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).