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**Clarifying Ex parte Communications:  
Ethics Opinion No. 604**

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**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

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