



ECMC RULE 530 GUIDANCE

Rule 530 - Ex Parte Communications

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Rule 530. Ex Parte Communications

Purpose

Rule 530 is intended to protect the integrity of the decision-making process and avoid the appearance of unfair influence when an application has been filed and a matter is pending before the Commission or a Hearing Officer.¹ The rule does so by prohibiting communications with a Commissioner or Hearing Officer about the merits of a pending matter when all parties are not present. The rule requires disclosure of the content of communications that violate the rule. Finally, the rule provides for potential dismissal of a party or denial of a claim as a consequence of knowingly engaging in ex parte communications in violation of the rule.

Guidance

‘Ex parte’ communications

Ex parte is a legal term that refers to communications that are made without notice to another person interested in the matter. Ex parte usually refers to communication by one party with the person or entity that will decide an issue. Ex parte communications can be unfair because the other party does not have the opportunity to hear what is being communicated and respond to it to correct errors or provide additional information. Importantly, discussions between parties are not ex parte. Parties are encouraged to discuss the potential settlement of a case and are free to discuss a case without the presence of the decision-maker.

¹ The rule also mentions Administrative Law Judges, which the Commission has authority to use but which are not currently appointed to preside in Commission matters.

Communication about the merits

Rule 530 prohibits only ex parte communications about the merits of a matter. The “merits” are generally understood to be the “substantive considerations to be taken into account in deciding a case.”² Discussions that do not concern contested issues or issues to be decided in the application will not violate the rule. Because only communications about the merits will violate the rule, it is permissible to discuss scheduling and other procedural issues about a case without violating the rule.

Communication outside a hearing, without all parties present

Communication with the Commission or a Hearing Officer during a hearing are public communications. So there is no risk, even if some parties do not appear at a hearing, that ex parte communications could take place at a hearing or prehearing conference, as long as notice has been given to all parties.

Communications with a Commissioner or Hearing Officer, in person, over the phone, or by videoconference, could violate the rule if the discussion is about the merits of a matter and all parties are not present. These are the types of communications that are prohibited by Rule 530.

Communications with a Commissioner or a Hearing Officer by email or text message could violate Rule 530 if all parties to the matter are not included in the communications. Parties and ECMC Staff often communicate with Hearing Officers via email. This is permissible, but all parties should be included on messages. If a party is inadvertently excluded, correct the error as promptly as possible by providing the email communications to the excluded party and pointing out the mistake to everyone involved to avoid the appearance of impropriety.

Disclosure of ex parte communications

Rule 530 requires all ex parte communications received by a Commissioner or Hearing Officer to be disclosed as part of the public record. When the communications are oral communications, the Commissioner or Hearing Officer who received or made the communications is required to place a memorandum in the record stating the substance of such oral communications and any responses to those communications. When the communications are written, the Commissioner or Hearing Officer who made or received the communications is required to place a copy of the written communications in the public record.

² See *Black’s Law Dictionary* 8th ed. (2004).

Sanctions for ex parte communications

If an ex parte communication is made “knowingly,” the Commission or a Hearing Officer may deny the application, dismiss the party from the proceeding, or take other action adverse to that party’s interests in the case. Such actions cannot be taken summarily and are only available when the prohibited communication is made with awareness or understanding that the communication was prohibited.

Before imposing such a sanction, the Commission or the Hearing Officer must first give the party responsible for the communication an opportunity to explain (“show cause”) why their interest should not be dismissed, denied, or otherwise “adversely affected” because of the Rule 530 violation. Such a sanction imposed by a Hearing Officer would also be subject to appeal to the Commission.

Ex parte communications by ECMC Staff

When ECMC Staff is directly participating in a proceeding, such as when Staff files an Application for an Order Finding Violation in an enforcement matter, Staff is a party to that case. As a party, the Rule 530 prohibition of ex parte communication applies to ECMC Staff and all other parties in a case. However, when Staff is not the applicant and did not file a Rule 507 petition, and is merely reviewing an application for completeness or consistency in the normal course of business, Staff is not a party and the ex parte rule does not apply to Staff’s communications. When ECMC Staff are not certain of their role in a case, staff members should seek guidance from supervisors and the Assistant Attorney General assigned to advise their unit on legal issues.

Rulemaking proceedings are treated differently under Rule 530

The prohibition against ex parte communication is not as strict in rulemaking proceedings. This is possible because rulemaking does not involve individual party interests and specific property rights in the same way that an application might. Instead, rulemakings impose general standards that will apply to all applicants and individuals. However, the rule still requires that the Commission include in the rulemaking record any communications presented to or considered by an individual Commissioner.

Additional Information

Don’t hesitate to ask.

ECMC Staff, stakeholders, parties and members of the public should not let concern about Rule 530 inhibit communications. If you aren’t sure whether a communication is

permitted, ask first. ECMC Staff can seek advice from a supervisor, and the Hearings Manager can provide information about how Rule 530 will apply in specific situations.

Use written communications. Include everyone. Request a conference.

The easiest way to avoid ex parte communications is to (1) use written communications such as email; and (2) make sure all parties are included in the communications. There is never any harm in including all parties in communications that raise procedural questions.

If it is not possible to include all parties for some reason, one solution is to request a prehearing conference with the Hearing Officer, which will provide an opportunity for a discussion on the record without violating Rule 530.

Appendix A - Rule 530

Rule 530. EX PARTE COMMUNICATIONS

- a. The following provisions will be applied in any adjudicatory proceeding before the Commission, Administrative Law Judge, or Hearing Officer.
 - (1) No person will make or knowingly cause to be made to any member of the Commission, Administrative Law Judge, or Hearing Officer an ex parte communication concerning the merits of a proceeding for which an application has been filed.
 - (2) No Commissioner, Administrative Law Judge, or Hearing Officer will make or knowingly cause to be made to any interested person an ex parte communication concerning the merits of a proceeding that has been noticed for hearing.
 - (3) A Commissioner, Administrative Law Judge, or Hearing Officer who receives, or who makes, or knowingly causes to be made, a communication prohibited by this rule will place on the public record of proceeding:
 - A. All such written communications and any responses thereto; and
 - B. Memoranda stating the substance of any such oral communications and any responses thereto.

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- (4) Upon receipt of a communication knowingly made or knowingly caused to be made by a person in violation of this Rule 530, the Commission, Administrative Law Judge, or Hearing Officer may require the person to show cause why their claim or interest in the proceeding should not be dismissed, denied, or otherwise adversely affected on account of such violation.
 - (5) If Staff is a party to an adjudicatory proceeding, they are subject to the provisions of this Rule 530.a.
- b. Oral or written communication with individual Commission members is permissible in a rulemaking proceeding. The Commission will make any communication presented to or considered by an individual Commissioner part of the record. After the rulemaking record is closed, new information that is intended for the rulemaking record will be presented to the Commission as a whole upon approval of a request to reopen the rulemaking record.
 - c. This Rule 530 will not limit the right to challenge a decision of the Commission, Administrative Law Judge, or Hearing Officer on the grounds of bias or prejudice due to any ex parte communication.