EX PARTE CONTACTS IN THE AGENCY CONTEXT: PITFALLS AND UNCERTAINTIES CREATED BY OPINIONS 587 AND 604

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CHAPTER 11

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I. INTRODUCTION[1]

In May 2009, the Professional Ethics Committee of the State Bar of Texas issued Opinion 587 – an advisory opinion on ex parte contacts under Rule 3.05(c)(2) of the Texas Disciplinary Rules of Professional Conduct.[2] Opinion 587 created serious new uncertainties for lawyers dealing with agencies about when and how their agency contacts might be prohibited ex parte contacts: it extended the reach of existing prohibitions to proceedings beyond contested cases under the Texas Administrative Procedure Act (APA) and effectively reversed the Texas Supreme Court's 1981 *Vandygriff* decision interpreting the APA ex parte limits, which had served as "bright-line" guidance for lawyers. After administrative lawyers asked for reconsideration, in January 2011 the Committee issued Opinion 604 as a "clarification and amplification" of Opinion 587.[3] In November 2010 the Texas Supreme Court proposed amendments to a number of Disciplinary Rules, including a revised comment to Rule 3.05 which might have alleviated some uncertainties, but in February 2011, all the proposed amendments were rejected by members of the State Bar.

As a result of these two advisory opinions – which are not subject to appellate review – Texas lawyers representing clients before agencies should be aware of the scope of Opinions 587 and 604, their expansive interpretation of the scope of Rule 3.05, and consequent implications for communication with agency staff and agency decision makers.

II. TEXAS ADMINISTRATIVE PROCEDURE ACT

A. 1975: APA Limits on Ex Parte Contacts

In 1975 Texas adopted what is now the Texas Administrative Procedure Act (APA). The APA included a provision limiting ex parte contacts in the agency contested case context:

> (a) Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate.

TEX. GOV'T CODE § 2001.061(a).[4]

A "contested case" is defined as "a proceeding, including a ratemaking or licensing proceeding, in which the legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing." *Id.* § 2001.003(1). As interpreted in *Ramirez v. Texas State Bd. of Medical Examiners*, 927 S.W.2d 770 (Tex. App. – Austin 1996), an "adjudicative hearing" which is required in APA contested case proceedings means a hearing at which a decision-making agency hears evidence and, based on the evidence and, acting in a judicial or quasi-judicial capacity, determines the rights, duties or privileges of the parties before it. "Party" means "a person or state agency named or admitted as a party." *Id.* § 2001.003(4). "State agency" means "a state officer, board, commission, or department with statewide jurisdiction that makes rules or determines contested cases." "State agency" includes SOAH but excludes, among other things, the legislature and the courts. *Id.* § 2001.003(7).

B. 1981: *Vandygriff*

In 1981 the Texas Supreme Court interpreted what is now Section 2001.061 in *Vandygriff v. First Savings & Loan Association of Borger*, 617 S.W.2d 669 (Tex. 1981).[5] The Court held this provision was not violated when no contested case was actually pending at the time. Organizers from Borger, Texas met with the Savings and Loan Commissioner after their charter application for a savings and loan in Borger was denied. The unsuccessful applicants wanted "to find out what (they) had done wrong." *Id.* at 671. After this meeting, and after another institution filed an application for another savings and loan in Borger, the organizers filed a second application for a

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[1] Extensive writing on the issues arising from Opinions 587 and 604, gratefully acknowledged by the author, has been done by Graves Dougherty lawyers Peter Cesaro, Robin Melvin and Pete Schenkkan.

[2] Opinion 587 is attached as Attachment 1.

[3] Opinion 604 is attached as Attachment 2.

[4] Section 2001.061 is attached in entirety as Attachment 3. Its predecessor, interpreted in *Vandygriff*, was Section 17 of the Administrative Procedure and Texas Register Act (APTRA), Article 6252-13a, which provided, "Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party or their representatives, except on notice and opportunity for all parties to participate."

[5] *Vandygriff* is attached as Attachment 4.

savings and loan charter. The application from the Borger organizers was granted. The other institution's application was denied, and the institution sued. The Court held the meeting between the Commissioner and organizers did not violate the APA ex parte prohibition because: "The facts establish that no application was pending before the Savings and Loan Commission when the meeting between the Commissioner and the organizers occurred. There was no contested case at the time." *Id.* at 672.

The Court distinguished the earlier pre-APA case of *Lewis v. Guaranty Federal Savings and Loan Ass'n*, 483 S.W.2d 837 (Tex. Civ. App. – Austin 1972, writ ref'd n.r.e.) which had affirmed the trial court's order voiding the Savings and Loan Commissioner's award of applicant's charter because of ex parte contact between the applicant and Commissioner during the pendency of a contested case. The Court said *Vandygriff* is "distinguishable from *Guaranty Federal*" because there "was no contested case pending when the meeting occurred" and the "content of the meeting was voluntarily disclosed at the outset of the hearing." *Vandygriff* at 672. The Court cited *Guaranty Federal* as an example of due process being denied where "the ex parte investigation occurred during pendency of a contested case and the appellants were clearly denied notice and the opportunity to cross-examine and present rebuttal evidence." *Id. See also Hammack v. Public Utility Comm'n of Texas*, 131 S.W.3d 713, 731 (Tex. App. – Austin 2004, pet. denied) (pre-filing communications between Public Utility Commission and applicant were not impermissible ex parte communications, *citing Vandygriff*).

III. 1990: RULE 3.05, TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT

Rule 3.05, "Maintaining Impartiality of Tribunal," provides:

> A lawyer shall not:
>
> (a) seek to influence a **tribunal** concerning a **pending matter** by means prohibited by law or applicable rules of practice or procedure;
>
> (b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a **tribunal** for the purpose of influencing that entity or person concerning a **pending matter** other than:
>
> (1) in the course of official proceedings in the cause;
>
> (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
>
> (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.
>
> (c) For purposes of this rule:
>
> (1) Matter has the meanings ascribed by it in Rule 1.10(f) of these Rules;
>
> (2) A matter is pending before a particular tribunal either when that entity has been selected to determine the matter or when it is **reasonably foreseeable** that that entity will be so selected.

TEX. DISCIPLINARY R. PROF'L CONDUCT § 3.05 (emphasis added).[6]

"Matter" specifically excludes rule-making, but otherwise is broadly defined in Rule 1.10(f) to include "any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties" as well as "any other action or transaction" covered by an agency's conflict of interest rules.

The comments to Rule 3.05 suggest broad application in a variety of "tribunals." Comment 1 warns as follows: "Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions." *See* Attachment 5. Comment 4 acknowledged existing exceptions:

> There are certain types of adjudicatory proceedings, however, which have permitted pending issues to be discussed ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. As long as such contacts are not prohibited by law or applicable rules of practice or procedure, and as long as paragraph (a) of this Rule is adhered to, such ex parte contacts will not serve as a basis for discipline.

Id.

Rule 3.05 was adopted as part of the State Bar's review beginning in 1984 of the ABA's Model Code of Professional Responsibility. After review, the proposed Texas Disciplinary Rules of Professional Conduct (Rules) were proposed to the State Bar's Board of Directors in February 1987; the Texas Supreme Court held the referendum in 1989, and the Rules (including Rule 3.05) became effective in

[6] Relevant portions of the Rules, including Rule 3.05 and its Comments, Rule 1.10(f) ("matter") and the Terminology definition of "tribunal," are attached as Attachment 5.

January 1990, nine years after *Vandygriff*. Notably, the *Hammack* decision, which followed *Vandygriff*, was decided in 2004, fourteen years after members of the State Bar approved Rule 3.05.

IV. PROFESSIONAL ETHICS COMMITTEE

The opinions at issue are advisory opinions issued by the Professional Ethics Committee, which consists of nine members appointed by the Texas Supreme Court for staggered three year terms. TEX. GOV'T CODE § 81.091(a)-(b). The Committee "shall, either on its own initiative or when requested to do so by a member of the state bar, express its opinion on the propriety of professional conduct" other than on a question already pending before a state court. *Id.*, § 81.092(a). Committee opinions are not binding on the Texas Supreme Court. *Id.*, § 81.092(c). The committee may meet in three-member panels to express its opinion on behalf of the whole committee, but an inquirer who is dissatisfied with the panel's opinion may appeal it to the full committee for review. *Id.*, § 81.093. Otherwise, an opinion requires concurrence of a quorum of the committee members.

The Committee, "as far as possible," "must disclose the rationale for its opinion" and indicate whether it is based on ethical consideration or on disciplinary rules." *Id.*, § 81.092(d).

The Committee "shall adopt rules it considers appropriate relating to the procedures to be used in expressing opinions." These rules take effect when approved by the Supreme Court. *Id.*, § 81.092(e). The Committee chair recently told me that to his knowledge, this power (to adopt rules subject to approval by the Supreme Court) has not been exercised. The Committee has internal operating procedures including a handout of procedures for request of opinions.[7]

The Committee shall "periodically publish its issued opinions to the legal professional in summary or complete form," and on request must provide copies of its issued opinions to members of the state bar or public. *Id.*, § 81.094(1)-(2). The statute does not provide for judicial review of opinions.

V. THE FLAP OVER OPINION 587

A. Substance of the Opinion

In May 2009, the Professional Ethics Committee for the State Bar of Texas released Opinion 587. A request for an opinion had come in 2006 from Randall Chapman, executive director of Texas Legal Services Center. The statement of facts included in the opinion was as follows: "A lawyer plans to file a matter with a state administrative agency that has decision-making authority over the matter. Before filing the matter, the lawyer proposes to communicate concerning the matter with persons in the agency for the purpose of ultimately obtaining a favorable decision from the agency," without notice or copies to potential parties.

Opinion 587 concluded that such communication would violate Rule 3.05 "even though the same communication would not be a violation of the Texas Administrative Procedure Act as interpreted by the Texas Supreme Court in the *Vandygriff* decision." Opinion 587 at 2. Opinion 587 concludes: "In the absence of applicable law that permits ex parte communications in a particular matter, Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct imposes strict limits on ex parte communications with an agency's decision maker prior to the filing of a matter with an agency that is expected to act concerning the matter in a dispute resolution, licensing, or adjudicatory capacity, if a purpose of the ex parte communication is to influence the agency's decision in the matter." *Id.* at 5. The Opinion states that Rule 3.05 does not prohibit ex parte communications with agency employees who are not decision makers, except where "such communications are **intended** to be indirect ex parte communications with the decision maker for purposes of influencing the outcome of the matter." *Id.* (emphasis added).

B. Interpretation of Rule 3.05

In reaching its conclusions concerning application of Rule 3.05 in the administrative agency context, the Opinion examines the meaning of "matter," "pending," and "tribunal."

1. Meaning of "matter"

Opinion 587 looks to Rule 1.10(f) to determine the meaning of "matter." The Opinion states that under Rule 1.10(f) "the term 'matter' does not include regulation-making or the rule-making proceedings or assignments." But "matter" does include any "adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest, or other similar, particular transaction involving a specific party or parties." *Id.* at 2.

2. Meaning of "pending"

Opinion 587 states that "a matter is 'pending' before an administrative agency when the future adjudicatory proceedings in the agency are reasonably foreseeable." *Id.* at 2. The Opinion states that the matter is "pending" before the agency if "the agency

[7] The Committee procedures handout is attached as Attachment 6.

with which the communication occurs is expected to make a decision on the matter." *Id.*

3. Meaning of "tribunal"

The Rules define "tribunal" as "any governmental body or any other person engaged in a process of resolving a particular dispute or controversy." Rules, Terminology; *see* Attachment 5. In particular, the Rules recognize that an administrative agency is a tribunal "when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure," but does not include "governmental bodies when acting in a legislative or rule-making capacity." *Id.* at 2.

The Opinion acknowledges that agencies are "legal hybrids that may have judicial, legislative, executive and ministerial functions," and states that Rule 3.05 only applies to these agencies when they are functioning as "tribunals" in their dispute-resolution, licensing or adjudicatory capacity and "not when such agencies are functioning in a legislative, executive or ministerial capacity." *Id.*

The Opinion also concludes that, in the agency context, "tribunal" only includes the judge or agency decision maker or decision-making body. "In the case of an administrative agency, the decision maker could be an administrative law judge, a hearing officer, the executive in charge of the agency, or a board or other governing body of the agency." *Id.* at 3.

The Opinion concludes that "tribunal" does not include the members, employees or representatives of the agency who are not the decision maker or a member of the decision making body with respect to the matter, with one caveat: Rule 3.05 would apply "only if such a communication was **intended** by the lawyer as an indirect communication, through non-decision-making personnel, with the decision maker **for the purpose of influencing** the outcome of the agency's decision in the matter." *Id.* at 3-4 and at 5 (emphasis added).

Further, the Opinion concludes that although the definition of "tribunal" does not necessarily preclude ex parte communications with every agency employee in a matter that is or may become a contested case, it does prohibit agency employees who take an "advocacy position" in a contested case from communicating ex parte with agency employees who are decision makers. *Id.* at 4.

Prior to issuance of Opinion 587, practitioners in reliance on *Vandygriff* had understood that unless a contested case had been filed (i.e., had understood that under the APA, "pending" meant "filed"), Rule 3.05 did not proscribe contact with the tribunal, such as occurred in *Vandygriff*. Relying on *Vandygriff*, administrative agencies and regulated entities and their counsel had assumed that attorneys could meet with administrative agency representatives when there was no contested case pending before them without violating ex parte prohibitions. As in *Vandygriff*, this had practical benefits for the commissioner and for the concerned citizens because the commissioner could have specific questions addressed in a subsequent proceeding and the concerned citizens could "determine what they may have done wrong."

But Opinion 587's interpretation of Rule 3.05 conflicts with *Vandygriff*'s interpretation of the APA. Rule 3.05(a) defines an ex parte communication as one that is "prohibited by law or applicable rules of practice or procedure." The Supreme Court in *Vandygriff* held that communications between a potential applicant in a possible contested case not yet filed and the agency head are "not prohibited." *Vandygriff*, 617 S.W.2d at 672. Opinion 587 notes that Rule 3.05(b) applies "except as permitted by law and not prohibited by applicable rules of practice and procedure," but then states that for purposes of Rule 3.05(b), the Texas Supreme Court's opinion in *Vandygriff* did not "affirmatively permit[]" communications between a potential applicant in a possible contested case not yet filed and the agency head. The Opinion so states even though the Supreme Court held in *Vandygriff* that such communications are not prohibited by the APA and that it disagreed with the Third Court that the communications violated the APA prohibition. *See* Opinion 587 at 2.

Indeed, Opinion 587 appears to leave little scope for *Vandygriff* when it states that "if there are no other applicable laws or rules of practice or procedure that prohibit or specifically permit ex parte communications with respect to the matter coming before the agency," Rule 3.05 imposes strict limits "in the factual situation here considered." Opinion 587 states that for purposes of Rule 3.05(b), "there is no generally applicable law in Texas that permits the lawyer in these circumstances to communicate with the agency's decision maker, before a matter is filed, for the purpose of influencing the outcome except in the limited ways set forth in Rule 3.05(b)," and that this result applies "even though the same communication would not be a violation of the Texas Administrative Procedure Act as interpreted by The Texas Supreme Court" in *Vandygriff*. *Id.* Arguably this leaves very little of *Vandygriff*, although nothing in the text of Rule 3.05 or its interpretive comments suggests that the Court intended in the adoption process for Rule 3.05 to overrule its holding in *Vandygriff* concerning agency practice pursuant to the APA.

Opinion 587 is intent-focused in defining who the "tribunal" may be with respect to contact. This is consistent with Rule 3.05 (a lawyer shall not "seek to

influence"...). Rule 3.05 provides further that the lawyer may not seek to influence "by means prohibited by law or applicable rules of practice or procedure" and may not communicate ex parte with a tribunal for the purpose of influencing "except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure." A question is the scope of the prohibited intent: whether the Rule prohibits intent to "seek to influence" while knowingly using prohibited means, or prohibits intent to "seek to influence" by using means which are "prohibited by law or applicable rules of practice or procedure" even where the lawyer may not recognize that the means are prohibited. Comment 1 to Rule 3.05 suggests a strict liability approach: "Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. **A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions."** (Emphasis added.)

C. Request for Reconsideration of Opinion 587

A number of Texas lawyers who practice administrative law submitted a Request for Reconsideration of Opinion 587 and accompanying Brief In Support of Request for Reconsideration of Opinion 587 Before The Professional Ethics Committee of the State Bar of Texas (Dec. 30, 2009). The Brief argued that Opinion 587 is legally wrong because it expands the definition of "pending matter" beyond the language of Rule 3.05, is contrary to Texas Supreme Court controlling precedent, infringes upon a person's constitutional right to free speech, and treats lawyer and non-lawyer communication differently. Brief In Support of Request for Reconsideration of Opinion 587 Before The Professional Ethics Committee of the State Bar of Texas at 1-2 (Dec. 30, 2009). The Brief also stated, "The Opinion eliminates a bright line rule of law that administrative lawyers and agency decision makers and staff have relied on for years." *Id.* at 1. The Brief also stated that Opinion 587 neglects current realities of administrative law practice and "creates an undesirable framework for practicing administrative law before Texas agencies because it greatly expands the scope of Rule 3.05 without accounting for the realities of regulatory practice." *Id.* at 1-2.

The Brief raised certain practical problems in light of Opinion 587, such as the following.

Contacts before filing a contested case. The Brief noted that administrative lawyers often contact agency decision makers on potential contested case matters to determine whether or not to file the case and when – e.g., in light of considerations such as viability of the potential case and its relation to other existing or potential contested cases that may raise similar topics. Just such a meeting occurred in *Vandygriff*, where the purpose of the meeting specifically included making sure that on reapplication the applicant knew what it would have to do to address the agency's concerns. *Vandygriff*, at 671. Opinion 587 opines that Rule 3.05 prohibits these contacts if it is "reasonably foreseeable" that the case may be filed.

Contacts regarding rulemakings, task forces, etc. Practitioners often contact agency decision makers on pending rulemakings, and/or executive proceedings (studies, contract, request for proposals, and development). Those contacts are not subject to ex parte prohibitions, though they may be regulated in other ways. However, there may be some overlap in the substance of a rulemaking and the possible "matters" that the lawyer's client, or another entity, or the agency might file under the rules. Brief at 14.

One rule for lawyers, another for clients? Only lawyers, acting directly or through clients acting at their direction, are subject to Rule 3.05. So non-lawyer clients acting without legal counsel may (subject to other applicable law) meet with agency heads and have conversations that would, for their attorneys, be prohibited ex parte contacts under the conclusions of Opinion 587. The Brief noted the frequency of non-lawyer contacts with agency decision makers. Non-lawyer clients acting without the presence or direction of counsel may be less likely to understand where the lines between proper and improper communication are, have less incentive to respect the lines, or less understanding of the potential risks involved.[8]

On May 20, 2010, the Committee responded that the practitioners' request, treated as a request to

[8] Risks posed by application of the interpretation of Rule 3.05 contained in Opinion 587 are not limited to possible disciplinary actions against lawyers, but include risks to the client's interests, such as that a contested case decision may be overturned based on due process arguments and the case remanded for new proceedings. The Third Court of Appeals in *Hammack v. Public Utility Commission of Texas*, 131 S.W.3d 713 (Tex. App. – Austin 2004, pet. denied), addressed the due process issue in a case alleging violation of the APA ex parte prohibition, though it concluded on the facts of that case (and applying *Vandygriff*) that those appealing the PUC's decision had not created a due process fact issue. *Id.* at 730-32. *See also Lewis v. Guaranty Federal Savings and Loan Ass'n*, 483 S.W.2d 837 (Tex. Civ. App. – Austin 1972, writ ref'd n.r.e.) (affirming trial court's order voiding Savings and Loan Commissioner's award of applicant's charter because of ex parte contact between applicant and Commissioner during pendency of contested case).

reconsider the conclusions reached in Opinion 587, was denied, but that the request, treated as a request for an opinion clarifying certain issues relating to Opinion 587, was accepted for further action.

VI. COMMITTEE OPINION 604

In January 2011, the Committee released Opinion 604, an express "clarification and amplification of the conclusions set forth in Opinion 587." The Statement of Facts for Opinion 604 provides that a state agency is considering a regulation that would institute a permitting process for a previously unregulated activity; a lawyer has a client who is currently engaged in the activity but might have problems getting a permit under the proposed rule; and a permit application could result in a contested case. Opinion 604 at 1. Opinion 604 addresses three questions:

(1) may a lawyer communicate ex parte with the members of a state agency board about their consideration of a rule that would require the lawyer's client to get a permit?

(2) may the lawyer communicate ex parte with those board members about the client's planned permit application? and

(3) may the client communicate ex parte with an agency decision maker when the lawyer is prohibited from doing so?

Opinion 604 concludes that:

(1) the lawyer may communicate ex parte with the board members about adoption of a rule;

(2) the lawyer may not communicate with the board members about the planned permit application; and

(3) Rule 3.05 places no restrictions on the client's ex parte communications, although the lawyer may not "cause" the client to do indirectly what the lawyer cannot do directly.

Opinion 604 attempts to clarify the Opinion 587 discussion of the meaning of "matter," "pending," "tribunal," and "otherwise permitted by law" in the administrative context.

A. The Committee Now Says A Contact Involves A "Matter" Unless There Is "No Realistic Possibility" of A Contested Case

Opinion 604 clarifies that Rule 3.05 does not apply to rule-making activity. It "does not prohibit a lawyer from having ex parte communications on behalf of the client with the board or individual members, regarding the proposed regulation," although under the facts given, the rule would determine whether the client would need to get a permit and what the client would need to prove to get the permit. Opinion 604 at 3.

The new Opinion says that the filing of an application for a permit is a "matter" for purposes of Rule 3.05 "in all cases where the application potentially requires discretionary action by the agency board acting as a 'tribunal'" – i.e., in a judicial capacity:

> [I]n cases where the permit sought involves **discretionary action** by the agency board, there will almost always exist the realistic probability of a dispute or controversy as to whether and on what terms the permit should be granted. When there is a realistic possibility of a dispute or controversy, either with the agency staff or with one or more third parties, the permit application will constitute a "matter" and communications by lawyers both before and after the filing of the application will be subject to Rule 3.05.

Id. (emphasis added).

In its new Opinion the Committee says that, in contrast, if the permitting process involves purely ministerial action by the agency, then there is "no realistic possibility" of a dispute that would require discretionary decision by the agency board. If so, the Committee reasons, the agency board would not be acting as a "tribunal," and Rule 3.05 does not apply. *Id.* at 3-4. The Opinion defines ministerial action as follows: "In cases of purely ministerial action, the granting of the permit sought is mandated by applicable law or regulation when certain clearly defined requirements are met." *Id.* at 4.

B. The Committee Now Says "Pending" Will Be A Fact-Specific Question Involving Intent

In its new Opinion, the Committee states that when a "matter" first becomes "pending" under Rule 3.05(c) in the administrative agency context "will be a question of fact that must be determined in each case." *Id.* at 4. In most cases, per the Opinion, the question is not who is the "tribunal," or whether it is "reasonably foreseeable" that this tribunal will be selected, because the legislature has already established that jurisdiction. *Id.* Instead, "when the matter becomes pending turns on when the client and the lawyer decide to pursue a permit application."[9] *Id.*

According to Committee Opinion 604, the fact question will turn on when it "appears reasonably clear" that the client will file an application. But the

[9] Resolution of this fact-specific issue would likely involve inquiry into privileged communications between client and lawyer.

line is not a bright one. The Opinion focuses on both client intent and lawyer intent: "Once it is reasonably clear that the client will seek to file a permit application, the matter is pending." *Id.* Yet the Opinion also states that even before the matter is "pending" under its interpretation, if a lawyer's private communication "attempted to persuade a member of the board regarding how a decision should be made or what factors should be relevant and the lawyer had a client whose interests were aligned with the lawyer's comments, such a conversation" would both "evidence the fact that there was a pending matter" and that "the lawyer was attempting, ex parte, to influence the board's decision." *Id.* In other words, even before it appears "reasonably likely" that a client will file an application – even before the client has decided – a lawyer's contact which advocates a particular outcome for such matters would arguably violate Rule 3.05 if the client's "interests were aligned with the lawyer's comments."

C. The Committee Now Says "Tribunal" Is Another Contact-Specific Fact Question

Committee Opinion 604 states that a lawyer may contact employees of and attorneys for the agency, other than a board member, to discuss any issue regarding an application, "[s]o long as the communications are not in fact indirect communications that seek to influence the decision-making board. For example, ... there would be a violation of Rule 3.05 if the applicant's lawyer met with a staff member or lawyer of the agency, before the permit application was filed, and asked the staff member or lawyer to convey privately to a member of the agency's board that the granting of the requested permit was very important to the lawyer and lawyer's client." *Id.* at 405. Opinion 604 also states that the requirements of Rule 3.05 apply to lawyers representing the agency. *Id.* at 5.

D. The Committee Still Says *Vandygriff* Does Not Count As "Otherwise Permitted By Law"

Opinion 604 reiterates the Committee's position in Opinion 587 that "there is no generally applicable law in Texas that permits a lawyer to communicate with an agency's decision maker for the purpose of influencing the outcome of a matter for the purpose of influencing...when the matter is pending before the agency." First, Opinion 604 states that *Vandygriff* involved a case in which non-lawyers had ex parte communications with an agency decision maker before the filing of a matter.[10] *Id.* at 2. While the case does so state, Opinion 587 did not focus on whether *Vandygriff* applied only to non-lawyer contacts, but implicitly acknowledged that its interpretation of Rule 3.05 conflicts with *Vandygriff* in stating that "when future adjudicatory proceedings in the agency are reasonably foreseeable, ex parte communications with the agency decision maker prior to filing for the purpose of influencing the matter" would violate Rule 3.05, "even though the same communication would not" violate the APA "as interpreted by the Texas Supreme Court" in *Vandygriff.* Opinion 587 at 2.

Second, Opinion 604 states, "In [*Vandygriff*], the court held that ex parte communications were not prohibited by what is now the Texas Administrative Procedure Act. That decision, however, did not hold that such ex parte communications are affirmatively permitted by applicable Texas law (compare Rule 680 of the Texas Rules of Civil Procedure, which in certain circumstances affirmatively permits ex parte applications for temporary restraining orders)." Opinion 604 at 2-3.[11]

VII. CURRENT STATUS – RULE 3.05 UNCHANGED

In 2009 and 2010, the Texas Supreme Court considered extensive amendments to the Disciplinary Rules of Professional Conduct relating to a variety of subjects, including conflicts of interest and sexual relationships with clients. Rule 3.05 was not the focus of these amendments, but I and other lawyers with my firm sent a letter to the court urging it to amend Rule 3.05 and/or reword the comments to overrule or clarify the application of Opinion 587. Professor Ron Beal and others strongly urged the Supreme Court to support Opinion 587.

The amendments proposed by the Texas Supreme Court in November 2010 made slight changes to the text of Rule 3.05, but included a revised comment on ex parte contacts:

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[10] The Austin Court of Appeals opinion states that after the applicants' first charter application was denied, "during the absence of counsel, five of the disappointed organizers came to Austin and visited with the Commissioner...." *First Savings & Loan Ass'n of Borger v. Vandygriff,* 605 S.W.2d 740, 741 (Tex. Civ. App.-Austin 1980), *rev'd by Vandygriff v. First Sav. & Loan Ass'n of Borger,* 617 S.W.2d 669). The Supreme Court's opinion also recites, "[F]ive of the unsuccessful applicants came to Austin and, in the absence of counsel, met with the Commissioner 'to find out what (they) had done wrong.'" *Id.* at 670.

[11] This interpretation appears strained, given that *Vandygriff* expressly states, "The court of civil appeals held the meeting between the organizers of Citizens Security Savings and Loan and the Commissioner was an unlawful ex parte communication. We disagree." *Id.* If the Texas Supreme Court held that the meeting was lawful, or permitted, arguably it was "affirmatively permitted by applicable Texas law," in the terminology of Opinion 604.

~~There are~~ In certain types of adjudicatory proceedings, however, ~~which have permitted~~ a lawyer is permitted to discuss pending issues ~~to be discussed~~ ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. The exception in paragraph (b) provides that as ~~As~~ long as such contacts are permitted by law and not prohibited by applicable rules of practice or procedure, such as state agency rules and the Texas Rules of Civil Procedure, ~~and so long as paragraph (a) of this Rule is adhered to, such~~ the contacts will not serve as a basis for discipline under paragraph (b).

All the proposed amendments were rejected by the members of the State Bar in a referendum that ended in February 2011.

VIII. THE "UNLESS OTHERWISE PERMITTED" ISSUE AND EXISTING AGENCY RULES

Both opinions take the position that the Texas Supreme Court's opinion in *Vandygriff* did not "affirmatively permit[]" communications between a potential applicant in a possible contested case not yet filed and the agency head, even though the Texas Supreme Court held that such communications are not prohibited by the APA and that it disagreed with the Third Court that the communications violated the APA prohibition. Under the opinions' reasoning, contact which is permissible under the APA as interpreted by *Vandygriff* is not "otherwise permitted by law and not prohibited by applicable rules of practice or procedure" for purposes of Rule 3.05.

A number of Texas administrative agencies have adopted their own "ex parte" rules concerning hearings, including (without limitation) the following. *See* Office of the Secretary of State, 1 TEX. ADMIN. CODE § 101.6; Texas Health and Human Services Commission, 1 TEX. ADMIN. CODE § 357.5; Texas Department of Agriculture, 4 TEX. ADMIN. CODE § 1.1052; Finance Commission of Texas, 7 TEX. ADMIN. CODE §§ 9.3; Credit Union Department, 7 TEX. ADMIN. CODE § 92.203; State Securities Board, 7 TEX. ADMIN. CODE § 105.23; Texas Department of Housing and Community Affairs, 10 TEX. ADMIN. CODE §§ 49.7, 50.7; Railroad Commission of Texas, 16 TEX. ADMIN. CODE §§ 1.6, 12.222; Public Utility Commission of Texas, 16 TEX. ADMIN. CODE §§ 21.7, 22.3[12]; State Board for Educator Certification, 19 TEX. ADMIN. CODE § 249.9; State Board of Dental Examiners, 22 TEX. ADMIN. CODE § 107.59; Texas Appraiser Licensing and Certification Board, 22 TEX. ADMIN. CODE § 157.13; Texas State Board of Public Accountancy, 22 TEX. ADMIN. CODE § 519.4, -.5; Department of State Health Services, 25 TEX. ADMIN. CODE § 417.106; Texas Department of Insurance, 28 TEX. ADMIN. CODE § 1.30; Texas Department of Insurance, Division of Workers' Compensation, 28 TEX. ADMIN. CODE §§ 142.3, 144.2, 148.12; Texas Commission on Environmental Quality, 30 TEX. ADMIN. CODE § 80.15; Texas General Land Office, 31 TEX. ADMIN. CODE §§ 2.6, 17.46; Comptroller of Public Accounts, 34 TEX. ADMIN. CODE § 1.41; Teacher Retirement System of Texas, 34 TEX. ADMIN. CODE § 43.36; Employees Retirement System of Texas, 34 TEX. ADMIN. CODE § 67.101; Texas Board of Pardons and Paroles, 37 TEX. ADMIN. CODE § 147.3; Department of Aging and Disability Services, 40 TEX. ADMIN. CODE § 7.106; Texas Workforce Commission, 40 TEX. ADMIN. CODE § 802.147. Many of these ex parte provisions are modeled on APA § 2001.061. However, other provisions include hearings which are not contested case proceedings. *See, e.g.,* the Uniform Fair Hearing Rules of the Texas Health and Human Services Commission, 15 TEX. ADMIN. CODE § 357.5, which is an informal proceeding; the Administrative Hearing Procedures for Conducting the Appeals of the Food and Nutrition Programs of the Texas Department of Agriculture, 1 TEX. ADMIN. CODE § 1.1052, an informal proceeding.

Where existing agency rules delineate (as does the APA provision) what constitutes prohibited communication, is a lawyer safe in assuming that under Rule 3.05(b), communication is "as otherwise permitted"? Or does a statement of what constitutes prohibited conduct not permit the assumption that conduct not prohibited is "otherwise permitted"?

Other agencies have adopted rules which are modeled on the APA provision, but are highly specific as to the timeframe for prohibited ex parte contact. For instance, the State Securities Board specifies not only when the contested case begins (and ex parte prohibitions apply) but also to whom:

> (a) Upon the issuance of a Notice of Hearing in a contested case and continuing until a Motion for Rehearing is ruled on or at the time for ruling on such a Motion has expired, the Securities Commissioner (or other person assigned to render

[12] Notably, the Public Utility Commission's ex parte regulation specifically reminds lawyers "of their responsibilities under the Texas Disciplinary Rules of Professional Conduct, §§ 3.01, 3.02, 3.03 and 3.04," omitting 3.05 (the subject of the opinions at issue).

> a decision in a contested case) and members of the Board may not communicate directly or indirectly with any party or a representative of a party in a contested case in connection with any issue of fact or law in the proceeding except on notice and opportunity for all to participate.

7 TEX. ADMIN. CODE § 105.23.

Similarly, *see* 10 TEX. ADMIN. CODE § 49.7, governing the application process within Texas Department of Housing and Community Affairs for the 2011 Housing Tax Credit Program Qualified Allocation Plan and Rules, where the ex parte rule applies to "a member of the Board," beginning "during the period beginning on the first date of the Application Acceptance Period and ending on the date the Board makes a final decision with respect to the approval of any Application in that Application Round... ." *See also* 16 TEX. ADMIN. CODE § 21.7, in which the Public Utility Commission specifies that a "presiding officer assigned to render a decision may not communicate, directly or indirectly, in connection with any substantive issues currently the subject of a dispute resolution proceeding before that presiding officer with any person, party, or their representatives, except on notice and opportunity for all parties to participate." *See also* 30 TEX. ADMIN. CODE § 80.15, the TCEQ ex parte provision, which applies "during the pendency of a contested case either at SOAH or before the commission" and prohibits any "party, person, or their representatives" from communicating "directly or indirectly with any commissioner or the judge concerning any issue of fact or law relative to the pending case" except on notice to all parties. Where the agency has specifically designated the point at which the ex parte prohibition takes effect, does that narrow the applicability of Rule 3.05 to communication ex parte with a tribunal because it is "otherwise permitted by law and not prohibited by applicable rules of practice or procedure" under Rule 3.05(b)? Where the agency has also specifically designated which persons are subject to a communication prohibition applies to ("presiding officer" or "member of the Board" or "commissioner" or "judge"), does that similarly narrow the applicability of Rule 3.05 (and hence the opinions)? The TCEQ rules (adopted to be effective as of June 6, 1996, and hence post-*Vandygriff* and pre-Opinions 587 and 604) provide that "representatives" of a party shall "observe the letter and spirit of the Texas Lawyer's Creed as adopted by the Texas Supreme Court, and the State Bar of Texas' Texas Disciplinary Rules of Professional Conduct, including those provisions concerning improper ex parte communications with the commissioners and judges." 30 TEX. ADMIN. CODE § 80.9. Given Opinion 587 and Opinion 604, must "commissioners and judges" be read more broadly, to extend to TCEQ staff who might conceivably have some influence on a future contested case?

While both opinions quote Rule 3.05's exception ("except as permitted by law and not prohibited by applicable rules") (Opinion 587 at 2 and 4 ["if there are no other applicable laws or rules of practice or procedure that prohibit or specifically permit ex parte communications with respect to the matter coming before the agency"] and Opinion 604 at 2), it is not clear how the opinions would interpret the scope and application of an agency's own ex parte rules.

IX. PRACTICAL PROBLEMS WITH THE COMMITTEE'S OPINIONS FOR WATER AND OTHER ADMINISTRATIVE LAWYERS

A. Problems With The Committee's Views Going Far Beyond Possible APA Contested Cases – They Affect Other Groundwater District Decisions and DFC Appeals

Committee Opinions 587 and 604 focus on permit applications or other applications for approval filed at state agencies in which the applicant or another person is entitled to a contested case hearing as defined in the APA. The opinions certainly apply to applications filed with the TCEQ that may be the subject of an APA contested case, such as an application for a water rights permit or an amendment to a water rights permit, or an application for a wastewater discharge permit or an amendment to a wastewater discharge permit. *See* TEX. WATER CODE § 11.132(a) (requiring hearing on water rights permit application on request of "affected person"); *id.*, § 26.028(c) (requiring hearing on applications for wastewater discharge permit, amendment or renewal on request of commissioner, executive director, or "affected person," if certain conditions are met).

But the biggest practical impact on water lawyers is much broader than with respect to agency decisions that could be decided in APA contested cases. The opinions' reasoning also applies to permit application decisions that under applicable law cannot be APA contested cases. This is because Opinion 604 says that agency decision makers are acting as a "tribunal" in all cases "where the permit sought involves discretionary action by the agency board." Opinion 604 at 3.

For example, under the opinions, Rule 3.05 applies to all applications submitted to groundwater conservation districts where the district's action on the application is discretionary, because the district board is therefore acting as a "tribunal." This is so even though Chapter 2001, Government Code, "does not apply to a hearing" under Subchapter M, Permit and

Permit Amendment Applications, Notice and Hearing Process, of the Texas Water Code, except as provided by §§ 36.416 and 36.4165 (if the district contracts with the State Office of Administrative Hearings [SOAH] to conduct a hearing, either on its own or upon request by the applicant or other party to a contested case) and § 36.417 (if the district chooses to adopt rules establishing procedures for contested case hearings under Chapter 2001, Government Code). This reasoning means that Rule 3.05 will apply to all permit applications and permit amendment applications that change the withdrawal or use of groundwater, because the district board's actions on those applications are discretionary under the applicable statute. *See* TEX. WATER CODE § 36.113(d) (listing factors which the district shall consider before granting or denying a permit or amendment). Rule 3.05 may apply to other applications, for example, permit renewal applications, if the district rules make board action on those applications discretionary. *See, e.g.*, Blanco-Pedernales GCD Rule 3.5.B. (permit renewals are reviewed by general manager and are automatic except under specific circumstances when the board must consider them, including non-compliance by the permit holder, permit is in designated Critical Groundwater Depletion Area, or permit is for a high-volume well capable of producing over 25,000 gpd). Rule 3.05 may not apply to applications where approval can properly be called a "ministerial" act under the district rules. For example, approval of a well registration may be ministerial if the granting of the approval "is mandated by applicable ... regulation when certain clearly defined requirements are met." Opinion 604 at 4.

Under the opinions, Rule 3.05 would also apply to an appeal of desired future conditions (DFCs) to the Texas Water Development Board (TWDB) under Texas Water Code § 36.1083. The Water Code does not require an APA contested case hearing, and TWDB rules expressly state that the hearing required by the statute is not a contested case hearing. *See* TEX. WATER CODE § 36.1083(c); 31 TEX. ADMIN. CODE § 356.44(d). But TWDB will be making a discretionary decision on the reasonableness of the DFCs in a dispute, and thus would be acting as a tribunal under Rule 3.05 as interpreted in the opinions. *See* 31 TEX. ADMIN. CODE § 356.45(c), listing the criteria to be considered by TWDB in determining whether a DFC is reasonable, including, for instance, "any other information relevant to the specific desired future conditions."

Under the opinions' reasoning, Rule 3.05 would apply to lawyer contacts with groundwater district decision makers, even though by statute the APA prohibition on ex parte is not directly applicable to those districts except in cases where a district contracts with the State Office of Hearings Examiners to conduct hearings. *See* TEX. WATER CODE § 36.416. Many, though not all, districts have adopted rules that prohibit ex parte communications with decision makers, but most of these rules are modeled after the APA ex parte prohibition and only prohibit ex parte communications with board members and hearing examiners during the pendency of a contested case. *See, e.g.,* Fayette County GCD Rule 14.5(11); Lone Star GCD Rule 12.7(j); Clearwater GCD Rule 8.10.20; Panhandle GCD Rule 10.6(k); Brazos Valley GCD Rule 14.5(j). Some of these rules specifically exempt communications among between a board member and a lawyer or consultant retained by the district from the ex parte prohibition. *See, e.g.,* Lone Star GCD Rule 12.7(j). But this exemption may not exempt district lawyers from Rule 3.05's ex parte prohibition because, under the opinions' reasoning, those rules may be deemed not to "affirmatively permit" ex parte communications. So, by prohibiting pre-filing ex parte contacts, the opinions' interpretation of Rule 3.05 may have the same, or greater, impact on lawyers practicing before groundwater conservation districts.

B. Problems With the Committee's View of Contacts Before Filing an Application

In the past, administrative lawyers have often contacted agency decision makers on potential contested case matters to determine whether or not to file the case, and when – *e.g.*, in light of the agency's workload, its policy priorities, and its expectations about other potential contested cases that may raise the same or similar policy issues. The purposes of such meetings have specifically included making sure they know what the client will need to do to address the agency's concerns (as in *Vandygriff*). Opinion 604 and Opinion 587 prohibit such meetings.

Committee Opinion 604 prohibits ex parte contacts with the "tribunal" if it is "reasonably clear" that the client will file an application that requires discretionary action by the decision maker. Opinion 604 at 4. Opinion 604 presumes that if an application involves discretionary action, there is "a realistic possibility" of a dispute or controversy, with the agency staff or with a third person. *Id.* at 3. Under Opinion 604, therefore, Rule 3.05 applies to all lawyer communications with the tribunal before the application is filed, after it is filed, but before it is known if the application will be contested, and after it is known that the application is contested. As a practical matter, then, a lawyer planning to file an application at TCEQ or with a groundwater conservation district that requires discretionary action by the tribunal should think carefully before having any ex parte communications with the tribunal after a

client decides to file the application. (Indeed, the lawyer should think carefully about having such communications even when the client has not yet decided to file the application, if a contested case is "reasonably foreseeable.")

Where a statewide agency, like TCEQ and TWDB, has a full-time staff that are not the designated decision makers (*but see* the discussion of the identity of "tribunal" in Section IX(C), below), this pre-filing prohibition may not be significant. A lawyer may be able to contact the staff for information relevant to the decisions concerning whether (or when) to file an application. But for groundwater conservation districts who have no full-time staff, or very limited full-time staff, the lawyer's inability to interact with people who have this kind of knowledge may have an impact on an application's success.

Given the wide variety of procedures for filing applications and making decisions on them, there may be situations in which it is difficult to determine whether a matter is "pending" for different lawyers under the opinions. The appeal of DFCs to TWDB illustrates such a difficulty. Under TWDB rules, a petition challenging the reasonableness of adopted DFCs must be filed within one year of their adoption. 31 TEX. ADMIN. CODE § 356.43(a)(5). The opinions make it fairly clear that the Committee would conclude that a lawyer may not have any ex parte communications about the petition with a TWDB Board member after his or her client decides to file a petition challenging DFCs.

But what about the lawyers representing a district, lawyers on a district board, or lawyers representing other interested parties? Are they prohibited from talking with the TWDB Board members ex parte about the DFCs that the district has have adopted, for a year after their adoption, on the Committee's theory that they cannot rule out, as having no realistic possibility, an appeal, which will involve a discretionary action by TWDB? Should they refrain from discussing a district's DFCs with the TWDB Board members anytime after the DFC process begins (or restarts), because the existence of an appeal that will involve a TWDB discretionary decision makes it "reasonably probable" that the TWDB will someday have to act on such an appeal? Or are those other lawyers only prohibited ex parte communications with TWDB Board members about DFCs after a petition is filed? Should they also refrain from discussing the substance of the DFCs with TWDB staff members, knowing that if someone files an appeal of the DFCs, those staff members may attend the hearing itself, will likely review the evidence submitted and write the staff recommendation to the TWDB Board? Indeed, during the development of DFCs, or consideration of amendment of DFCs, should the lawyers refrain from discussing issues which are likely subjects for a future appeal? If so, given the interwoven interactions between TWDB staff and districts and their consultants in developing or amending DFCs, the process is likely to be negatively affected. *See* TEX. WATER CODE § 36.1084 (TWDB provides modeled available groundwater to districts based upon the DFCs); *see also* newly-added TEX. WATER CODE § 36.1081 (TWDB and TCEQ "shall make technical staff available to serve in a nonvoting advisory capacity to assist with the development" of DFCs during the joint planning process).

Where agency staff have expertise that could be helpful in deciding whether or not to file an application, the opinions' reasoning on "indirect" efforts to influence can have a chilling effect as well. For example, assume a lawyer contacts TCEQ air personnel about whether or not certain repairs to a new type of equipment would require an air permit or whether the repairs could fall within a permit-by-rule exception. Following the contact, personnel agree no permit is required, and the lawyer so confirms in a letter to the agency. Was the prior communication an impermissible ex parte contact under Rule 3.05 as construed by Opinion 587? Did the lawyer *intend* the conversation as an indirect communication "through non-decision-making personnel, with the decision maker for the purpose of influencing the outcome of the agency's decision in the matter"?

Assume a lawyer for an environmental non-profit organization contacts TCEQ with a question about the application of Concentrated Animal Feeding Operations regulations, in order to determine whether or not a violation may exist, in order to decide whether or not to file a complaint for low-income residents adjacent to a feedlot. Is a future proceeding "reasonably foreseeable"? Is the communication hence impermissible under Rule 3.05 as construed by Opinion 587 as an attempt to influence the tribunal indirectly?

C. Problems With The Committee's Concept of the "Tribunal"

Opinions 604 and 587 assume that the agency board or the head of an agency will make the final decision on an application that involves a discretionary action, and that Rule 3.05 prohibits pre-filing and post-filing ex parte communications with those board members or agency heads and post-filing ex parte communications with any SOAH ALJ or hearings examiner assigned to conduct a hearing. But agencies and groundwater conservation districts sometimes delegate their powers to approve some applications to

other agency employees. Who is the tribunal in those cases?

As an example, the TCEQ has delegated the final decision-making authority in many permitting, licensing, and enforcement proceedings to its executive director when the proceedings are uncontested or when the law does not provide an opportunity for a hearing. *See* 30 TEX. ADMIN. CODE §§ 50.131, 50.133. Does this delegation mean that the lawyer for an applicant may not communicate with the executive director after the lawyers knows that the client will file an application that may, ultimately, be decided by the executive director?

In cases in which the rules allow the executive director to make the final decision because no third party has contested the application and the applicant has no dispute with the permit or other approval proposed by TCEQ staff, the TCEQ rules provide that, before granting the application, the executive director must determine that the application "meets all relevant statutory and administrative criteria" and "does not raise new issues that require the interpretation of commission policy." 30 TEX. ADMIN. CODE § 50.133(a)(1)-(2). The executive director has generally already determined that the draft permit that he is proposing meets the relevant criteria while he was acting as a potential party to the case, rather than as the decision maker. But where he is effectively the decision maker, and hence the tribunal under Rule 3.05, does this compliance determination make his action discretionary? If so, at what point does contact by the applicant's lawyer violate Rule 3.05?

The rules also allow the executive director final approval of an application "for any air permit amendment, modification, or renewal that would not result in an increase in allowable emissions and would not result in the emission of an air contaminant not previously emitted." *Id.*, § 50.133(a)(6). Is the determination that the application would not result in an increase in allowable emissions or in the emission of an air contaminant not previously emitted a discretionary determination or a ministerial decision? If it is discretionary, is the executive director a "tribunal" in those cases?

Groundwater conservation district rules also routinely delegate certain decisions to the district's general manager. In many cases, these decisions do qualify as ministerial under Opinion 604 – "the granting of the permit sought is mandated by the applicable ... regulation when certain clearly defined criteria are met." Opinion 604 at 4. As discussed above, general manager approval of a well registration may be a ministerial act under many groundwater conservation district rules. *See, e.g.,* Panhandle GCD Rule 5.1 and Brazos Valley GCD Rule 8.2(a).

But district rules may give the general manager the authority to grant an application for a minor amendment "in full or in part" without notice and a public hearing. *See, e.g.,* Lone Star GCD Rule 3.6(e). Does that degree of discretion make the general manager a "tribunal"? What if the rules allow an appeal of a general manager decision, which will be heard by the district board in a public meeting? Does that mean that the general manager is not the tribunal, but only a party, and the board is the tribunal?

D. Problems With The Committee's Views of Contacts Regarding Rulemakings

One major task of judicial tribunals is to interpret and apply statutes – rules of law adopted by the legislature. Unlike courts, however, agencies and districts often also act as both the legislature (by rulemaking) and the judiciary. Furthermore, unlike courts, agencies may also act as the executive, e.g., as the prosecutor in enforcement cases.

In the hypothetical situation discussed in Opinion 604, the lawyer represents a client before an agency that is considering promulgating a rule that would require the client to get a permit and would establish the factors that the agency would consider in granting or denying a permit application. Opinion 604 purports to address the practical problems caused by its ex parte prohibition interpretation by applying a bright-line test to the hypothetical. If the ex parte communication concerns rulemaking, Rule 3.05 does not apply, although there may, potentially, be an application filed at the agency in the future.

Does Opinion 604's bright-line rule mean that, in an ex parte communication regarding the rulemaking, the lawyer can discuss with an agency or district board member the client's particular facts and the application of the proposed rule to those facts? In comments on proposed rules, lawyers often discuss their client's specific fact situations in order to illustrate the practical implications of the proposed rules, including the equities of imposing or not imposing certain requirements. May a lawyer discuss these in ex parte communications regarding the rulemaking without violating Rule 3.05, even though these same facts would be at issue in the board member's decision on the application that the client will submit? Does it depend on the lawyer's subjective intent in having these discussions – i.e., does the lawyer intend to influence the decision on the future application? If the client's interests are "aligned" with the comments the lawyer makes, Opinion 604 would consider that as evidence of improper intent to influence the tribunal.

Or what if the client has an existing permit, has decided to amend that permit, and the agency is considering changes to the rules that would affect that

planned application? May the lawyer discuss the facts of his client's situation in ex parte communications with board members in that situation without violating Rule 3.05, even though the amendment application is "pending" under the opinions' analysis?

Each of these situations highlights the difficulties of applying any ex parte prohibitions on agency board members other than *Vandygriff*'s bright line of a genuinely pending contested case. A lobbyist communicating with a legislator would not hesitate to discuss the particular facts of his client's situation with that legislator. The judge, who may eventually decide how the resulting legislation would apply, was not there when these facts were discussed and would not be influenced by that contact. But an agency board member may be both the legislator and the judge who eventually decides how the legislation will apply to particular facts.

E. Problems With The Committee's One Rule For Lawyers, Another For Clients

Only lawyers, acting directly or through clients acting at their direction, are subject to Rule 3.05. So non-lawyer clients acting without legal counsel may meet with agency heads and have conversations that would, for their attorneys, be prohibited ex parte contacts. Opinion 604 recognizes this, then states: "Of course, lawyers may not use the fact that the Texas Disciplinary Rules do not apply to non-lawyers as a basis for claiming that lawyers are permitted to cause their clients to accomplish indirectly what lawyers are prohibited from doing directly. Rule 3.05's prohibition on ex parte communications with a decision maker for purposes of trying to influence the decision maker regarding a matter also prohibits the lawyer from causing another to communicate privately with a decision maker in order to influence that decision maker." Opinion 604 at 5.

Does this mean that the lawyer may not suggest that the client have an ex parte pre-filing meeting with an agency decision maker? Does it mean that the lawyer may not help a client prepare for an ex parte pre-filing meeting with a decision maker, if the client decides to have one, because this may lead to an "indirect communication"? Does allowing clients to have pre-filing meetings with decision makers without lawyers present make the perceived problems with the ex parte communications worse or better?

F. Problems With Effects on the Agency's Own Legal Staff

As discussed earlier, Rule 3.05, as interpreted by the opinions, prohibits ex parte communications between agency decision makers and their own staff if the agency staff would or could be a party to any contested case on an application. This prohibition applies to the agency's own staff lawyers who may take an "advocacy position" in a potential contested case. *See* Opinion 604 at 5 ("The requirements of Rule 3.05 as discussed in this opinion and in Opinion 587 would apply to lawyers representing any party that ultimately participates in the permit-application case, including lawyers representing the agency itself"). (Some agencies, including the Texas Commission on Environmental Quality (TCEQ), have one legal staff that takes "advocacy positions" and a second legal staff that only advises the Commissioners on pending and potentially pending matters. But many groundwater conservation districts do not have the luxury of employing two legal staffs.

X. POSSIBLE OPTIONS FOR DEALING WITH PROBLEMS CREATED BY THE COMMITTEE

A lawyer can, of course, simply have pre-filing communications with agency or district decision makers that would not be ex parte under *Vandygriff* but would or might be under the Committee's views. In doing so, he or she risks disciplinary action. But other options might address some of the uncertainties that Opinions 587 and 604 create.

A. Additional Requests for Opinions

Lawyers who practice before state agencies and groundwater conservation district boards, or other agencies or political subdivisions with discretionary authority over required approvals, may want to consider a carefully crafted request for another opinion from the Committee that address the questions that the previous opinions may create in their practices.

B. Rulemaking Action – Agency by Agency, District by District

Rule 3.05 does not prohibit ex parte communications that are "otherwise permitted by law." Ex parte communications may be "otherwise permitted" by agency rules. State agencies have the power to adopt "rules of practice stating the nature and requirements of all available formal and informal procedures." Many agencies already have rules outlining some prohibited and some permitted contacts. But state agencies may be reluctant to adopt rules that expressly permit ex parte communications because of the "optics" of that action, and because of the difficulty of foreseeing all scenarios (all potential contacts) that could or should be covered by a specific agency rule.

Groundwater conservation districts and other water agencies should consider rules that would clearly delineate the situations in which ex parte communications are permitted. For example, rules that

clearly permitted ex parte contacts with a general manager about any matter that the general manager is authorized to decide could clear up any confusion about the identity of the "tribunal" in those matters. Districts may want to expressly permit ex parte contacts in rulemaking proceedings. They may want to expressly permit ex parte contacts in other matters for which the rules do not provide for notice and hearing, or for matters in which the rules provide for notice, but do not provide for a contested case hearing. A rule which makes contact "expressly permitted" (instead of merely defining prohibited contact) may address uncertainties created by the opinions.

C. Texas Supreme Court Changes to Rules 3.05 and 1.10(f)

Though found in an Appendix to the Government Code, the Rules are not enacted by the Legislature, but are adopted by the Supreme Court of Texas in the exercise of its constitutional powers over the judicial department of government.

There are different processes to propose revisions to the Rules. As discussed above, the initial rules were drafted by practitioners and law professors before delivery to the Supreme Court. The recent attempted amendments were drafted by members of the Committee and presented to the State Bar Board of Directors, which recommended the amendments to the Supreme Court.

But the Supreme Court "may, either as it considers necessary, pursuant to a resolution of the board of directors of the state bar, or pursuant to a petition signed by at least 10 percent of the registered members of the state bar," prepare, propose, and adopt rules or amendments to rules. TEX. GOV'T CODE § 81.024(b). Through such procedures the Supreme Court could propose amendments to Rule 3.05 that take a more nuanced approach to communications with administrative agencies who act in a judicial capacity. State Bar members would have the opportunity to vote on the proposed amendments, and the Supreme Court would promulgate the amendments if they received the majority of the votes case in the election. *Id.*, § 81.024(c)-(g). The Supreme Court could also initiate a process to amend the comments to Rule 3.05 to clarify the Rule's application in administrative proceedings. Arguably, amendments to comments may not require a vote of State Bar members, but the referendum process may be used in any event.

D. Declaratory Judgment Action

The Committee's opinions do not bind the Texas Supreme Court. But as a practical matter, a Committee opinion - even if possibly mistaken as to the law or otherwise unwise - threatens lawyers, who must comply with the opinion or risk allegations of violation of the Disciplinary Rules in litigation or as the basis for a grievance filed with the State Bar.

Are there ways that lawyers could seek a court declaration on the meaning of Rule 3.05 and related disciplinary rules?

The purpose of the Uniform Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered." TEX. CIV. PRAC. & REM. CODE § 37.002(b). The UDJA provides that: "A person ... whose rights, status, or other legal relations are affected by a statute ... may have determined any question of construction or validity arising under the ... statute ... and obtain a declaration of rights, status, or other legal relations thereunder." *Id.*, § 37.004(a). Lawyers who are affected by the opinions' interpretation of Rule 3.05 could seek a declaration of their rights under Rule 3.05 in one or more concrete fact situations. *See, e.g., O'Quinn v. State Bar of Texas*, 763 S.W.2d 397, 399 (Tex. 1988) (holding court should treat disciplinary rules "like statutes" for purposes of constitutional challenge).

XI. CONCLUSION

Lawyers should carefully consider Committee Opinions 587 and 604 before initiating any contacts with agency decision makers or staff advising decision makers. Those most directly affected may wish to consider possible ways to address problems created by the Opinions.

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THE PROFESSIONAL ETHICS COMMITTEE FOR THE STATE BAR OF TEXAS
Opinion No. 587

May 2009

QUESTION PRESENTED

Before filing a matter with an administrative agency having decision-making authority over the matter, may a lawyer communicate with the administrative agency concerning the matter?

STATEMENT OF FACTS

A lawyer plans to file a matter with a state administrative agency that has decision-making authority over the matter. Before filing the matter, the lawyer proposes to communicate concerning the matter with persons in the agency for the purpose of ultimately obtaining a favorable decision from the agency. In such communications concerning the matter, the lawyer does not propose to provide copies of written communications or notice of oral communications to other potential parties in the matter.

DISCUSSION

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct provides as follows:

"Maintaining Impartiality of Tribunal
A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) 'Matter' has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is 'pending' before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected."

Rule 3.05 provides that a lawyer shall not seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules and that, except as permitted by law and not prohibited by applicable rules, a lawyer may not communicate ex parte with a tribunal for the purpose of influencing the tribunal concerning a pending matter except in one of three limited ways specified in Rule 3.05(b) – in official proceedings, in writing with copies to all parties, or orally with adequate notice to all parties.

Rule 3.05(c)(1) defines the term "matter" by reference to Rule 1.10(f). Rule 1.10(f) provides that the term "matter" does not include regulation-making or rule-making proceedings or assignments but that the term includes the following:

> "(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and
>
> (2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency."

Rule 3.05(c)(2) specifies that a matter is pending before a tribunal when the tribunal has been selected to determine the matter or it is reasonably foreseeable that the tribunal will be so selected. In the circumstances here considered, the matter is clearly "pending" for purposes of Rule 3.05 because the agency with which the communication occurs is expected to make a decision on the matter. As discussed in more detail below, the agency decision maker in these circumstances is a "tribunal" as that term is defined for purposes of the Texas Disciplinary Rules of Professional Conduct. Therefore, unless there is some applicable law that permits the lawyer to do so, under Rule 3.05 the lawyer may not communicate ex parte with the agency decision maker (or cause another to do so) for the purpose of influencing the outcome of the matter except in the limited ways specified in Rule 3.05(b). For purposes of applying Rule 3.05(b), there is no generally applicable law in Texas that permits the lawyer in these circumstances to communicate with the agency's decision maker, before a matter is filed, for the purpose of influencing the outcome of the matter. The Texas Supreme Court in *Vandygriff* v. *First Savings and Loan Association of Borger,* 617 S.W.2d 669 (Tex. 1981) held that the prohibition of what is now the Texas Administrative Procedure Act against ex parte communications in a pending matter does not apply to communications before a matter has been filed with an agency. However, that decision did not hold that such communications are affirmatively permitted by applicable Texas law. Accordingly, since under Rule 3.05(c)(2) of the Texas Disciplinary Rules of Professional Conduct a matter is "pending" before an administrative agency when future adjudicatory proceedings in the agency are reasonably foreseeable, ex parte communications with the agency decision maker prior to filing for the purpose of influencing the matter (except using a means specifically permitted by Rule 3.05(b)) would constitute a violation of Rule 3.05. This result applies even though the same communication would not be a violation of the Texas Administrative Procedure Act as interpreted by the Texas Supreme Court in the *Vandygriff* decision.

The question remains as to who is included within the term "tribunal" for purposes of applying the requirements of Rule 3.05. The Terminology section of the Texas Disciplinary Rules of Professional Conduct provides that

> "'Tribunal' denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. 'Tribunal' includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity."

In the application of this definition to administrative agencies, it is important to recognize that these agencies are legal hybrids that may have judicial, legislative, executive and ministerial functions. Rule 3.05 applies only to administrative agencies when they are, or will be, functioning as "tribunals," that is in a dispute-resolution, licensing or adjudicatory capacity and not when such agencies are functioning in a legislative, executive or ministerial capacity.

Whether applied to a court or an administrative agency, the restrictions of Rule 3.05 on communications with a tribunal could be read either to apply to communications with all personnel associated with a court or administrative agency or to apply only to communications with the judge or agency decision maker or decision-making body. The Committee is of the opinion that the term "tribunal" as defined in the Terminology section of the Texas Disciplinary Rules and as used in Rule 3.05 refers only to the judge or agency decision maker or decision-making body and not to all personnel associated with a court or administrative agency. In the case of an administrative agency, the decision maker could be an administrative law judge, a hearing officer, the executive in charge of the agency, or a board or other governing body of the agency. The decision maker, however, is not the agency itself or all of its members, representatives or employees. Lawyers routinely contact court and agency personnel other than decision makers to obtain answers to administrative questions, to obtain settings, to check on the status of pending matters and for a variety of other reasons where there could normally be no effect on the court's or agency's decision in the matter. In the case of communications with non-decision-making personnel of an agency, Rule 3.05 would apply only if such a communication was intended by the lawyer as an indirect communication, through non-decision-making personnel, with the decision maker for the purpose of influencing the outcome of the agency's decision in the matter.

This interpretation of Rule 3.05 as applicable only to communications with decision makers is consistent with the requirements of section 2001.061 of the Texas Government Code, the provision of the Texas Administrative Procedure Act specifically addressing ex parte communications. Section 2001.061(a) of the Texas Government Code provides in part:

". . . a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate."

This provision generally prohibits certain ex parte communications in connection with an issue of fact or law in a contested case. The prohibition however, is only upon "a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law," in other words, the decision maker. See *County of Galveston* v. *Texas Department of Health,* 724 S.W.2d 115 (Tex. App. – Austin 1987, writ ref'd, n.r.e.); *Coalition Advocating A Safe Environment* v. *Texas Water Commission,* 798 S.W.2d 639 (Tex. App. – Austin 1990), vacated as moot, 819 S.W.2d 799 (Tex. 1991).

This interpretation of Rule 3.05 appropriately treats the situation in which an administrative agency that has authority to make the decision on a contested matter also is a party that takes an advocacy position in the matter through other agency personnel. The parties to the contested case, including the representatives of the agency taking an advocacy position, are not permitted to have ex parte communications with the agency decision maker for the purpose of influencing the outcome of the matter unless as required by Rule 3.05(b) all parties participate or are given an opportunity to participate. However, representatives of another party in the matter may communicate directly with the advocacy representatives of the agency in the matter without including in the communication all other parties in the matter, as would be required if the communication were subject to Rule 3.05(b).

Special laws or rules may apply to specific situations and govern communications in those specific situations. Comment 4 to Rule 3.05 notes the following:

"There are certain types of adjudicatory proceedings, however, which have permitted pending issues to be discussed ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. As long as such contacts are not prohibited by law or applicable rules of practice and procedure, and so long as paragraph (a) of this Rule is adhered to, such ex parte contacts will not serve as a basis for discipline."

See also Texas Attorney General Opinion No. DM-144 (July 24, 1992) (special provisions applicable to the Texas Water Commission impose additional limitations, beyond the limitations of general administrative law, on ex parte communications of hearings examiners with other employees of the agency).

In the factual situation here considered, if there are no other applicable laws or rules of practice or procedure that prohibit or specifically permit ex parte communications with respect to the matter coming before the agency, Rule 3.05 imposes strict limits on a lawyer's ex parte communications with the decision maker of the agency for the purpose of influencing the decision maker concerning the matter. These limitations apply only to communications directly or indirectly with the decision maker within the agency as established by applicable law (such as

an administrative law judge, a hearing officer, the executive in charge of the agency, or a board or other governing body of the agency, including any individual member of that board or body). These limitations apply before the filing of the matter if it is reasonably foreseeable that the decision on the matter will be made by the agency. However, the limitations do not apply to communications with the members, employees or representatives of the agency who are not the decision maker or a member of the decision making body with respect to the matter provided that the communications with such persons are not intended to be indirect ex parte communications with the decision maker for the purpose of influencing the decision in the matter.

CONCLUSION

In the absence of applicable law that permits ex parte communications in a particular situation, Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct imposes strict limits on ex parte communications with an agency's decision maker prior to the filing of a matter with an agency that is expected to act concerning the matter in a dispute resolution, licensing or adjudicatory capacity, if a purpose of the ex parte communication is to influence the agency's decision in the matter. However, in these circumstances, Rule 3.05 does not limit ex parte communications, either before or after the filing of the matter, with members, representatives or employees of the agency who are not the applicable decision maker or a member of the applicable decision making body unless such communications are intended to be indirect ex parte communications with the decision maker for the purpose of influencing the outcome of the matter.

2

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 604

January 2011

QUESTION PRESENTED

Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer communicate privately with the members of a board of a state agency about their consideration of a regulation that would require the lawyer's client to apply for and obtain a permit? If the regulation is adopted, may the lawyer communicate privately with members of the board about the client's planned permit application? May the lawyer's client communicate privately with members of the board when the lawyer is prohibited by the Texas Disciplinary Rules of Professional Conduct from doing so?

STATEMENT OF FACTS

A state agency is considering a regulation that would institute a permitting process for what was previously an unregulated activity. A lawyer represents a client that is currently engaged in the activity but may have difficulty qualifying for a permit under the proposed regulation. The agency's board will decide whether and in what form to adopt the regulation. If the regulation is adopted, the board would also be the body that would decide whether to grant applications for permits. Any application for such a permit would be acted on as part of a contested case in which the permit applicant, the agency, and possibly others would be parties. The parties would normally be represented by counsel, and ultimately the permit application would be heard and decided by the board.

DISCUSSION

Professional Ethics Committee Opinion 587 (May 2009) addressed the application of Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct to administrative law matters. The present opinion further considers certain issues involved in applying Rule 3.05 to administrative proceedings. This Opinion constitutes a clarification and amplification of the conclusions set forth in Opinion 587.

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct provides as follows:

"Maintaining Impartiality of Tribunal
A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) 'Matter' has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is 'pending' before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected."

Rule 3.05 provides that a lawyer shall not seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules and that, except as permitted by law and not prohibited by applicable rules, a lawyer may not communicate ex parte with a tribunal for the purpose of influencing the tribunal concerning a pending matter except in one of three limited ways specified in Rule 3.05(b) – in official proceedings, in writing with copies to all parties, or orally with adequate notice to all parties.

Rule 3.05(c)(1) defines the term "matter" by reference to Rule 1.10(f). Rule 1.10(f) provides that the term "matter" does not include "regulation-making or rule-making proceedings or assignments" but that the term includes the following:

"(1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and

(2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency."

Rule 3.05(c)(2) specifies that a matter is pending before a tribunal when the tribunal has been selected to determine the matter or it is reasonably foreseeable that the tribunal will be so selected. As discussed in more detail in Opinion 587, the agency decision maker (here, the members of the state agency's board) is the "tribunal" as that term is defined in the Texas Disciplinary Rules of Professional Conduct. For purposes of applying Rule 3.05(b), there is no generally applicable law in Texas that permits a lawyer to communicate with an agency's decision maker for the purpose of influencing the outcome of a matter when the matter is pending before the agency. In *Vandygriff* v. *First Savings and Loan Association of Borger*, 617 S.W.2d 669 (Tex. 1981), the Texas Supreme Court considered a case in which non-lawyers had ex parte communications with an agency's decision maker before the filing of a matter. In that case, the court held that the ex parte communications were not prohibited by what is now the Texas Administrative Procedure Act. 617 S.W.2d at 672. That decision, however, did not hold that such ex parte communications are affirmatively permitted by applicable Texas law (compare

Rule 680 of the Texas Rules of Civil Procedure, which in certain circumstances affirmatively permits ex parte applications for temporary restraining orders).

At the stage at which the state agency is considering the adoption of a regulation that will institute a permitting process, the activity of the agency, and of its decision-making board in particular, is a regulation or rule-making activity, and hence the state agency and its board are acting in a legislative capacity. Thus, Rule 3.05 does not apply to these activities and does not prohibit a lawyer from having ex parte communications on behalf of the client with the board or its individual members regarding the proposed regulation under consideration by the state agency. This opinion does not address whether such activity in a particular situation would be permissible under other legal or regulatory requirements that may apply to the lawyer, the client, the agency, or other persons involved in the matter.

After the agency has adopted the regulation and the lawyer knows the client plans to seek a permit under the regulation, Rule 3.05 generally prohibits the lawyer from having private communications with the state agency's board or the board's individual members for the purpose of influencing the board on its decision regarding the client's planned permit application. As discussed in Opinion 587, Rule 3.05 prohibits such private communications because the board is the entity that will be acting as a "tribunal," i.e., acting in a judicial capacity in deciding the permit application. At this stage, after the client has decided to apply for a permit, the matter is "pending" within the meaning of Rule 3.05(c)(2). Therefore, the lawyer is not permitted to communicate privately with members of the board about the client's anticipated permit application even though the permit application has not yet been filed. Such conduct is prohibited for essentially the same reasons that a lawyer is not permitted to communicate privately with members of the Texas Supreme Court about a planned petition to the Court before the petition is actually filed with the Court. It should be noted that Rule 3.05(b) allows a lawyer to communicate ex parte with the agency's board in three specific situations:

> "(1) in the course of official proceedings in the cause;
> (2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;
> (3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer."

The Committee is of the opinion that the filing of an application for a permit is a "matter" for purposes of Rule 3.05 in all cases where the application potentially requires discretionary action by the agency board acting as a "tribunal." As set forth in the Terminology section of the Texas Disciplinary Rules of Professional Conduct, the term "tribunal" "denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy." Thus, in cases where the permit sought involves discretionary action by the agency board, there will almost always exist the realistic possibility of a dispute or controversy as to whether or on what terms the permit should be granted. When there is a realistic possibility of a dispute or controversy, either with the agency staff or with one or more third parties, the permit application will constitute a "matter" and communications by lawyers both before and after the actual filing of the application will be subject to Rule 3.05. Rule 3.05 and the foregoing analysis will not however apply if the permit-granting process involves purely

ministerial, as contrasted with discretionary, action by the agency. In cases of purely ministerial action, the granting of the permit sought is mandated by applicable law or regulation when certain clearly defined requirements are met. There is in these cases no realistic possibility of a "dispute or controversy" that would require a discretionary decision by the agency board. In such cases the permit application will not involve a determination by a "tribunal" as defined in the Texas Disciplinary Rules and hence Rule 3.05 concerning communications with a "tribunal" on a "matter" will not apply.

In most cases where discretionary action by an agency board may be involved, the question of at what point a "matter" first becomes "pending" under Rule 3.05(c) will be a question of fact that will have to be determined in each case. In the circumstances here considered, that determination does not turn on when the "tribunal" is selected or when it becomes reasonably foreseeable that the tribunal will be selected because the tribunal (the board of the state agency) is selected either by the issuance of the regulation or by the prior passage of other governing legislation or regulation. In these circumstances, when the matter becomes pending turns on when the client and the lawyer decide to pursue a permit application. Before that time, the matter would not be pending. For example, if the client merely asked the lawyer about the requirements for obtaining a permit, there would not at that time be a pending matter. However, once it appears reasonably clear that the client will seek to file a permit application, the matter is pending. Before the matter is pending, a lawyer would have no reason to have an ex parte communication with the board or one of its members to try to influence the board's decision on the matter. At that stage, a lawyer might make a general inquiry about how decisions are made and what factors are relevant but any such inquiry would be solely for the purpose of gathering information. If, however, a lawyer's private communication attempted to persuade a member of the board regarding how a decision should be made or what factors should be relevant and the lawyer had a client whose interests were aligned with the lawyer's comments, such a conversation would evidence the fact that there was a pending matter and that the lawyer was attempting, ex parte, to influence the board's decision, in violation of Rule 3.05.

By contrast, as noted in Opinion 587, the lawyer may contact employees of and attorneys for the agency, other than members of the board, before and after the permit application is filed for a variety of reasons relating to the permit application. Those contacts may be used to discuss the requirements of the application, its processing, means for complying with regulatory requirements, determining the agency's position with respect to the requested permit, obtaining information or evidence from the agency, and dealing with any third parties that may join in the matter. As in any contested matter, it is permissible to communicate with another party in a matter (as contrasted with the decision maker) to attempt to influence the party's position on issues in dispute. So long as such communications are not in fact indirect communications that seek to influence the decision-making board and that would hence be violations of Rule 3.05 if the communications were directly with the board, Rule 3.05 does not prohibit the communications. For example, there would be no violation of Rule 3.05 if, in an attempt to come to an agreement on an application, the lawyer discussed with staff and lawyers of the agency, either before or after the application was filed, permit restrictions that could be jointly proposed to the agency's board by the applicant and the agency's staff. On the other hand, there would be a violation of Rule 3.05 if the applicant's lawyer met with a staff member or lawyer of the agency, before or after the permit application was filed, and asked the staff member or lawyer

to convey privately to a member of the agency's board that the granting of the requested permit was very important to the lawyer and the lawyer's client.

The requirements of Rule 3.05 as discussed in this opinion and in Opinion 587 would apply to lawyers representing any party that ultimately participates in the permit-application case, including lawyers representing the agency itself. Again, it is important to note that this opinion considers only the requirements of Rule 3.05 and does not consider the impact of any other law or regulation that in the particular circumstances may apply to a lawyer, the lawyer's client, an agency lawyer, or any other person involved in a matter.

The last issue to address is whether the lawyer's client may have ex parte communications with members of the board before filing the permit application when the lawyer is not allowed to do so. Rule 3.05 governs only the conduct of lawyers and does not apply to a non-lawyer client. Rule 3.05 thus places no restrictions on the actions of such a client. Concerns have been expressed about the fact that Rule 3.05 as so interpreted gives rise to different standards for the conduct of lawyers and for the conduct of lawyers' clients. In fact, that is exactly what the Rules normally do. The Texas Disciplinary Rules of Professional Conduct regulate the conduct of lawyers but not their clients. Lawyers are prohibited by the Rules from doing many things that are permissible in the case of non-lawyers.

Of course, lawyers may not use the fact that the Texas Disciplinary Rules do not apply to non-lawyers as a basis for claiming that lawyers are permitted to cause their clients to accomplish indirectly what lawyers are prohibited from doing directly. Rule 3.05's prohibition against ex parte communications with a decision maker for the purpose of trying to influence the decision maker regarding a matter also prohibits the lawyer from causing another to communicate privately with a decision maker in order to influence that decision maker. Rule 3.05(b) and Rule 8.04(a)(1).

CONCLUSION

Rule 3.05 of the Texas Disciplinary Rules of Professional Conduct does not apply to ex parte communications between a lawyer and members of a state agency's board (the agency's decision maker) when the board is considering whether to act in a legislative capacity to adopt a regulation. After a regulation has been adopted, Rule 3.05 prohibits, with limited specified exceptions, a lawyer from communicating privately with members of the board of the state agency for the purpose of influencing the board's decision on a permit application that the lawyer and the client are planning to file. Rule 3.05 and Rule 8.04(a)(1) also prohibit the lawyer from causing another, including the client, to communicate privately with members of the board of the state agency for the purpose of influencing the board in its decision regarding a planned permit application. The Texas Disciplinary Rules of Professional Conduct apply only to Texas lawyers and, therefore, do not govern the conduct of non-lawyer clients acting independently of their lawyers. This opinion clarifies and amplifies the conclusions of Professional Ethics Committee Opinion 587 (May 2009).

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ceeding as parties at their own request and thereby waived any claim of liability from immunity, and Commission had power under Administrative Procedure Act (APA) to assess costs among parties admitted to contested case. Smith v. Houston Chemical Services, Inc. (App. 3 Dist. 1994) 872 S.W.2d 252, rehearing overruled, writ granted, writ withdrawn, writ denied, rehearing of writ of error overruled. Administrative Law And Procedure ⚿ 512

§ 2001.060. Record

The record in a contested case includes:

(1) each pleading, motion, and intermediate ruling;

(2) evidence received or considered;

(3) a statement of matters officially noticed;

(4) questions and offers of proof, objections, and rulings on them;

(5) proposed findings and exceptions;

(6) each decision, opinion, or report by the officer presiding at the hearing; and

(7) all staff memoranda or data submitted to or considered by the hearing officer or members of the agency who are involved in making the decision.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:

Acts 1975, 64th Leg., p. 136, ch. 61.
Vernon's Ann.Civ.St. art. 6252–13a, § 13(f).

Library References

Administrative Law and Procedure ⚿506.
Westlaw Topic No. 15A.

C.J.S. Public Administrative Law and Procedure §§ 295 to 296.

Research References

Encyclopedias

TX Jur. 3d Administrative Law § 154, Transcript; Record.

Forms

2 West's Texas Forms § 4.37, Record.

Notes of Decisions

In general 1

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1. In general

On review of Railroad Commission's decision authorizing replacement gas well on legal subdivision with substandard acreage, agency record did not have to include transcripts of public meetings at which Commissioners discussed with the hearing examiner his proposal for decision, the evidence and law, and the possible terms of a final order, where hearing examiner did not communicate to the Commissioners, in the two public meetings, anything not otherwise contained in the record or the proposal for decision itself. Exxon Corp. v. Railroad Com'n of Texas (App. 3 Dist. 1999) 993 S.W.2d 704, rehearing overruled. Mines And Minerals ⚿ 92.35

§ 2001.061. Ex Parte Consultations

(a) Unless required for the disposition of an ex parte matter authorized by law, a member or employee of a state agency assigned to render a decision or

to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or a representative of those entities, except on notice and opportunity for each party to participate.

(b) A state agency member may communicate ex parte with another member of the agency unless prohibited by other law.

(c) Under Section 2001.090, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may communicate ex parte with an agency employee who has not participated in a hearing in the case for the purpose of using the special skills or knowledge of the agency and its staff in evaluating the evidence.

Added by Acts 1993, 73rd Leg., ch. 268, § 1, eff. Sept. 1, 1993.

Historical and Statutory Notes

Prior Laws:
Acts 1975, 64th Leg., p. 136, ch. 61.
Acts 1977, 65th Leg., p. 1959, ch. 780, § 1.
Vernon's Ann.Civ.St. art. 6252–13a, § 17.

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605 S.W.2d 740
(Cite as: 605 S.W.2d 740)

Court of Civil Appeals of Texas, Austin.
FIRST SAVINGS & LOAN ASSOCIATION OF BORGER, Appellant,
v.
L. Alvis **VANDYGRIFF**, Savings & Loan Commissioner of Texas et al., Appellees.

No. 13215.
Sept. 24, 1980.
Rehearing Denied Oct. 15, 1980.

From judgment of the 98th Judicial District Court, Travis County, Pete Lowry, P. J., sustaining savings and loan commissioner's order granting charter for savings and loan association, another savings and loan association appealed. The Court of Civil Appeals, Shannon, J., held that: (1) applicants' conduct, which took place after commissioner denied first application for a charter and before applicants refiled application and which consisted of visiting with commissioner and giving him "different view" of economic conditions of the area, constituted a violation of statute providing in effect that members or employees of agency assigned to render decision in contested case could not communicate with any party except on notice and opportunity for all parties to participate, and (2) the impropriety was not cured by fact that the ex parte communication was disclosed at the administrative hearing.

Reversed and rendered.

West Headnotes

[1] Administrative Law and Procedure 15A 490

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak489 Decision
15Ak490 k. Conformity to Pleadings, Evidence and Findings. Most Cited Cases

Administrative order must be grounded on evidence taken at hearing and on facts officially noticed by hearings officer in record of the hearing; ex parte communications may not be a basis for such an order. Vernon's Ann.Civ.St. arts. 852a, § 11.12(5)(b), 6252–13a, § 17.

[2] Building and Loan Associations 66 3.1(2)

66 Building and Loan Associations
66k3.1 Charter, Certificate, License, or Other Authority
66k3.1(2) k. Proceedings. Most Cited Cases
(Formerly 66k3.2)

Applicants' conduct, which took place after savings and loan commissioner denied application for charter for savings and loan association and before applicants refiled application and which consisted of visiting with commissioner and giving him "different view" of the economic conditions in the area, constituted violation of statute providing that members or employees of agency assigned to render decision in contested case could not communicate with any party except on notice and opportunity for all parties to participate, in light of fact that, though there was no formal contested case pending when applicants met with commissioner, the two proceedings were, in effect, one ongoing application. Vernon's Ann.Civ.St. art. 6252–13a, § 17.

[3] Administrative Law and Procedure 15A 750

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak750 k. Burden of Showing Error. Most Cited Cases

Party complaining in regard to an alleged violation of statute, which provides in effect that mem-

bers or employees of an agency assigned to render decision in contested case may not communicate with any party except on notice and opportunity for all parties to participate, does not have burden of demonstrating harm by showing extent to which the official was persuaded by the secret information, but, rather, it is to be presumed that the separate meeting has resulted in finding precipitating the administrative order even though the order may recite the opposite. Vernon's Ann.Civ.St. art. 6252–13a, § 17.

[4] Building and Loan Associations 66 ⇨3.1(2)

66 Building and Loan Associations
66k3.1 Charter, Certificate, License, or Other Authority
66k3.1(2) k. Proceedings. Most Cited Cases
(Formerly 66k3.2)

Impropriety consisting of fact that certain applicants, who sought charter for savings and loan association, visited with savings and loan commissioner and gave him information in regard to economic conditions of area in question was not cured by fact that such ex parte communication between applicants and commissioner was disclosed at the administrative hearing. Vernon's Ann.Civ.St. art. 6252–13a, § 17.

***740** Dudley D. McCalla, Heath, Davis & McCalla, Austin, for appellant.

***741** Mark White, Atty. Gen., Yolanda Martin, Asst. Atty. Gen., Larry Temple, Austin, for appellees.

SHANNON, Justice.

The opinion of this Court handed down on August 6, 1980, is withdrawn, and the following opinion replaces it.

First Savings and Loan Association of Borger, Texas, has appealed from the judgment of the district court of Travis County sustaining the order of the Savings and Loan Commissioner of Texas granting a charter for Citizens Security Savings and Loan Association to be located in Borger. Appellant is First Savings and Loan Association, and appellees are the proposed association and L. Alvis **Vandygriff**, Savings and Loan Commissioner of Texas.

Appellant attacks the judgment by eight points of error. The crucial issue on appeal is stated in point of error two: the district court erred in failing to hold that the course of ex parte actions and conduct pursued by the organizers of the proposed association invalidated the Commissioner's order.

The Administrative Procedure and Texas Register Act, Tex.Rev.Civ.Stat.Ann. art. 6252-13a s 17 (1970), provides:

> "Unless required for the disposition of ex parte matters authorized by law, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not communicate, directly or indirectly, in connection with any issue of fact or law with any agency, person, party, or their representatives, except on notice and opportunity for all parties to participate. An agency member may communicate ex parte with other members of the agency, and pursuant to the authority provided in Subsection (q) of Section 14, members or employees of an agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may communicate ex parte with employees of the agency who have not participated in any hearing in the case for the purpose of utilizing the special skills or knowledge of the agency and its staff in evaluating the evidence."

The organizers of the proposed association filed a charter application in 1978. The Commissioner heard the application in June and entered an order denying the application in August, 1978. The Commissioner overruled the applicant's motion for rehearing on August 17, 1978.

During the first week in September, 1978, and

during the absence of counsel, five of the disappointed organizers came to Austin and visited with the Commissioner, giving him a "different view" of economic conditions of the Borger area than that reflected in the order denying the application. Those persons told the Commissioner that the economy of Borger was better at that time than it had been in thirty years. They suggested that two new shopping centers were going to be located in Borger and that such location would create a "real spurt in the economy." The organizers further told the agency head about the expansion of the Phillips Petroleum Company in the Borger area. No one representing appellant was advised of or was present at this parley with the Commissioner.

After their conference with the Commissioner, and in October, 1978, the organizers elected to refile the application with the Commissioner. In this connection, the charter applicants left the capital funds from the first application on deposit and used the stock subscription forms from the prior application. On cross-examination, Harold Orman, one of the organizing directors of the proposed association agreed that he viewed the entire proceeding "as just one ongoing application." In March, 1979, the Commissioner entered his order approving the charter application.

The Commissioner's order recited the fact that the organizers had met with him in September, 1978:

> "(The) record forthrightly reflects that some of the charter applicants met with the Commissioner in September, 1978. That was a time when a previous application (which was turned down) had become*742 final and prior to the filing of the present application. These applicants had nothing pending before the Commissioner at that time. The Commissioner would note the existence of that meeting only in order to say that his decision in this case was based only upon the record as complied by all of the parties at the January 31 and February 1, 1979, hearing."

Appellees state that at the time of the discussion between the organizers and the Commissioner, the organizers had no application pending before the Commissioner. Accordingly, appellees argue that the ex parte communication could not and did not relate to a contested case or any matter pending before the Commissioner and, as such, was not prohibited by s 17.

[1] An administrative order must be grounded upon evidence taken at the hearing and upon facts officially noticed by the hearings officer in the record of such hearing. Gerst v. Nixon, 411 S.W.2d 350 (Tex.1966); Tex.Rev.Civ.St.Ann. art. 852a s 11.12(5)(b) (1964). Recognition of this fundamental rule necessarily means that ex parte communications may not be a basis for such order.

[2] Section 17 codified the preexisting rule in Texas that condemned ex parte communications by parties with officials charged with the duty of deciding contested issues. Lewis v. Guaranty Federal Savings and Loan Association, 483 S.W.2d 837 (Tex.Civ.App.1972, writ ref'd n. r. e.). The statutory prohibition against ex parte communications is, of course, consistent with the rules governing administrative hearings in this State, and, in addition, is recognition that such communications discredit the administrative process and undermine public confidence in government.

It is true, as urged by appellees, that at the time of the meeting the organizers had no formal contested case pending before the Commission. Nevertheless, it is also true that shortly after the parley with the Commissioner, the same organizers once again filed with the Commissioner their application for a charter for an association with the same name for the same location, Borger, Texas. The organizers placed in no new capital funds because the capital funds from the first application were still placed on account to the credit of the proposed association. The applicants also used the stock subscription forms from the prior application in the second application. This Court agrees with the organizers that, indeed, the first and second proceed-

ings before the Commissioner were, in effect, "just one ongoing application," and concludes that the applicants acted contrary to the command of s 17.

On motion for rehearing, appellees insist that the holding of this Court places an unreasonable and unnecessary restraint upon communication between agencies and the public. To the contrary, the holding does not hinder proper communications between agencies and the public. Pursuant to s 17, the holding does inhibit communications of the character presented by the facts of this appeal.

[3] It is not the burden of the complaining party to demonstrate harm by showing the extent, if any, to which the official was persuaded by the secret information. Instead, it is presumed that the separate meeting resulted in findings that precipitated the administrative order, Lewis v. Guaranty Federal Savings and Loan Association, supra, even though the administrative order may recite the opposite. One reason that the complaining party should not have the burden to show harm, is that it could be discharged only with great difficulty in view of the rule that the party may not probe the thought processes of the administrative officer. United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1940); City of Frisco v. Texas Water Rights Commission, 579 S.W.2d 66 (Tex.Civ.Ap.1979, writ ref'd n. r. e.).

[4] Appellees contend, finally, that any impropriety resulting from the ex parte communication was cured by the disclosure at the administrative hearing. Contrary to that argument, disclosure of the ex parte consultation does not somehow purge the ***743** parties' misconduct. Moreover, the opposing party is placed at a disadvantage in that an opportunity to controvert ex parte evidence afforded weeks or months after its communication to the decision maker is far less effective than timely cross-examination following the admission of evidence.

The judgment of the district court is reversed, and the judgment that the district court should have entered is here rendered that the order of the Commissioner be set aside and held for naught.

Reversed and Rendered on Motion for Rehearing.

PHILLIPS, C. J., not sitting.

Tex.Civ.App., 1980.
First Sav. & Loan Ass'n of Borger v. Vandygriff
605 S.W.2d 740

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KEYCITE

First Sav. & Loan Ass'n of Borger v. Vandygriff, 605 S.W.2d 740 (Tex.Civ.App.-Austin,Sep 24, 1980) (NO. 13215)

History

Direct History

=> 1 **First Sav. & Loan Ass'n of Borger v. Vandygriff,** 605 S.W.2d 740 (Tex.Civ.App.-Austin Sep 24, 1980) (NO. 13215)

Judgment Reversed by

H 2 Vandygriff v. First Sav. and Loan Ass'n of Borger, 617 S.W.2d 669 (Tex. Jun 10, 1981) (NO. B-9920)

5

compliance. This situation can arise in criminal cases, for example, where the court orders disclosure of the identity of an informant to the defendant and the government decides that it would prefer to allow the case to be dismissed rather than to make that disclosure. A lawyer should consult with a client about the likely consequences of any such act of disobedience should the client appear to be inclined to pursue that course; but the final decision in that regard rests with the client.

Rule 3.05 Maintaining Impartiality of Tribunal

A lawyer shall not:

(a) seek to influence a tribunal concerning a pending matter by means prohibited by law or applicable rules of practice or procedure;

(b) except as otherwise permitted by law and not prohibited by applicable rules of practice or procedure, communicate or cause another to communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter other than:

(1) in the course of official proceedings in the cause;

(2) in writing if he promptly delivers a copy of the writing to opposing counsel or the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(c) For purposes of this rule:

(1) Matter has the meanings ascribed by it in Rule 1.10(f) of these Rules;

(2) A matter is pending before a particular tribunal either when that entity has been selected to determine the matter or when it is reasonably foreseeable that that entity will be so selected.

Comment:

Undue Influence

1. Many forms of improper influence upon tribunals are proscribed by criminal law or by applicable rules of practice or procedure. Others are specified in the Texas Code of Judicial Conduct. A lawyer is required to be familiar with, and to avoid contributing to a violation of, all such provisions. See also Rule 3.06.

2. In recent years, however, there has been an increase in alternative methods of dispute resolution, such as arbitration, for which the standards governing a lawyer's conduct are not as well developed. In such situations, as in more traditional settings, a lawyer should avoid any conduct that is or could reasonably be construed as being intended to corrupt or to unfairly influence the decision-maker.

Ex Parte Contacts

3. Historically, ex parte contacts between a lawyer and a tribunal have been subjected to stringent control because of the potential for abuse such contacts present. For example, Canon 3A(4) of the Texas Code of Judicial Conduct prohibits many ex parte contacts with judicial officials. A lawyer in turn violates Rule 8.04(a)(6) by communicating with such an official in a manner that causes that official to violate Canon 3A(4). This rule maintains that traditional posture towards ex parte communications and extends it to the new settings discussed in paragraph 2 of this Comment.

4. There are certain types of adjudicatory proceedings, however, which have permitted pending issues to be discussed ex parte with a tribunal. Certain classes of zoning questions, for example, are frequently handled in that way. As long as such contacts are not prohibited by law or applicable rules of practice or procedure, and as long as paragraph (a) of this Rule is adhered to, such ex parte contacts will not serve as a basis for discipline.

5. For limitations on the circumstances and the manner in which lawyers may communicate or cause another to communicate with veniremen or jurors, see Rule 3.06.

Rule 3.06 Maintaining Integrity of Jury System

(a) A lawyer shall not:

> (l) conduct or cause another, by financial support or otherwise, to conduct a vexatious or harassing investigation of a venireman or juror; or
>
> (2) seek to influence a venireman or juror concerning the merits of a pending matter by means prohibited by law or applicable rules of practice or procedure.

(b) Prior to discharge of the jury from further consideration of a matter, a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected or any juror or alternate juror, except in the course of official proceedings.

(c) During the trial of a case, a lawyer not connected therewith shall not communicate with or cause another to communicate with a juror or alternate juror concerning the matter.

relationship test is defended by asserting that to require a showing that confidences of the first client were in fact used for the benefit of the subsequent client as a condition to procedural disqualification would cause disclosure of the confidences that the court seeks to protect. A lawyer is not subject to discipline under Rule 1.05(b)(l), (3), or (4), however, unless the protected information is actually used. Likewise, a lawyer is not subject to discipline under this Rule unless the new representation by the lawyer in reasonable probability would result in a violation of those provisions.

9. Whether the substantial relationship test will continue to be employed as a standard for procedural disqualification is a matter beyond the scope of these Rules. See Preamble: Scope. The possibility that such a disqualification might be sought by the former client or granted by a court, however, is a matter that could be of substantial importance to the present client in deciding whether or not to retain or continue to employ a particular lawyer or law firm as its counsel. Consequently, a lawyer should disclose those possibilities, as well as their potential consequences for the representation, to the present client as soon as the lawyer becomes aware of them; and the client then should be allowed to decide whether or not to obtain new counsel. See Rules 1.03(b) and 1.06(b).

10. This Rule is primarily for the protection of clients and its protections can be waived by them. A waiver is effective only if there is consent after disclosure of the relevant circumstances, including the lawyer's past or intended role on behalf of each client, as appropriate. See Comments 7 and 8 to Rule 1.06.

Rule 1.10 Successive Government and Private Employment

(a) Except as law may otherwise expressly permit, a lawyer shall not represent a private 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 consents after consultation.

(b) No lawyer in a firm with which a lawyer subject to paragraph (a) is associated may knowingly undertake or continue representation in such a matter unless:

> (1) The lawyer subject to paragraph (a) is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is given with reasonable promptness to the appropriate government agency.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person or legal entity.

(d) After learning that a lawyer in the firm is subject to paragraph (c) with respect to a particular matter, a firm may undertake or continue representation in that matter only if that disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.

(e) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

> (1) Participate in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
>
> (2) Negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially.

(f) As used in this rule, the term matter does not include regulation-making or rule-making proceedings or assignments, but includes:

> (1) Any adjudicatory proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge accusation, arrest or other similar, particular transaction involving a specific party or parties; and
>
> (2) any other action or transaction covered by the conflict of interest rules of the appropriate government agency.

(g) As used in this rule, the term confidential government information means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

(h) As used in this Rule, Private Client includes not only a private party but also a governmental agency if the lawyer is not a public officer or employee of that agency.

(i) A lawyer who serves as a public officer or employee of one body politic after having served as a public officer of another body politic shall comply with paragraphs (a) and (c) as if the second body politic were a private client and with paragraph (e) as if the first body politic were a private client.

Comment:

1. This Rule prevents a lawyer from exploiting public office for the advantage of a private client.

16. Moreover, these rules are not intended to govern or affect judicial application of either the attorney-client or work product privilege. The fact that in exceptional situations the lawyer under the Rules has a limited discretion to disclose a client confidence does not vitiate the proposition that, as a general matter, the client has a reasonable expectation that information relating to the client will not be voluntarily disclosed and that disclosure of such information may be judicially compelled only in accordance with recognized exceptions to the attorney-client and work product privileges.

Terminology

"Adjudicatory Official" denotes a person who serves on a Tribunal.

"Adjudicatory Proceeding" denotes the consideration of a matter by a Tribunal.

"Belief" or "Believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Competent" or "Competence" denotes possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client.

"Consult" or "Consultation" denotes communication of information and advice reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Firm" or "Law firm" denotes a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government.

"Fitness" denotes those qualities of physical, mental and psychological health that enable a person to discharge a lawyer's responsibilities to clients in conformity with the Texas Disciplinary Rules of Professional Conduct. Normally a lack of fitness is indicated most clearly by a persistent inability to discharge, or unreliability in carrying out, significant obligations.

"Fraud" or "Fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Knowingly," "Known," or "Knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Law firm" : see Firm.

"Partner" denotes an individual or corporate member of a partnership or a shareholder in a law firm organized as a professional corporation.

"Person" includes a legal entity as well as an individual.

"Reasonable" or "Reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "Reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Should know" when used in reference to a lawyer denotes that a reasonable lawyer under the same or similar circumstances would know the matter in question.

"Substantial" when used in reference to degree or extent denotes a matter of meaningful significance or involvement.

"Tribunal" denotes any governmental body or official or any other person engaged in a process of resolving a particular dispute or controversy. Tribunal includes such institutions as courts and administrative agencies when engaging in adjudicatory or licensing activities as defined by applicable law or rules of practice or procedure, as well as judges, magistrates, special masters, referees, arbitrators, mediators, hearing officers and comparable persons empowered to resolve or to recommend a resolution of a particular matter; but it does not include jurors, prospective jurors, legislative bodies or their committees, members or staffs, nor does it include other governmental bodies when acting in a legislative or rule-making capacity.

I. CLIENT-LAWYER RELATIONSHIP

Rule 1.01 Competent and Diligent Representation

(a) A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence, unless:

(1) another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter; or

(2) the advice or assistance of the lawyer is reasonably required in an emergency and the lawyer limits the advice and assistance to that which is reasonably necessary in the circumstances.

(b) In representing a client, a lawyer shall not:

(1) neglect a legal matter entrusted to the lawyer; or

(2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients.

6

PROCEDURE FOR REQUESTING OPINIONS FROM THE PROFESSIONAL ETHICS COMMITTEE FOR THE STATE BAR OF TEXAS

1. A written request for a formal opinion will be acted upon only if it includes the following information:

   a) A scenario of background facts in the hypothetical;
   b) The question(s) presented;
   c) A discussion of applicable authority;
   d) A statement that the question(s) presented is/are not in litigation.

   The brief need not be exhaustive, but should focus on specific disciplinary rules that may be involved, and any case law or prior opinions that apply.

2. The request should be submitted to Professional Ethics Committee, Attention: Michelle Jordan, Attorney Liaison, Office of the Chief Disciplinary Counsel, State Bar of Texas, P.O. Box 12487, Austin, Texas 78711, for forwarding to the PEC. The Chief Disciplinary Counsel's Office handles the administrative duties of the PEC, and will assign the request randomly to a Committee member.

3. The brief requirement may be waived if it is clear that there is no relevant authority on point or if the request is instigated by a State Bar officer or committee. Useful research sources are:

   a) The most recent current comprehensive index of all the ethics opinions to date are published by The Texas Center for Legal Ethics and Professionalism. The opinions should be obtainable at any law library. Also, copies are on the Internet at WWW.TXETHICS.ORG;
   b) Texas Lawyers Professional Ethics, a publication of the Texas Young Lawyer's Association;
   c) Baylor Law Review, Vol. 18, No. 2 (Spring 1966) and Vol. 25, No. 5 (Winter 1972);
   d) The Texas Attorney General's Office also issues written opinions as requested.

4. The PEC may dismiss a pending opinion request at any time upon finding that the question(s) presented is in litigation, that the request concerns interpretation of legislation, that the request concerns interpretation of the unauthorized practice of law, or if the request is covered by a prior PEC opinion.

5. The PEC will not issue an opinion on a particular lawyer advertising, but will consider a general type of lawyer advertising.

The Professional Ethics Committee for the State Bar of Texas is the only entity authorized to issue written ethics opinions in Texas. However, the Chief Disciplinary Counsel's Office maintains an ethics helpline for members of the State Bar, at (800) 532-3947, for informal verbal ethics opinions.

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PROFESSIONAL ACTIVITIES

Shareholder, Graves, Dougherty, Hearon & Moody, P.C., 2000-present: business and regulatory litigation
Listed in The Best Lawyers in America®, Administrative Law (2010, 2011)
Member, State Bar of Texas, Litigation Section, Environment and Natural Resources Section
Member, Austin Bar Association, Administrative Law; Environment, Natural Resources & Water; and Oil, Gas & Mineral Sections
Member, American Bar Association, Litigation Section; Section of Environment, Energy and Resources)
Member, Alabama State Bar (President, Environmental Law Section, 1998-1999)

SELECTED LAW-RELATED PUBLICATIONS

Author, "Climate Change and Texas Water Regulation," State Bar of Texas, The Changing Fact of Water Rights 2011, February 2011.
Author/Speaker, "Federal Preemption in Regulatory Litigation," Fifth Annual Advanced Texas Administrative Law Seminar of the Administrative and Public Law Section of the State Bar and the University of Texas School of Law, September 2010.
Author/Speaker, Environmental Ethics "I've Got No Strings," 22nd Annual Texas Environmental Superconference, August 2010.
Co-Author, "As Is" In a Contaminated World (61 pages), 19th Annual Robert C. Sneed, TEXAS LAND TITLE INSTITUTE, December, 2009, San Antonio, Texas.
Author/Speaker, Complying with Storm Water and Surface Water Management Regulations, Texas Water Laws and Regulations, HalfMoon Seminars, April 30, 2009, Austin, Texas.
Author/Speaker, New Phase I Requirements for Real Estate Transactions: Implications of The New "All Appropriate Inquiries" Rule, State Bar of Texas 28th Annual Advanced Real Estate Law Course, June 29 – July 1, 2006, San Antonio, Texas.
Author/Speaker, Curious Characteristics of Karst: Legal Environmental Considerations, presented at the American Bar Association Section of Environment, Energy and Resources, October 3-7, 2001, Adam's Mark Hotel, St. Louis, Missouri.
Faculty Member and Author/Speaker, Recent Developments - Texas Water Law, The University of Texas School of Law 3rd Annual Conference on Land Use Planning Law, March 4-5, 1999, Austin, Texas.