

FORMAL OPINION NO 2005-83

[REVISED 2016]

Ex Parte Contact with Administrative Law Judge

Facts:

A contested-case hearing has been scheduled before an administrative law judge for a state agency.

Questions:

1. May counsel for a private party involved in the contested-case hearing communicate *ex parte* with the administrative law judge?
2. May agency counsel from the Oregon Attorney General's Office do so?

Conclusions:

1. See discussion.
2. See discussion.

Discussion:

Oregon RPC 3.5(b) provides, in pertinent part:

A lawyer shall not:

....

(b) communicate *ex parte* on the merits of a cause with [a judge, juror, prospective juror or other official] during the proceeding unless authorized to do so by law or court order.

What constitutes “the merits of the cause” was broadly construed under *former* DR 7-110(B) to include any matter that might indirectly affect how a judge might ultimately rule. Even communication on a seemingly purely procedural matter might affect the merits of the cause if it would provide one party with a strategic or tactical advantage. Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, 2 *The Law of Lawyering* § 34.07 (4th ed 2015) (supplemented periodically); *In re Schenck*, 320 Or 94, 879 P2d 863 (1994) (*ex parte* letter criticizing judge's decision to

delay trial).¹ In all instances, it was irrelevant for a violation of *former* DR 7-110(B) whether or not the judge or other official's impartiality was adversely affected by the *ex parte* communication. *In re Thompson*, 325 Or 467, 473, 940 P2d 512 (1997).

In the context of a contested-case proceeding, Oregon RPC 3.5(b) appears to apply to administrative law judges and hearing officers just as it applies to judges of trial courts and appellate courts. Several authorities apply analogous rules in administrative proceedings as in court proceedings. *See, e.g., Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 55 Cal App 4th 1305, 64 Cal Rptr 2d 705 (1997) (no principled distinction between judge and administrative law judge for purposes of restriction against *ex parte* contact); *Matter of LaCava*, 615 NE2d 93 (Ind 1993) (members of medical malpractice review panel are "officials" within the meaning of the rule); Illinois Ethics Op No 313 (2000) (RPC 3.5 applies to workers' compensation arbitration proceeding because arbitrator is an "official"). The issue whether Oregon RPC 3.5(b) applies in the context of a contested-case proceeding is not free from doubt, however. *See, e.g., 39 Op Att'y Gen 431* (No 7691, 1978) (stating that "it could well be argued" under *former* DR 7-110(B) that a contested-case proceeding "does not constitute an adversary proceeding because there is no *independent, impartial tribunal*").

The law in Oregon is presently unsettled regarding the extent to which it authorizes *ex parte* communications with administrative law judges or other hearing officers. With regard to contested-case proceedings conducted pursuant to the Oregon Administrative Procedures Act, ORS 183.462 provides:

¹ For other authorities construing the meaning of "the merits of the cause" under *former* DR 7-110(B), see *In re Smith*, 295 Or 755, 670 P2d 1018 (1983); and *In re Burrows*, 291 Or 135, 629 P2d 820 (1981).

The agency shall place on the record a statement of the substance of any written or oral *ex parte* communications on a fact in issue made to the agency during its review of a contested case. The agency shall notify all parties of such communications and of their right to rebut the substance of the *ex parte* communications on the record.

ORS 183.462 does not expressly allow or forbid *ex parte* communications. It does, however, imply that *ex parte* communications may occur in contested administrative law proceedings in at least some instances. Under that tacit premise, the statute requires that *ex parte* communications be disclosed and that other parties be given an opportunity to rebut the substance of the communications. Other laws impose similar requirements. *See, e.g.*, ORS 183.685; OAR 137-003-0660 (imposing similar statutory and administrative requirements on *ex parte* communication received by an administrative law judge assigned from the Office of Administrative Hearings); OAR 137-003-0055 (imposing similar administrative requirements under Attorney General’s Uniform and Model Rules for Contested Case Proceedings). *See also Forelaws on Bd. v. Energy Facility Siting Council*, 306 Or 205, 229, 760 P2d 212 (1988) (stating in dictum that “the Oregon APA does not prohibit *ex parte* communications; it requires only that such communications be disclosed and that other parties be given an opportunity to rebut the substance of the communications”).

Arguably, ORS 183.462, ORS 183.685, OAR 137-003-0055, and OAR 137-003-0660 authorize *ex parte* communication with an administrative law judge or a hearing officer in a contested-case proceeding.² However, the authorization provided by those laws may be limited to

² The aspirational Code of Ethics for Administrative Law Judges of the Oregon Office of Administrative Hearings, at section 2-102(C) (available at <www.oregon.gov/OAH/pages/Code_of_Ethics.aspx>), provides that “[a]n Administrative Law Judge may communicate *ex parte* when circumstances require for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided that the ALJ reasonably believes that no party will gain a procedural or tactical advantage as a result of *ex parte* communication.” The Code does not have the force of law and is not promulgated by court order, so it cannot be relied on to authorize *ex parte* communication under Oregon RPC 3.5(b).

contested-case proceedings conducted pursuant to the Oregon Administrative Procedures Act. Even if this analysis does not accurately represent present law, it seems that a lawyer for a private party involved in the contested-case proceeding who concludes that it is reasonable and appropriate to engage in *ex parte* communication in a manner apparently authorized by ORS 183.462, ORS 183.685, OAR 137-003-0055, OAR 137-003-0660, or a similar law should not be found in violation of Oregon RPC 3.5(b). *See In re Gillis*, 297 Or 493, 500–03, 686 P2d 358 (1984) (discussing how a good-faith interpretation of unsettled law may serve as a basis for finding *ex parte* communication authorized by law).

Regardless of the authority under which a lawyer for a private party may engage in *ex parte* communication with an administrative law judge or hearing officer in a contested-case proceeding, an agency lawyer from the Oregon Attorney General’s Office may have greater legal authority to engage in such communication. *See generally* 39 Op Att’y Gen 431 (No 7691, 1978) (advising that ORS 180.060 and ORS 180.220 both contemplate and require the Attorney General, when requested to do so, to render legal advice to a state agency or its hearings officer in a contested-case proceeding pending before the agency and hearings officer for decision).

It may well be that the statutes and administrative rules pertaining to the state agency in question authorize lawyers of the Attorney General’s Office to communicate advice to the agency’s administrative law judges or hearing officers.³ It also may well be that the same lawyers of the Attorney General’s Office who participate in the presentation of evidence in a contested-case proceeding are authorized to communicate *ex parte* legal advice to the administrative law judge or hearing officer while a contested-case proceeding is pending. If the applicable statutes or administrative regulations enacted thereunder so provide, a government lawyer’s *ex parte* communication with an administrative law judge or hearing officer in a contested-case proceeding is permitted, regardless of the

³ We do not, however, view an administrative law judge or hearing officer as a represented party within the meaning of Oregon RPC 4.2. *Cf.* OSB Formal Ethics Op No 2005-80 (rev 2016); OSB Formal Ethics Op No 2005-134; OSB Formal Ethics Op No 2005-144 (rev 2007); OSB Formal Ethics Op No 2005-152.

limitations that may apply on similar conduct if engaged in by a private lawyer.

Approved by Board of Governors, August 2005, and updated by the Legal Ethics Committee, May 2016.

COMMENT: For additional information on this general topic, and other related subjects, see *The Ethical Oregon Lawyer* § 15.6-1 (*ex parte* contacts between judicial clerks and judges), § 15.8-1 (*ex parte* communications in pending cases) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 104, 113 (2000) (supplemented periodically); and ABA Model RPC 3.5(b).

