

NEW RULE 3.5 OF CALIFORNIA'S RULES OF PROFESSIONAL CONDUCT FOR LAWYERS: EFFECTIVE 11/1/18

***1. RECOMMENDED LOCAL RULE(S) FOR
COMMUNICATIONS WITH MEMBERS OF COUNTY BOARDS
AND COMMISSIONS ACTING IN AN ADJUDICATIVE
CAPACITY; AND***

***2. RECOMMENDED LOCAL RULE AGAINST GIFTS BEYOND
THE LIMITS OF CALIFORNIA'S POLITICAL REFORM ACT***

County Counsel

November 13, 2018

NEW RULE OF PROFESSIONAL CONDUCT 3.5(b)

... **(b)** Unless permitted to do so by law, an applicable code of judicial ethics or code of judicial conduct, a rule or ruling of a tribunal, or a court order, a lawyer shall not **directly or indirectly communicate** with or argue to a judge or judicial officer upon the merits of a contested matter pending before the judge or judicial officer, except...

(c) As used in this rule, “judge” and “judicial officer” shall also include: ... (iv) members of an administrative body acting in an adjudicative capacity;...

Comment [1] ... State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.

COUNTY COUNSEL

“The county counsel...is the legal adviser of the board of supervisors.” (Gov. Code § 26526.)

Roberts v. City of Palmdale (1993) 5 Cal.4th 363, 380-81: The California Supreme Court upheld the attorney-client confidentiality of a City Attorney’s written memo that was distributed to City Council members, concerning the appeal of a parcel map approval.

SCOPE OF PROPOSED LOCAL RULE FOR LAWYER COMMUNICATIONS

- When an administrative board considers an “adjudicative” matter (example: a land use permit appeal), new Rule 3.5 treats the board’s members as “judges.”
- The Board of Supervisors may adopt a local rule for lawyer communications with “members or employees” of the County’s adjudicative boards and commissions.
- Recommended Actions (A) and (B) address potential local rules for:
 - 1) County Counsel (including Deputy County Counsels & Outside Counsel);
 - 2) Other County officers, appointees, or employees who are lawyers, but do not practice law from within the Office of County Counsel; and/or
 - 3) All other lawyers.

NEW RULE OF PROFESSIONAL CONDUCT 3.5(a)

(a) Except as permitted by statute, an applicable code of judicial ethics or code of judicial conduct, or standards governing employees of a tribunal,* **a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal.*** This rule does not prohibit a lawyer from contributing to the campaign fund of a judge or judicial officer running for election or confirmation pursuant to applicable law pertaining to such contributions.

* “Tribunal” includes “an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved.” (New Rule 1.0.1(m).)

POLITICAL REFORM ACT & GIFTS

Political Reform Act applies to local officials including Supervisors, Planning Commissioners, County Counsel, etc. and limits gifts:

- May not accept gifts from single source totaling > \$470/year.
- Gifts include any payment or personal benefit for which local official does not provide payment or services of \geq value.
- Gifts \$50 or over in value from a single source are reportable.

RECOMMENDED ACTIONS

- 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 and appointees who are lawyers, but do not practice law from within the Office of County Counsel; and 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 the California Environmental Quality Act.

RECOMMENDED ACTION B: COUNTY OFFICERS, APPOINTEES OR EMPLOYEES OTHER THAN COUNTY COUNSEL LAWYERS

In addition to the local rule for confidential attorney-client communications by County Counsel lawyers as the statutory legal advisor to the Board of Supervisors and the County, and pursuant to new Rule 3.5(b) of California’s Rules of Professional Conduct for lawyers, adopt as another 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 County officers, appointees or employees who are lawyers, but do not practice law from within the Office of County Counsel: 1) may continue to communicate with members of those boards and commissions on the merits of adjudicative matters, including planning, zoning and subdivision matters; and 2) those communications shall be disclosed by members of those boards and commissions as part of their “*ex parte*” disclosures at hearings.

RECOMMENDED ACTION B: *ALL OTHER ATTORNEYS*

In addition to a local rule for confidential attorney-client communications by County Counsel lawyers as the statutory legal advisor to the Board of Supervisors and the County, and pursuant to new Rule 3.5(b) of California's Rules of Professional Conduct for lawyers, adopt as another 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 all lawyers who neither: a) practice law from within the Office of County Counsel; nor b) are County officers, appointees or employees who are lawyers, but do not practice law from within the Office of County Counsel: 1) may continue to communicate with members of those boards and commissions on the merits of adjudicative matters, including planning, zoning and subdivision matters; and 2) those communications shall be disclosed by members of those boards and commissions as part of their "*ex parte*" disclosures at hearings.

RECOMMENDED ACTION B: *BOTH GROUPS*

In addition to the local rule for confidential attorney-client communications by County Counsel lawyers as the statutory legal advisor to the Board of Supervisors and the County, and pursuant to new Rule 3.5(b) of California's Rules of Professional Conduct for lawyers, adopt as another 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 all lawyers who do not practice law from within the Office of County Counsel: 1) may continue to communicate with Board members and Commissioners on the merits of adjudicative matters, including planning, zoning and subdivision matters; and 2) those communications shall be disclosed by members of those boards and commissions as part of their "ex parte" disclosures at hearings.