, or engage in outside employment when such actions are *inconsistent* with the conscientious performance of their official duties.

Executive Order 92-04 (emphasis added). While some of these principles receive additional guidance through other sources, such as the regulation of financial conflicts of interests contained in Missouri Revised Statutes § 386.110, many do not. Commission staff would likely benefit from the development of ethics rules that spell out more

carefully what is “improper” or “inconsistent,” particularly when the definition of such terms could be reinforced through training and the availability of ethics guidance.

*External communications and activities.* Another issue is whether public statements from a decision-maker should constitute prohibited *ex parte* communications. Such communications have created due process concerns in other contexts, for example in the *United States v. Microsoft Corporation* antitrust litigation. Missouri does not regulate such communications by commissioners. Other jurisdictions do. South Carolina’s *ex parte* communication rule, for example, prohibits public communications about pending proceedings beyond what is “publicly available information” about those proceedings. Missouri may want to adopt a similar prohibition, either as part of its *ex parte* communication rule or (more likely) as a stand-alone rule.

*Improved procedures for addressing alleged violations.* The Commission’s current regulatory regime does not provide a clear system for adjudication and resolution of rules violations. The Governor can remove a Commissioner for “inefficiency, neglect of duty, or misconduct in office,” which, while generally consistent with removal standards in other jurisdictions, is quite vague. Other Commission ethics rules similarly lack clear triggers for adverse consequences, except for those rules that may give rise to criminal prosecution. These vague standards, as well as the threat of criminal prosecution, may inhibit the work of the Commission, in particular taking stances that may be unpopular with the governor or other elected officials.

Some states have much more developed systems for addressing alleged violations of rules. Colorado, for example, has a more comprehensive remedial scheme for inappropriate *ex parte* communications. Such a scheme may allow for redress of an

aggrieved parties' due process interests without requiring the disqualification of commissioners or staff, thus allowing for better operation of the Commission, even when for example inappropriate communications occur.

### **Additional Observations**

*Ethics Database is result of best efforts.* It should be kept in mind that the present Ethics Database is the result of Hinshaw's best efforts. Due to the nature and scope of the project, as well as how state utilities commissions are regulated, some relevant rules were likely omitted, and some rules included that are likely superseded, outdated or irrelevant to the operation of state utilities commissions. Further, in some instances, particularly with regard to federal rules, it appears the limits of visible information in cells were reached, such that complete information could not be included in a cell. Hinshaw attempted to include a notice statement where such omissions occurred.

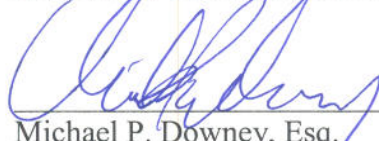
Hinshaw anticipates making further improvements, including with regard to better formatting and organization of information included in the Ethics Database. Anyone reviewing the Ethics Database who finds an error or omission should contact Michael Downey at [mdowney@hinshawlaw.com](mailto:mdowney@hinshawlaw.com).

*Utilities Commission v. Corporation Commission.* As the rulemaking process proceeds, participants may benefit from the observation that in general those states with focused utilities commissions appear to have more sophisticated ethics regimes than states that have corporation commissions regulating broader activities. The utilities commissions in Florida, New Jersey, and Texas in particular appear often to influence rules adopted in other jurisdictions.

*Rules Under Development.* Several states are presently evaluating changes to or adopting amendments for state ethics rules that will impact the state utility commission or in the process of adopting new rules. These states include Massachusetts, Mississippi and New Mexico. During the rulemaking process, Hinshaw anticipates adding additional rules to the database as it becomes aware of their adoption.

Respectfully submitted,

HINSHAW & CULBERTSON, LLP



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Michael P. Downey, Esq.  
701 Market Street, Suite 1300  
St. Louis, Missouri 63101  
(314) 241-2600 main  
(314) 425-2104 direct  
[mdowney@hinshawlaw.com](mailto:mdowney@hinshawlaw.com)