

**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.