DUAL REPRESENTATION AND *EX PARTE* COMMUNICATIONS: ETHICAL ISSUES IN WATER LAW AND RELATED REGULATORY SCENARIOS

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Mr. McCarthy was active during the 83rd Legislative Session working with clients to facilitate the availability of water resources to address the State's identified demands, including streamlining of regulations inhibiting the development of brackish water resources and storage of both fresh water and treated wastewater using Aquifer Storage and Recovery.

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DUAL REPRESENTATION AND *EX PARTE* COMMUNICATIONS: ETHICAL ISSUES IN WATER LAW AND RELATED REGULATORY SCENARIOS[1]

Edmond R. McCarthy, Jr.[2]

> **"Anyone who can solve the problem of water will be worthy of two Nobel prizes - one for peace and one for science."**
>
> **President John F. Kennedy**[3]

I. INTRODUCTION:

Water is a precious, limited resource in Texas. Former Supreme Court Chief Justice Jack Pope once described Texas water and the law applicable to it as "the story of its droughts."[4] Water is a property right capable of being bought and sold, as well as condemned. Accordingly, a working knowledge of Texas water law and the relationship of that body of law to Texas real property law and real estate transactions is imperative for the Texas practitioner.

Today, Texas has a supply of approximately 17 million acre-feet[5] of developed water resources. By 2060 the projected water demand in Texas will be 22 million plus acre-feet.[6] The TWDB, the state agency charged with the development of the State Water Plan, has predicted that unless new water supply sources are developed by the year 2060, the state will have an approximate 9 million acre-feet *shortfall* in the amount of water required to meet then-current demands in a reoccurrence of the drought of record.[7]

Dealing with water issues and, more importantly, the people and entities that "control" the water is something most every attorney in Texas will face at some point in their career. This paper is intended to provide an overview of some of the ethical issues attorneys will confront when dealing with water.

II. OVERVIEW OF TEXAS WATER REGULATORS:

Surface water is owned by the state and held in trust for the benefit of all of the people of the state.[8] Once "permitted" surface water becomes a property right of the permittee who perfects the permit. Groundwater is privately owned in Texas, but subject to the "Rule of Capture" and the lawful regulation by groundwater conservation districts and other governmental bodies.[9] In its natural state diffused water is the sheet flow from rainfall events falling across the land, and from a regulatory perspective is

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[1] This Paper is offered for informational purposes only. It is not intended to be, nor should it be construed as legal advice. Individuals with questions or issues related to the content of this paper, including water ownership, permitting and related matters should consult with their individual attorney for legal counsel on the specific matter(s).

[2] Ed McCarthy is a Partner in the Law Firm of Jackson, Sjoberg, McCarthy & Townsend, L.L.P., practicing primarily in water and water related matters. Mr. McCarthy represent landowners, industries, and public entities, including municipalities, water supply corporations, and water districts operating pursuant to Article XVI, Section 59, of the Texas Constitution. His representation has included matters involving the permitting, sales and leases of groundwater and surface water rights, water rights applications and contested cases before the Texas Commission on Environmental Quality. Mr. McCarthy also represents clients in the development of regional water supply projects, and the crafting of water rights and district legislation, and agency rules and regulations.

[3] Martin M. Cooper, *Water, Not Oil, Will Be Source of Conflict*; *Kaleidoscope Our Changing Valley*, 13 SAN FERN. V. BUS. J. 63, 63 (2008).

[4] *In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 441 (Tex. 1982).

[5] An "acre-foot" of water is the equivalent of 325,851 gallons of water, or the volume of water needed to cover an area one acre in size one foot deep in water. *See EAA v. Day*, 369 S.W.3d 814, 820 (Tex. 2012).

[6] *Id.* at 17.

[7] *See* TEXAS WATER CODE ANN § 16.051; 2012 WATER PLAN, at 17-18.

[8] *See* TEXAS WATER CODE § 11.021 . *See generally* Johnson, *The Continuing Voids in Texas Groundwater Law: Are Concepts and Terminology to Blame?*, 17 ST. MARY'S L.J. 1281, 1294-95 (1986) (analyzing groundwater law in Texas); McCarthy, *Environmental Flows: Water Development Perspective*, 34 ST. B. TEX. ENVTL. L.J. 248, 250-51 (Summer 2004) (discussing surface water and its public trust characteristic).

[9] *EAA v. Day*, 369 S.W.3d 814, 817-18, 828 (Tex. 2012); *see, e.g.*, TEXAS WATER CODE §§ 26.002, 35.003, 36.002; *Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 75-76 (Tex. 1999); *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 625-26 (Tex. 1996); *Friendswood Dev. Co. v. Smith-Southwest Indus.*, 576 S.W.2d 21, 26 (Tex. 1978); *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 800-01 (Tex. 1955); *Tex. Co. v. Burkett*, 296 S.W. 273, 277-78 (Tex. 1927); *Hous. & T.C. Ry. Co. v. East*, 81 S.W. 279, 281 (Tex. 1904). *See generally* McCarthy, *Texas Supreme Court Confirms Landowner's Ownership of Groundwater In Place*, The Water Report No. 99, at 19 (May 15, 2012), Drummond, Sherman & McCarthy, *The Rule of Capture in Texas—Still So Misunderstood After All These Years*, 37 TEX. TECH L. REV. 1 (2005) (discussing the development of the Rule of Capture and groundwater ownership in Texas).

neither surface water nor groundwater.[10] In its diffused state the water is the property of the landowner who may capture and beneficially use it without obtaining authorization from the state.[11] Once the sheet flows enter into a defined watercourse, however, the diffused water becomes "surface water" and is owned by the state.[12] Less well-developed in Texas jurisprudence is developed water, which can originate as either surface or groundwater. "Developed water" constitutes a new water source to the affected watercourse introduced to the watercourse by some man-made or artificial activity.[13]

1. *"State Surface Water"*:

State water is defined very broadly by statute:

> [W]ater of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the property of the state.[14]

Based upon this language, there is very little water flowing in a watercourse that is not presumptively owned by the state.[15] The Texas Commission on Environmental Quality (TCEQ) and its predecessor agencies have been designated by the Texas Legislature as the state's agent for administering and regulating surface water rights matters.[16]

To lawfully divert, store, or use state water for any purpose, a water right must be obtained from the state, unless the use is authorized as an exempt use.[17] It is illegal to "take, divert, or appropriate" state water for any purpose without authorization.[18] Unlawful use is subject to the imposition of civil penalties in the amount of up to $5,000 per day for each day the unlawful use continues.[19] It is also unlawful to sell a water right unless either the right (i) has been perfected, or (ii) the Commission has authorized the sale.[20] Authorization to use or to appropriate state water requires that one obtain a permit or hold a certificate of adjudication or a certified filing authorizing the use of the water.[21] Certificates of adjudication and, in particular, certified filings are historic evidences of the right to appropriate state water.[22]

A water rights permit grants a usufructuary right, or a "right of use," which authorizes the permittee to divert and use the water for specified beneficial purposes.[23] Title to the corpus of the water, however,

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[10] *See Dietrich v. Goodman*, 123 S.W.3d 413, 417 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

[11] *See id.*; *Raburn v. KJI Bluechip Invs.*, 50 S.W.3d 699, 704 (Tex. App.—Fort Worth 2001, no pet.). *See generally* ESSENTIALS OF TEXAS WATER RESOURCES 14 (1st ed., 2009).

[12] *See Dietrich, supra,* 123 S.W.3d at 417.

[13] *See* Booth, *Ownership of Developed Water Rights in Texas: A Property Right Threatened*, 17 ST. MARY'S L.J. 1181, 1189 (1986).

[14] *See* TEXAS WATER CODE § 11.021.

[15] *See* TEXAS WATER CODE § 11.021; *cf. id.* § 11.042(b) (authorizing the transport of groundwater based return flows in a watercourse without converting the same to "surface water").

[16] *See id.* §§ 5.012-.013.

[17] *See* Act of May 28, 2001, 77th Leg., R.S., Ch. 966, § 2.09, 2001 Tex. Gen. Laws 1880, 1886-87 (SB 2 amending § 11.142 of the TEXAS WATER CODE to authorize the impoundment of up to 200 acre-feet of water for fish and wildlife use similar to the existing domestic and livestock exemption); TEXAS WATER CODE §§ 11.121, 11.142, 11.1421, 11.1422, 11.303; 30 TEX. ADMIN. CODE §§ 297.21-297.30 (2012). The exceptions include the right for a person to construct on his property a dam or reservoir that will impound less than 200 acre-feet of water to be used for domestic and livestock (including wildlife) purposes. *See* TEXAS WATER CODE § 11.142 (noting SB 1 amended this section to authorize "temporary" impoundment of more than 200 acre-feet without obtaining a permit if the average storage over twelve months is 200 acre-feet or less). *See* Act of May 28, 2001, § 2.09, 2001 Tex. Gen. Laws at 1886-1887. Additionally, water may be diverted from the Gulf of Mexico at a rate not to exceed one acre-foot of water during a twenty-four hour period for purposes of facilitating drilling and producing oil and gas or conducting operations associated with such development and production. *See* TEXAS WATER CODE § 11.142. Reservoirs may be constructed without a permit if their sole purpose is sediment control as part of a surface coal mining operation under the Texas Surface Coal Mining Reclamation Act. *See* TEXAS NAT. RES. CODE Ch. 134; TEXAS WATER CODE § 11.142(c). Brackish or marine water may also be used without a permit for purposes of conducting mariculture activities. *See* TEXAS WATER CODE § 11.1421. Finally, a tax-exempt, non-profit corporation that owns a cemetery may divert up to 200 acre-feet of water a year from a river to irrigate the grounds of a cemetery, which borders the river and is more than 100 years old, and water may be impounded in sedimentation control ponds constructed in conjunction with surface coal mining operations. *See id.*; *see also* RG-141, *supra*, at 10-11.

[18] *See* TEXAS WATER CODE §§ 11.081, 11.082, 11.084; *cf. id.* § 11.121 (requiring a permit be obtained to use state water).

[19] *See id.* § 11.082.

[20] *See id.* §§ 11.081, 11.082, 11.084, 11.121.

[21] *Id.* §§ 11.307, 11.323.

[22] *See id.* § 11.081.

[23] *See In re Adjudication of the Water Rights of the Upper Guadalupe Segment of the Guadalupe River Basin*, 642 S.W.2d 438, 444-□45 (Tex. 1982); *Texas Water Rights*

remains in the state.[24] As against every other person other than the State, the permittee owns the water right and, upon perfection, holds it as a vested property right.[25] The measure of a perfected right under the prior appropriation doctrine is the maximum amount beneficially used, after reasonable development, pursuant to the appropriative claim.[26]

2. *"Groundwater"*:

Groundwater belongs to the surface owner.[27] The landowner has a constitutionally protected property right in the groundwater in place, but is subject to lawful regulation by governmental entities exercising police power jurisdiction over the development and production of groundwater, including groundwater districts.[28] It is important to note that the sale or lease of groundwater produced at the wellhead and groundwater rights in place are to be distinguished. The sale of groundwater at the wellhead, or after it has been produced, is a sale of real property, and the former is the sale of personal property.[29] The sale of groundwater rights involves the sale of the groundwater in place, or in situ, *i.e.*, beneath the surface of the property. The groundwater in place belongs to the owner of the surface of the property or surface estate.[30] In a conventional real estate transaction involving the sale of surface acreage, the conveyance also includes the groundwater in place, together with all the oil, gas, and other minerals, unless the same are expressly excepted from the conveyance.[31] The groundwater estate, however, like oil and gas, can be severed from the surface and sold separately.[32]

There are multiple issues confronting the landowner who desires to develop, sell or lease his groundwater, and/or protect it from third-party capture.[33] One of the biggest issues associated with those activities is the potential impact of groundwater conservation district regulation. The regulation of groundwater production by groundwater districts can also significantly impact the enjoyment, use, and/or value of the groundwater rights by the owners and/or prospective purchasers of those rights.

In 1917, the Texas voters passed article XVI, § 59 of the Texas Constitution, an amendment that has come to be known as the Conservation Amendment.[34] The amendment declared the conservation of the state's natural resources, including water, to be a public right and duty and imposed the obligation for the implementation of that policy upon the state Legislature.[35] Specifically, the Legislature was

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Commission v. Wright, 464 S.W.2d 642, 647–48 (Tex. 1971); *see generally Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (TEXAS CIV. App.-Austin 1974, no writ); *Lakeside Irrigation Co. v. Markham Irrigation Co.*, 285 S.W. 593, 596 (Tex. Comm'n App. 1926, op. adopted); Booth, *Ownership of Developed Water: A Property Right Threatened*, 17 St. Mary's L.J. 1181, 1184-85, 1187-88 (1986); Townsend, *Cancellation of Water Rights*, 17 St. Mary's L.J. 1217, 1218 (1985).

[24] *See South Texas Water Co. v. Bieri*, 247 S.W.2d 268, 272 (TEXAS CIV. App.-Galveston 1952, writ ref'd n.r.e.); Wells A. Hutchins, Texas Law of Water Rights 77-□81 (1966).

[25] *See* TEXAS WATER CODE §§ 11.025–.027; *Board of Water Engineers v. McKnight*, 229 S.W. 301 (Tex. 1921); *Guelker v. Hidalgo County Water Improvement District No. 6*, 269 S.W.2d 551 (TEXAS CIV. App.-San Antonio 1954, writ ref'd n.r.e.); *Harrell v. F.H. Vahlsing, Inc.*, 248 S.W.2d 762 (TEXAS CIV. App.-San Antonio 1952, writ ref'd n.r.e.); *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 679 (TEXAS CIV. App.-Austin 1974, no writ).

[26] *See In re Contests of City of Eagle Pass, to the Adjudication of Water Rights in Middle Rio Grande Basin and Contributing Texas Tributaries*, 680 S.W.2d 853 (Tex. App.-Austin 1984, writ ref'd n.r.e.).

[27] TEXAS WATER CODE § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817-18 (Tex. 2012).

[28] TEXAS WATER CODE § 36.002; *EAA v. Day*, 369 S.W.3d 814, 817-18 (Tex. 2012).

[29] *EAA v. Day*, 369 S.W.3d 814, 817-18 (Tex. 2012); *see generally* Drummond, Sherman & McCarthy, *The Rule of Capture in Texas -Still So Misunderstood After All These Years*, *supra*, at 80-82 (discussing the ownership of groundwater in Texas).

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[30] *Tex. Co. v. Burkett*, 296 S.W.2d 273, 277-78 (Tex. 1927); *Pecos County WCID No. 1 v. Williams*, 271 S.W.2d 503, 505 (TEXAS CIV. App.—El Paso 1954, writ ref'd n.r.e.); *see EAA v. Day*, 274 S.W.3d 742, 756 (Tex. App.—San Antonio 2008), *aff'd*, 369 S.W.3d 814 (Tex. 2012)(*citing Del Rio v. Clayton Sam Colt Hamilton Trust*, 269 S.W. 3d 613 (Tex. App.—San Antonio 2008, pet. denied)).

[31] *See Pfluger v. Clack*, 897 S.W.2d 956, 959 (TEXAS CIV. App.—Eastland 1995, writ denied) (noting that water, surface or subsurface, that has not been severed by express conveyance or reservation remains part of surface estate). *See generally* TEXAS PROP. CODE § 5.001 (discussing the fee simple estate).

[32] *See Del Rio*, *supra*, 269 S.W.3d at 617; *Pfluger*, 897 S.W.2d at 959.

[33] *See generally* Drummond, Sherman & McCarthy, *The Rule of Capture in Texas -Still So Misunderstood After All These Years*, *supra*, at 53, 95-96 (discussing the confusion the Rule of Capture has caused); Caroom & Susan M. Maxwell, *The Rule of Capture—"If It Ain't Broke . . ."*, *in* TEX. WATER DEV. BD. REPORT 361, 100 YEARS OF RULE OF CAPTURE: FROM EAST TO GROUNDWATER MANAGEMENT 41 (2004), *available at* https://www.twdb.state.tx.us/publications/reports/numbered_reports/doc/R361/R361.pdf (last visited June 4, 2012).

[34] TEX. CONST. art. XVI, § 59.

[35] *See id.*; *see also EAA v. Day*, 274 S.W.3d 742, 757 (Tex. App.—San Antonio 2008), *aff'd*, 2012 Tex. LEXIS 161 Tex. Feb. 24, 2012) (discussing Article XVI, § 59 of the Texas Constitution).

empowered to pass all laws necessary to protect, enhance, and preserve natural resources of the state, including its groundwater.[36] One state court held that the Conservation Amendment evidenced the "clear and explicit purpose to conserve the public waters of the State and to develop their use in the public interest."[37]

It was not until 1949, however, that the Legislature took its first action to enact groundwater legislation pursuant to the Conservation Amendment.[38] The first groundwater district was created in the 1950s, pursuant to the Groundwater Conservation District Act of 1949.[39] Since 1997, the proliferation of groundwater districts has impacted groundwater rights in Texas dramatically. Among the changes to the Water Code, the Legislature amended Chapter 36 to add Section 36.0015, which provides, in part, that "[g]roundwater conservation districts created as provided by this chapter [36] are the state's preferred method of groundwater management."[40] The Texas Legislature has modified the Rule of Capture in Texas by enacting laws empowering groundwater districts to regulate the production of the resource.[41] Writing for a split court in the Supreme Court's 1999 reaffirmation of the 1904 *East* decision adopting the "Rule of Capture" in *Sipriano v. Great Spring Waters of America*,[42] Justice Enoch reiterated the Legislature's position regarding the State's "preferred" management strategy for groundwater.[43]

For landowners, the question is whether these local groundwater districts will pursue a management style that focuses on (i) developing the resource and preventing waste, or (ii) preventing landowners from the beneficial use of their groundwater rights by restricting groundwater production to prevent possible export. Despite the wisdom of Professor Hutchins' words quoted above, the Legislature has opened the door to abuses by groundwater districts by expanding the powers of these districts with few "checks and balances" for recourse by landowners short of going to the courthouse.[44]

Groundwater districts appear to be here to stay, and are the primary regulators of the permitting of wells and production of groundwater. For better or worse, "local control" is the catch phrase these groundwater authorities have seized upon. According to both the Texas Legislature and the appellate courts, at least for now, groundwater districts remain the State's "preferred" means to manage groundwater resources.[45] Getting to know your local groundwater district(s) is important. Set forth below are some "pointers" regarding practicing before, and dealing with, groundwater districts.

A. Familiarize Yourself with the District:

All groundwater districts are subject to Chapter 36, TEXAS WATER CODE.[46] Accordingly, a working knowledge of the provisions of Chapter 36 is beneficial.

Many groundwater districts, however, were created by special legislative enactment, known as "enabling legislation." With certain limited exceptions, an individual groundwater district's enabling legislation prevails over any conflicting provision of Chapter 36, while Chapter 36 prevails over any other conflicting provision of Texas law.[47] Accordingly, a working knowledge of the individual groundwater district's enabling legislation is also essential to the Practitioner.

Unfortunately, with limited exceptions, most groundwater districts' enabling legislation is not codified currently.[48] Public access to the enabling legislation, therefore, may not necessarily be available from traditional sources. In its "uncodified" form, district enabling legislation, and all amendments thereto, can only be found by going to the session laws, or Texas General Laws. These volumes are not as readily available for public review as the statutes codified in Vernon's "Black Statutes." Most law firms and, in fact, many smaller county courthouses do not possess session law volumes in their libraries. While not necessarily the most "user friendly" resources, there are two on-line sources one can look to for uncodified statutes in the session laws: (i) The Texas

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[36] *See EAA v. Day*, *supra*, 274 S.W.3d at 757; *City of Corpus Christi v. City of Pleasanton*, 276 S.W.2d 798, 803 (Tex. 1955).

[37] *Clark v. Briscoe Irrigation Co.*, 200 S.W.2d 674, 680, 682 (TEXAS CIV. App.—Austin 1947, writ dism'd).

[38] *See* HUTCHINS, *supra*, 588 & n.62 (*citing* Act of May 19, 1949, 51st Leg., R.S., ch. 306, §§ 1, 3c, 1949 Tex. Gen. Laws 559).

[39] *See id.*; *EAA v. Day*, 369 S.W.3d 814, 833 & n. 107 (Tex. 2012).

[40] TEXAS WATER CODE § 36.0015 .

[41] *See, e.g.*, TEXAS WATER CODE § 36.0015 .

[42] 1 S.W.3d 75 (Tex. 1999).

[43] *Id.* at 79; *cf.*, *id.* at 81 (Hecht, J. concurring).

[44] During the 75th Regular Legislative Session (2005), the Legislature passed H.B. 1763 in an effort to require groundwater districts to develop, and apply with some uniformity, procedural rules as part of the permitting process.

[45] TEXAS WATER CODE § 36.0015; *Sipriano*, 1 S.W.3d, *supra*, at 79.

[46] TEXAS WATER CODE § 36.052 (other laws not applicable). Districts created by special legislative enactment are also specifically subject to their "enabling legislation."

[47] *Id.*

[48] *See generally* TEXAS SPECIAL DISTRICTS LOCAL LAWS CODE §§ 1.001 *et seq*.

Legislative Reference Library[49] and (ii) the Texas Legislature Online.[50]

An alternative source of a district's enabling legislation is the district itself. Many groundwater districts have their own websites on which they post information about the district, including its enabling legislation, rules, application forms, meeting notices and agendas, and newsletters. If you do not know your district's website URL, it can probably be found on the Texas Alliance of Groundwater Districts[51] website,[52] which contains a list of its member districts and their respective website URLs where available.

In addition to developing a working knowledge of Chapter 36 and the district's enabling legislation, it is important to become knowledgeable of the district's rules. As noted above, a good source of access to the district's rules is frequently the district's website.[53] You should become familiar with the district's well registration forms, permit applications and any required reporting forms, *e.g.*, production reports, well logs, etc.

B. Meet the District's Board Members and Personnel:

In order to successfully appear before and work with any organization, being familiar with the leadership of both its governing body and management, as well as key members of the districts' field operations is important. Because groundwater districts have prospered under the mantra of "local control," and many regulate rural and/or thinly populated areas where folks know each other on a first name basis, you do not want to appear before the Board as an outsider. Finally, as important as the development of personal relationships will be, knowing the educational and professional backgrounds, as well as, politics and/or philosophy of those with whom you are dealing will be important. Accordingly, subject to the ethical considerations related to such things as "*ex parte* communications," it is a good idea with districts you do a lot of work with to sit down and visit with board members and staff over a cup of coffee or glass of tea periodically.

C. Participate In the District:

The majority of groundwater districts around the State are less than fifteen years old and have been actively involved in permitting and rulemaking for less than a decade. Accordingly, the rules and permitting processes are either still in the developmental stages, or are continuing to evolve to address (i) unintended consequences, (ii) statutory requirements to develop updated management plans,[54] or (iii) participate in joint management planning with other groundwater districts within their management area to determine critical issues such as the "future desired condition" of the aquifer(s) they regulate.[55]

District decisions on rules, management plan goals and objectives, joint management activities leading toward decisions about the future desired condition of the aquifer(s), as well as decisions on other permit applications will affect both your ability to deal effectively with the district, and represent your clients' interests.

In order to keep abreast of district activities, you should consider the following actions:

a) Learn when the Board regularly schedules meetings and watch for agenda notices to be posted/published, and attend meetings;[56]
b) Provide district personnel with your name, mailing address, fax number and e-mail address and ask them to provide you with copies of agenda notices;
c) With respect to rulemaking hearings, each calendar year, you should file a written request with each district of interest to receive notice of all rulemaking proceedings;[57]
d) With respect to permit proceedings, each calendar year, you should file a written request with each district of interest to receive notice of all permit proceedings;[58]
e) Subscribe to the district's "web alerts," if any;
f) Subscribe to the district's "newsletter," if any; and
g) Monitor the district's website for updates.

With respect to the recommendation to make written requests to the district on an annual basis to receive notices of permit proceedings and rulemaking proceedings,[59] be aware that the request does not

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49 http://www.lrl.state.tx.us/.
50 http://www.capitol.state.tx.us/.
51 The Texas Alliance of Groundwater Districts ("TAGD") is a non-profit statewide organization made up of member districts. TAGD is also known by the shorter acronym "TAG."
52 TAGD's website URL is *www.texasgroundwater.org*.
53 *See id.*
54 TEXAS WATER CODE §§ 36.1071-36.1073.
55 *Id*. § 36.108.
56 *See id.* § 36.063 (requiring districts to publish meeting notices in compliance with the Open Meetings Act); *see generally* TEX. GOV'T CODE Ch. 551.
57 TEXAS WATER CODE § 36.101(i); *Id*. § 36.101(d)-(3), (k).
58 *Id*. § 36.404(d); *see Id*. § 36.404(b)-(c), (e).
59 *Id*. §§ 36.101(i); 36.404(d).

guarantee receipt of those notices.[60] Specifically, while Section 36.101(d)(4)[61] requires the district to provide notice to anyone who has made the requisite annual written request,[62] the statute expressly provides that "[f]ailure to provide notice under subsection (d)(4) does not invalidate an action taken by the district at a rulemaking hearing."[63] Similarly, the notice provision for permit proceedings to be provided to anyone who files the annual written request under Section 36.404(d), although mandatory, carries with it no recourse if not sent.[64] All that is required to establish delivery of the notice under Section 36.404(d) is that an officer or employee of the district execute an affidavit to the effect that they attempted service by first class mail, facsimile, or e-mail to the person requesting the notice based upon the information provided by that person to the notice and that shall be sufficient proof that the notice was delivered.[65] Additionally, the statute provides that the failure to provide notice under Section 36.404(c)(3)(B) "does not invalidate an action taken by the district at the [permit] hearing."[66]

While these provisions appear to be giant loopholes for districts to ignore providing notices as requested, the fact that the district employee or officer is required to execute an affidavit that they sent the notice does create the potential for penalties and recourse associated with falsifying government documents and other potential criminal charges that could be used against the district and its personnel in the event that the notice is, in fact not sent, as opposed to sent and undelivered. Accordingly, to be certain that you are "in the loop," take the time to submit the annual requests to districts where you have frequent dealings.

III. ETHICAL CONSIDERATIONS

1. Conflicts and Dual Representation:

There are several ethical considerations dealing with water related matters worthy of note. The first, and probably the easiest to violate, is the obligation for lawyers to avoid conflicts of interest. Specifically, Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct (the "DRs") prohibits a lawyer from handling a matter for a client whose interests are (i) adverse to another client, or (ii) substantially related to another client such that the representation is, or could be materially and directly adverse to the interests of another client. Comment 1. to Rule 1.06 is clear in its message:

Loyalty is an essential element in the lawyer's relationship to a client.

The prospect of securing an adequate consent to and waiver of the conflict aside,[67] the Rule should be a guide to lawyers to *not* become counsel for both the landowner whose water is the objective of negotiations and the interested buyer or lessee. This is true irrespective of whether the water involved is surface water or groundwater.

For the sake of expediency and/or to keep costs down, the temptation exists to have the same represent both parties (i) in negotiating the contract for the water, and/or (ii) preparing and filing the application for the permit whether at the Texas Commission on Environmental Quality (TCEQ) or the local groundwater district. Either act, or any similar requests to ascertain dual representation, however, should be avoided.

While the parties' interests may initially appear to be "generally aligned in interest,"[68] the red tape and time delays associated with the permitting process before either regulatory entity, *e.g.*, TCEQ for surface water, and the local groundwater district for groundwater, can become tedious and try the best of relationships. This is particularly true where the landowner may be waiting on permits to receive his money, or the buyer/lessee the right to use the water, the lawyer who takes on both sides as his client is almost guaranteed to find himself in the middle of some dispute.

In addition to the express prohibition against a lawyer representing opposing parties in litigation,[69] in the event an attorney's clients to a multi-party representation scenario "properly accepted"[70] the dual representation becomes "improper" due to an unanticipated dispute among the clients, Rule 1.06(e) mandates that the attorney "promptly withdraw" from representation of either one or all of the clients as necessary to be compliant with the Rules of Professional Conduct.[71]

A corollary issue for consideration involving water rights related representation is whether Rule 1.06 prohibits representation by a lawyer, or lawyers within the same law firm, in scenarios involving "issues

[60] *Id*. §§ 36.101(k); 36.404(e).
[61] Section 36.101(d)(4) provides that not later than the 20th day before the date of a rulemaking hearing, either the General Manager or Board "shall" provide notice by mail, facsimile, or electronic mail to any person who has requested notice under subsection (i); . . . ."
[62] *See id.* § 36.101(i).
[63] *See id.* § 36.101(k).
[64] *See id.* § 36.404(e).
[65] *See id.* § 36.404(d).
[66] *See id.* § 36.404(e).

[67] *See* DR 1.06(c)(2).
[68] *See* Comment 13 to DR 1.06.
[69] *See* DR 1.06(a).
[70] *See* DR 1.06(c).
[71] *Id*.; *see* DR 1.05 & 1.09.

conflicts."[72] Specifically, can you represent clients who either own or seek to secure permits to develop water, particularly groundwater, and also undertake representation of (i) any groundwater district, or (ii) the groundwater district with jurisdiction over the groundwater interests of your client who is or may desire to seek permits.

Rule 1.06(b) proscribes representation of clients in any matter which "involves a substantially related matter [*e.g.*, permitting] in which the person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm;…"[73] Notwithstanding the ability to secure a waiver of potential conflict prior to the existence of an actual conflict pursuant to DR 1.06(c), the inherent adversarial relationship between landowners/permit applicants and the groundwater district/regulatory authority seems to make dual representation impossible under any scenario, but especially so in the context of a permit application. This is particularly true in light of the language of Comment 2. to Rule 1.06, which provides that (i) not only must the representation in the substantially related matter be based upon the "informed consent" of both parties, but (ii) the lawyer must "reasonably believe [ ]" that his representation will be protective of the clients' interests.[74]

The permitting process is fraught with conflict between the desires of the landowner to secure the right to develop and produce his groundwater rights which, more than likely in some aspect, will either be contrary to the groundwater district's rules, management plan and/or enabling legislation, or require the landowner/permit applicant to file suit against the district to challenge an adverse ruling in a permit proceeding. Assuming no conflict arises during the permit proceedings, however, the challenge is not over. The relationship between the district as "regulator" and the landowner/permittee as the "regulated entity" post-permit issuance creates what would seem to be an inevitable recipe for creation of a conflict in the attorney's representation of both clients and the ability to maintain the strict duty of "loyalty" to both in the continuing representation. The "red flag" is hoisted signaling the message *not* to represent both the regulator and regulated entity.

2. *Ex parte* Communications:

The other pitfall for counsel to be wary of involves "*ex parte* communications." Historically, attorneys practicing before administrative agencies thought they could rely upon Section 2001.061 of the Administrative Procedures Act,[75] as the bright line for avoiding inappropriate contacts. Section 2001.061 clearly prohibits the involvement of an agency "decision maker" in a contested case proceeding from participating in any discussion on a matter in the absence of proper notice and opportunity for participation by all affected parties.[76] Accordingly, discussions with both non-decision makers and/or decision makers, in the absence of the existence of a pending "contested case,"[77] was considered permissible until 2009.[78] The fact that Section 2001.061 does not apply to groundwater district proceedings,[79] coupled with the 2009 interpretation of Rule 3.05 by the State Bar's Professional Ethics committee, has created a lingering black cloud over attorney communications with permitting agencies.

In May 2009 the Ethics Committee issued Opinion No. 587.[80] The opinion concluded that pursuant to Rule 3.05, an attorney may not contact or communicate with the decision maker of an administrative agency (*e.g.*, TCEQ or a groundwater district) in connection with any matter in which it is "reasonably foreseeable" that the matter could become subject to an adjudicatory proceeding or "contested case hearing."[81]

As noted, in light of Section 2001.061,[82] and the historic appellate court decisions in *Vandygriff v. First Sav. & Loan Ass'n.*,[83] and *Lewis v. Guaranty Fed. Sav. & Loan Ass'n.*,[84] attorneys confidently communicated with agency representatives, including decision makers, about matters "pre-application." Once an application was filed, the rules became tighter and communications with agency heads more limited, but interaction with agency staff continued.

The issue presented to the Ethics Committee in Opinion No. 587 was:

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

[72] DR 1.06(b).
[73] DR 1.06(b)(1); *see id*. 1.06(f).
[74] *See* Comment 2 to DR 1.06.
[75] TEX. GOV'T CODE § 2001.061.
[76] *See* TEX. GOV'T CODE § 2001.061.
[77] *See* TEX. GOV'T CODE § 2001.003(1) (defining "contested case").
[78] *See* Opinion 587.
[79] TEXAS WATER CODE § 36.052(a); *cf.*, *id.* § 36.253 (making § 2001.174 of the Administrative Procedures Act (TEX. GOV'T CODE CH. 2001) applicable to groundwater district decisions).
[80] Opinion No. 587 can be viewed online at http://www.legalethicstexas.com.
[81] *See* Opinion No. 587.
[82] TEX. GOV'T CODE § 2001.061.
[83] 617 S.W.2d 669 (Tex. 1981).
[84] 483 S.W.2d 837 (Tex. Civ. App. – Austin 1972, writ ref'd n.r.e.).

with the administrative agency concerning the matter?[85]

The Opinion concludes:

> In the absence of applicable law that permits *ex parte* communications in a particular matter, Rule 3.05…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.[86]

The Opinion purports to "qualify" its applicability by stating that Rule 3.05 does *not* apply to communications with non-decision makers of the agency.[87] That qualification is limited, however, by the caveat "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.[88]

As one might imagine, the purpose of communications with an agency staff member is likely going to include persuading them to support the application and, thereafter, communicate that support to the decision-maker. Given the "broad brush" of the Opinion's conclusion, any such communication would seem to be susceptible to attack as an "indirect" *ex parte* communication.[89]

Opinion No. 587 was received with much angst by the administrative lawyers in Texas. In response, the Ethics committee published Opinion No. 604 in January 2011.[90]

The new opinion addressed three questions related to Opinion No. 587 and its interpretation of DR Rule 3.05:

1) may a lawyer communicate with the agency members about a rule or regulation under consideration if it would require his client to obtain a permit if adopted;
2) may the lawyer communicate about the client's planned permit in the context of the consideration of the regulation; and
3) may the client communicate with the members if the lawyer cannot?[91]

The Opinion concludes that the lawyer is not prohibited from communicating about a regulation which represents a legislative activity of the agency.[92]

A lawyer is, however, prohibited by Rule 3.05 from communicating about the regulation after it has been adopted for purposes of attempting to influence a decision on an application the lawyer and his client "plan to file."[93] While a non-attorney client who is not subject to Rule 3.05 would not be prohibited by the DR from communicating with the agency decision-maker, Rule 3.05 and Rule 8.04(a)(1) clearly prohibit the lawyer from encouraging or "instructing" his client to undertake any such *ex parte* communications.[94]

Both Opinion Nos. 587 and 604 arguably contain some gray areas of the law with respect to "as applied" factual determinations about who is, and who is not a decision maker, and what is "reasonably foreseeable." However, there are no gray areas with respect to the ultimate conclusion reached in both Opinions that they err on the side of concluding any such communication is likely governed by Rule 3.05 and, therefore, prohibited. *See* Opinion Nos. 587 and 604. While there is no bright line rule due to the gray areas, there are "flashing lights" cautioning counsel to be wary.

The uncertainty surrounding potential inappropriate *ex parte* communications can be compounded in the context of dealing with groundwater districts. As most district board members are non-lawyers, and prefer to act informally unless compelled to adopt and follow formal guidelines, dealing with the districts on behalf of the client can be a minefield. Specifically, avoiding inadvertent, or even knowing violations of Rule 3.05 can be viewed as a direct affront to district decision makers jeopardizing your client's permit application. Under the circumstances, counsel must learn to balance on a tightrope.

V. CONCLUSION:

Water is a key issue facing Texas today. Water transactions, both in the negotiation of the deal and any associated permitting, require attorneys to carefully balance their ethical duties to faithfully, effectively and earnestly represent our client's interests while avoiding the pitfalls of unauthorized *ex parte* contacts with regulatory decision makers and/or crossing the line of multi-party representation. A periodic re-ready of Opinion Nos. 587 and 604, and the DRs, particularly

[85] Opinion No. 587, at 1.
[86] *Id.* at 5.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] Opinion No. 604 can be viewed online at http://www.legalethicstexas.com.
[91] Opinion No. 604 at 1.
[92] *Id.* at 5.
[93] *Id.*
[94] *Id.*

Rule 3.05, will provide a beneficial reality check for approaching water issues.

Appendix "A" - Opinion No. 587

OPINION 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 counselor the adverse party if he is not represented by a lawyer;

(3) orally upon adequate notice to opposing counselor 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 1.1O(i) 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)(I) 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. Section2001.061(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 i f 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.

Appendix "B" - Opinion No. 604

OPINION 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.

1. 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.

See Rule 1.10(f). 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).