



**Buchanan**

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# Practice Tips for Agency Regulatory Counsel

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Presented to:

# The Three Roles of Agency Regulatory Counsel

- The Advisory/Counseling Role
- The Prosecutorial Role
- The Representative Role

# The Advisory/Counseling Role in Written Work Product

- Be clear in stating the issue or question being addressed.
- List all the facts being assumed.
- Identify what legal standards you are applying in the analysis.
- Be clear on what is dictated by statute, regulation or precedent and what is a matter of policy.
- Be objective in the analysis.
- Do not attempt to advise Commissioners on the politics of an issue.

# The Prosecutorial Role – Complaint, Intervention and Enforcement Actions

- Overall, strive to present a public interest position that harmonizes competing interests.
- Opinions get all the attention, but facts are extremely important – a witness can present facts in their testimony from which a policy position is argued in brief; avoids the witness presenting any opinion and exposing themselves to being cross-examined on that opinion.
- A purely factual piece of testimony can frustrate a cross-examiner that doesn't like where the facts point, but can't challenge the witness on the stand about an opinion.

# The Prosecutorial Role (continued)

- If your witness offers opinions, be clear on exactly what the opinion is based upon.
- Good cross examination is a lot of work to prepare – don't leave its' preparation to the last minute.
- Prepare cross examination questions that should be answered with a yes or no response.
- Have a command of the discovery responses of the witness you are cross examining so you can contradict an unexpected, inconsistent response.
- Ideally you know the answer you will receive to a cross examination question in advance, but that is not always possible and there are occasions where the potential reward of asking a question is worth taking a risk.

# The Representational Role – Representing the Agency Before a Court or other Agency

- Always be clear on what is a legal issue, an evidentiary issue or a matter of agency discretion, and the standard that applies to that type of issue.
- Do not forget about the Constitution – constitutional arguments are in the tool box for opponents or proponents of the agency's position.
- Make certain that your argument is consistent with what the agency said in its order – not what you wish the agency had said in its order.

# Statutory Interpretation

- The public utility law of a jurisdiction can be messy, with various provisions being unclear, circular definitions, vague, or inconsistent.
- Have a command of the rules of statutory construction for your jurisdiction – they are the roadmap for bringing order to the question of how statutes should be interpreted and applied.
- Beware of legislators and commissioners that “know” what was intended by statutory language because they were involved in its passage – the original intent and the words of a statute may not match.



# Case Study of Applying an Impractical Statute

- The Pennsylvania Public Utility Code states that a change in ownership of any portion of a company in any chain of ownership of a public utility or its affiliates is a transfer of public utility assets that requires obtaining a certificate of public convenience.
- Applied literally, the statute would swamp the Commission with many application filings that as a practical matter, did not really impact control of utility assets.
- To honor the statute and provide the regulated world proper guidance, the Commission adopted a policy statement that made reasonable assumptions about changes in ownership, in a chain of ownership, that would actually impact control of utility assets and limited the reach of the statute.

# The Regulatory Attorney's Achilles Heel

- The regulatory attorney's Achilles Heel is lack of familiarity with real-world business transactions and the impact of cost, delay and regulatory on transactions.
- Regulatory delay and uncertainty can terminate good transactions that are in the public interest as surely as an outright denial.
- Acquiescing in a process that makes high cost and delay inevitable is often the equivalent of taking a side on an issue.
- Meritorious positions can fail because a party is spent into submission.
- Learn as much as you can about how transactions are formed and implemented.
- There is no due process in heaven, and hell is an infinite amount of due process.

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