

FORMAL OPINION NO 2005-134

***Ex Parte* Contact: County Counsel Contact with Hearing Officer and County Land Use Officials**

Facts:

Lawyer in private practice has been hired by a county board of commissioners to be a part-time hearing officer in land use cases. Lawyer was interviewed and screened by county counsel before being hired by the commissioners. Lawyer's hearing officer salary is paid from the county counsel budget, although Lawyer does not maintain an office in the county counsel's office.

The county counsel's office generally renders legal advice to the commissioners on all matters, including employment, and to the planning division on land use matters. The planning division's land use decisions are reviewed first by the hearing officer, then by the board of commissioners.

In land use cases, the county counsel's office renders legal advice both orally and in writing to all three levels: the planning division, the hearing officer, and the board of commissioners. The county counsel's office often prepares draft findings and recommended orders for the hearing officer. The hearing officer is not required to follow such recommendations.

Questions:

1. Is communication between county counsel and the planning division, the hearing officer, or the county commissioners a form of improper *ex parte* contact?
2. May county counsel give legal advice to or prepare legal documents for the hearing officer?

Conclusions:

1. No, qualified.
2. Yes.

Discussion:

1. *Ex Parte Communications.*

Oregon RPC 3.5(a) and (b) provide:

A lawyer shall not:

- (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
- (b) communicate *ex parte* on the merits of a cause with such a person during the proceeding unless authorized to do so by law or court order.

OSB Formal Ethics Op No 2005-83 (rev 2016) holds that a lawyer in the Oregon Attorney General’s office may communicate on an *ex parte* basis with a hearing officer because such communications appear to be permitted by the applicable statutes and thus are “authorized by law.” By extension of that principle to the local government context, city or county counsel may also engage in similar contact if it is authorized by ordinance or other law.¹

2. *Propriety of Legal Advice to Hearing Officer.*

This does not mean, however, that the hearing officer is county counsel’s client. Absent additional circumstances not present here, county counsel’s client is the county. OSB Formal Ethics Op No 2005-67. Because county counsel has only one client, there can be no multiple-client conflict of interest. OSB Formal Ethics Op No 2005-122. The lawyer acting as a hearing officer does not represent any client. Similarly,

¹ We therefore need not consider the alternative analysis in OSB Formal Ethics Op No 2005-83 (rev 2016) under which, depending on the substantive Oregon law of *ex parte* communications in an administrative setting, it may be possible for all counsel to have such communications if the communications are placed on the record and an opportunity for rebuttal is provided.

no issue regarding information relating to the representation of a client is present here. Consequently, no Oregon Rule of Professional Conduct violation is present.

Approved by Board of Governors, August 2005.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 11.4-1 (client identification for government lawyers), § 11.5-2 (confidentiality issues for government lawyers) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 113 (2000) (supplemented periodically); and ABA Model RPC 3.5.

