

FORMAL OPINION NO 2005-84

Ex Parte Contact:
Lawyer for Nonparty, OLCC Hearing

Facts:

Proceedings are pending before the Oregon Liquor Control Commission (OLCC) on whether to cancel an alcohol licensee's license for selling alcohol to a minor. Lawyer represents the personal representative of the estate of someone who was killed in an automobile accident resulting from the sale at issue. Lawyer's client is not a party to the OLCC license cancellation proceedings, but the personal representative would like Lawyer to aid the efforts to cancel the license.

Questions:

1. May Lawyer send a letter to the hearing officer without providing a copy to counsel for the licensee and the OLCC?
2. May Lawyer send a letter to the hearing officer if a copy is provided to counsel for the licensee and the OLCC?

Conclusions:

1. No.
2. Yes, qualified.

Discussion:

The answer to the first question depends on Oregon RPC 3.5(b), which provides:

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.

As noted in OSB Formal Ethics Op No 2005-83 (rev 2016), this rule applies to contested-case administrative hearings as well as to general litigation, although the question how this rule applies in an administrative context is not wholly clear. To the extent that Oregon RPC 3.5(b) applies, however, the fact that Lawyer's client is not a party to the OLCC hearing does not constitute an exception to the prohibitions on *ex parte* contacts. *See, e.g., In re LaFrance*, 10 DB Rptr 1 (1996).

The answer to the second question depends on Oregon RPC 3.4(e) and Oregon RPC 3.9. Oregon RPC 3.4(e) provides:

A lawyer shall not:

....

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

Oregon RPC 3.9 provides:

A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

If it reasonably appears to Lawyer that the letter could be relevant to and admissible in the contested-case hearing and Lawyer complies with the full restrictions on the substance of the letter as detailed in Oregon RPC 3.4(e), Lawyer may ethically send it to the hearing officer if

Lawyer also sends a copy to counsel for the parties to comply with Oregon RPC 3.5(b).

Approved by Board of Governors, August 2005.

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* contacts in pending cases) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 104, 107, 113 (2000) (supplemented periodically); ABA Model RPC 3.4(e); ABA Model RPC 3.5(b); and ABA Model RPC 3.9.

