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## **EX PARTE CONTACTS WITH ADMINISTRATIVE AGENCIES**

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## **EX PARTE CONTACTS WITH ADMINISTRATIVE AGENCIES**

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This paper addresses a problem of importance to all lawyers who practice before Texas administrative agencies: when is contact with agency decision makers and staff a prohibited ex parte contact? The problem is created by two advisory opinions of the Professional Ethics Committee of the State Bar of Texas. The opinions effectively overrule a Texas Supreme Court decision: the Court held that, under the Administrative Procedure Act, the ex parte prohibition does not apply until an application requiring a contested case hearing has been filed. Because the Committee's opinions are advisory opinions, there is no appellate remedy. This paper describes the problem, and raises the question of what administrative lawyers can do about it.

### **INTRODUCTION AND SUMMARY**

The Texas Administrative Procedure Act prohibits ex parte contacts with members or employees of an agency assigned to decide or make findings or conclusions in a contested case. The Texas Supreme Court in its 1981 *Vandygriff* decision held that this prohibition only applies in a "pending" case, and that no application was pending after the Savings and Loan Commissioner had denied one charter application and before the next application for the same town was filed.

Texas Disciplinary Rules of Professional Conduct Rule 3.05, adopted after *Vandygriff*, prohibits ex parte contacts with a "tribunal" "concerning a "pending matter" "by means prohibited by law or applicable rules of practice and procedure," "except as otherwise permitted by law and not prohibited by applicable rules of practice and procedure."

In May 2009 the Professional Ethics Committee of the State Bar of Texas issued an advisory opinion concluding that, despite the Administrative Procedure Act as construed in *Vandygriff*, a contact by a lawyer with an agency decision maker would violate Rule 3.05 even if there were no pending contested case, if it were "reasonably foreseeable" that the subject of the discussions might become a contested case. See Opinion No. 587.<sup>1</sup> In January 2011, in response to the concerns of many administrative lawyers, the Committee issued a second advisory opinion, Opinion No. 604.<sup>2</sup> Opinion No. 604 is an express "clarification and amplification of the conclusions set forth in Opinion No. 587."

As set out here, the legal effect of advisory Opinion No. 587 is to overrule *Vandygriff*, a Texas Supreme Court decision, with no provision for appellate review. The practical effect is to chill contacts that have long been regarded as appropriate or necessary to dealing with agencies that have legislative (rulemaking) and executive (e.g., enforcement, grant-making) powers as well as powers to decide contested cases. Opinion No. 604 does nothing to solve either problem and may make the practical problems created by the Opinion more difficult.

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<sup>1</sup> Opinion No. 587 is attached as [Attachment A](#).

<sup>2</sup> Opinion No. 604 is attached as [Attachment B](#).

## **I. ADMINISTRATIVE PROCEDURE ACT**

### **A. The APA's ex parte prohibition -- Section 2001.061**

The Texas Administrative Procedure Act (APA), TEX. GOV'T CODE chapter 2001, was originally adopted in 1975. In 1975 the APA provided, and it continues to provide, that:

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.

TEX. GOV'T CODE § 2001.061(a).

The APA defines a "contested case" 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).

The APA provides three exceptions to the general prohibition against ex parte contacts in contested cases: (1) communications "required for the disposition of an ex parte matter authorized by law"; (2) communications between state agency members, "unless prohibited by other law"; and (3) communications 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." *Id.* § 2001.061(a), (b), (c).

### **B. The Texas Supreme Court's *Vandygriff* decision**

In *Vandygriff v. First Savings & Loan Association of Borger*, 617 S.W.2d 669 (Tex. 1981),<sup>3</sup> the Texas Supreme Court interpreted the APA's ex parte prohibition.

In *Vandygriff*, citizens from Borger, Texas met with the Savings and Loan Commissioner after their charter application for a savings and loan in Borger, Texas was denied. The unsuccessful applicants wanted "to find out what (they) had done wrong." *Id.* at 671. After the meeting with the Commissioner, and after another institution had submitted an application for another savings and loan in Borger, the citizens filed another application for a savings and loan charter. The application from the Borger citizens was granted and the other institution's application was denied. The second institution filed suit against Commissioner Vandygriff. *Id.* The Texas Supreme Court held the meeting between the Commissioner and the citizens 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 Supreme Court distinguished an earlier case, in which the Austin Court of Appeals held that parties' due process rights were violated when, after a hearing and before issuing an

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<sup>3</sup> The *Vandygriff* decision is attached as Attachment C.

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