



**BOARD OF SUPERVISORS  
AGENDA LETTER**

**Agenda Number:**

**Clerk of the Board of Supervisors**  
105 E. Anapamu Street, Suite 407  
Santa Barbara, CA 93101  
(805) 568-2240

**Department Name:** County Counsel  
**Department No.:** 013  
**For Agenda Of:** November 13, 2018  
**Placement:** Departmental  
**Estimated Time:** 30 minutes  
**Continued Item:** No  
**If Yes, date from:**  
**Vote Required:** Majority

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**TO:** Board of Supervisors  
**FROM:** Department Director: Michael Ghizzoni, County Counsel  
Contact Info: Johannah Hartley, Deputy (805) 568-2950  
**SUBJECT:** **New Rule 3.5 of California's Rules of Professional Conduct for Lawyers: Recommended Local Rule(s) for Communications with Members of County Boards and Commissions Acting in an Adjudicative Capacity; and Recommended Local Rule Against Gifts Beyond the Limits of California's Political Reform Act**

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**County Counsel Concurrence**

As to form: Yes

**Auditor-Controller Concurrence**

As to form: N/A

**Recommended Actions:**

County Counsel recommends that the Board of Supervisors:

- A. Pursuant to new Rule 3.5(b) of California's Rules of Professional Conduct for lawyers which became effective on 11/1/2018, reinforce and adopt as a local rule for communications with members of the Board of Supervisors and all other County boards and commissions for which the Board of Supervisors is the governing legislative body, that the County Counsel (and Deputy County Counsels and Outside Counsel hired by the County) as the statutory legal advisor to the Board of Supervisors and the County, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters, including planning, zoning and subdivision matters.
- B. Pursuant to new Rule 3.5(b) of California's Rules of Professional Conduct for lawyers which became effective on 11/1/2018 -- and in addition to the local rule at Recommended Action (A), above -- provide direction about any other potential local rule(s) concerning communications with members of the Board of Supervisors and all other County boards and commissions acting in an adjudicative capacity by: 1) County officers, employees or appointees who are lawyers, but do not practice law from within the Office of County Counsel; and/or 2) all other lawyers.
- C. Pursuant to new Rule 3.5(a) of California's Rules of Professional Conduct for lawyers which became effective on 11/1/2018, reinforce and adopt as a local rule that any gifts from lawyers to members of the Board of Supervisors and/or members of all other County boards and commissions and/or to County employees, shall be regulated by the Political Reform Act.
- D. Find that the proposed actions are not a "project" under California Environmental Quality Act Guidelines § 15378(b)(5) in that they are organizational or administrative activities of the government that will not result in direct or indirect physical changes to the environment.

**Summary Text:** Effective 11/1/2018, new Rule 3.5(b) of California's Rules of Professional Conduct for lawyers generally prohibits "*ex parte*" communications between lawyers and "members of an administrative body acting in an adjudicative capacity," unless permitted to do so "by law" or a rule of the tribunal or other stated exceptions. Concerning "adjudicative" matters, the County's Board of Supervisors, Planning Commissions, and other boards and commissions all appear subject to new Rule 3.5's general prohibition against *ex parte* contact by lawyers, unless otherwise permitted to do so "by law" or by a rule of the Board of Supervisors. (New Rule 3.5(b), new Rule 1.01(m) and Comment 1 to new Rule 3.5.)

County Counsel is the statutory legal advisor to the Board of Supervisors and the County. (Gov. Code §§ 26526, 26529.) Although not entirely clear without an implementing rule, we therefore believe that new Rule 3.5 probably already treats County Counsel attorneys as permitted "by law" to continue to engage in confidential attorney-client communications, with members of the Board of Supervisors and all other County boards and commissions, concerning contested adjudicative matters pending before those boards and commissions. While parts of new Rule 3.5 are not clear, Comment 1 to Rule 3.5 expressly states that, "local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal." Recommended Action (A) would reinforce and adopt as a local rule that County Counsel attorneys as the statutory legal advisor to the Board of Supervisors and the County, may continue to provide confidential attorney-client legal advice, to the County's boards and commissions, on the merits of adjudicative matters, including planning, zoning and subdivision matters. Especially until new Rule 3.5 is interpreted through State Bar Ethics Opinions and/or court decisions, the Board's approval of Recommended Action (A) would help to clarify how County Counsel attorneys perform their statutory legal duties concerning the County's land use hearings.

If the Board approves Recommended Action (A), the Office of County Counsel would continue to avoid *ex parte* communications by our attorneys, with the members of County boards and commissions, about the merits of adjudicative matters, in particular cases where those County Counsel attorneys were "a partisan advocate for a particular position or point of view," versus serving as a legal advisor to the board or commission. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4<sup>th</sup> 81, 93-94 [quoting *Howitt v. Superior Court* (1992) 3 Cal.App.4<sup>th</sup> 1575, 1585].) Consistent with "due process" case law, this "screening" already is standard, for example, when County Counsel attorneys advocate for County departments with the Civil Service Commission or Assessment Appeals Board. (*Id.* at p. 93.)

Both in the past and presently, some County officers, appointees and employees have been licensed lawyers, but do not practice law from within the Office of County Counsel. In addition to criminal justice and child support attorneys, examples have included: Supervisors, Planning Commissioners, and employees within Planning & Development and General Services. At Recommended Action (B), the Board can address any potential local rule concerning communications by these lawyers, about adjudicative matters, with members or other members of the County's boards and commissions.

Prior to new Rule 3.5, other lawyers who were not County officers, appointees and employees sometimes communicated *ex parte* about adjudicative matters with members of the County's boards and commissions, which Board Resolutions 91-333 and 04-243 (Procedural Rules Governing Planning, Zoning and Subdivision Hearings) then required to be addressed through *ex parte* disclosures by the members of those boards and commissions. New Rule 3.5 also is in tension with new Rule 4.2(c), which carries forward the exception from former Rule 2-100(C) that the prohibition against a lawyer communicating with a represented party does not prohibit "communications with a public official, board, committee, or body." At Recommended Action (B), the Board can address any potential local rule concerning communications by these lawyers, about adjudicative matters, with members of the County's boards and commissions.

New Rule 3.5(a), which also became effective on 11/1/2018, prohibits lawyers from directly or indirectly giving or lending “anything of value to a judge, official, or employee of a tribunal” unless permitted by statute or standards governing employees of a tribunal. Read literally and without a local rule, this leaves confusion about whether one Deputy County Counsel could even give a cup of coffee to another Deputy County Counsel, since new Rule 3.5(a) appears to apply to County Counsel attorneys as both “lawyer[s]” and “employee[s] of a tribunal.” Recommended Action (C) would avoid this by reinforcing and adopting as a local rule that the Political Reform Act’s rules on gifts apply to gifts from lawyers to members of the Board of Supervisors or members of all other County boards and commissions or to County employees. The Political Reform Act extensively controls: what qualifies as a gift (Gov. Code § 82028, 2 CCR § 18940 *et seq.*); the maximum amount of annual gifts allowed from any single source (Gov. Code § 89503); and gift reporting requirements (Gov. Code § 87200 *et seq.*).

We discovered that, statewide, many lawyers were not aware of the potential impacts of new Rule 3.5 on local land use hearings. We therefore asked the Santa Barbara County Bar Association to provide an informational notice to its members about this agenda item for November 13<sup>th</sup>. We also are working with the County Counsels’ Association of California concerning new Rule 3.5.

**Background:** Effective November 1, 2018, new Rule 3.5(b) of the California Rule of Professional Conduct generally prohibits *ex parte* communications between a lawyer and a “judge” -- which new Rule 3.5(c) now defines to include “members of an administrative body acting in an adjudicative capacity” -- on the merits of a pending contested matter, unless otherwise permitted to do so “by law” or by a rule of the tribunal or by some other stated exception. Generally speaking, legislative actions *make* rules (example: the Land Use and Development Code), while adjudicative (“quasi-judicial”) actions *apply* rules to specific sets of facts (example: the appeal of a development permit). The Rules of Professional Conduct in place prior to November 1, 2018, provided limitations on *ex parte* communications with judges, but did not include in the definition of judges “members of an administrative body acting in an adjudicative capacity.” (Former Rules 5-300 and 5-320.)

County Counsel is the legal advisor to the Board and the County’s other quasi-judicial bodies. (Gov. Code §§ 26526, 26529; *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4<sup>th</sup> 543, 569 [Deputy County Counsel’s actions were “consistent with those of a legal advisor to the Board”].) Likewise, the California Supreme Court has held that City Council members properly received confidential written legal advice from their City Attorney, concerning a contested parcel map appeal. (*Roberts v. City of Palmdale* (2006) 5 Cal.4<sup>th</sup> 363, 380-381.) In addition, while the California Administrative Procedures Act (Act) does not apply to counties unless specifically adopted, the Act provides that communications between a judge or tribunal and their legal counsel are allowed and are excluded from the definition of *ex parte* contacts. (Gov. Code §§ 11400, 11410.30, 11430.30(a); *Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4<sup>th</sup> 1, 10.)

**Fiscal and Facilities Impacts:** Budgeted: Yes

**Fiscal Analysis:** There are no direct fiscal impacts on the County associated with new Rule 3.5.

**Key Contract Risks:** N/A

**Staffing Impacts:** N/A

**Special Instructions:** None

**Attachments:** New Rule 3.5 of California’s Rules of Professional Conduct for lawyers

**Authored by:** Johannah Hartley, Senior Deputy County Counsel