

Agenda Date: December 20, 2018  
Agenda Placement: Admin  
Estimated Time: N/A  
Continued Item: No

## Board Agenda Item

TO: Air Pollution Control District Board

FROM: Aeron Arlin Genet, Air Pollution Control Officer 

CONTACT: William Dillon, Senior Deputy

SUBJECT: New Rule 3.5 of California's Rules of Professional Conduct for Lawyers:  
*Recommended Local Rule(s) for Communications with Members of the Board Acting in an Adjudicative Capacity; and Recommended Local Rule against Gifts beyond the Limits of California's Political Reform Act*

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### RECOMMENDATION:

That the Board:

1. Adopt a Resolution that will govern communications with members of the Board pursuant to new Rule 3.5 of California's Rules of Professional Conduct for lawyers which became effective on November 1, 2018, that:
  - a) The Board's Legal Counsel, as the advisor to the Board, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters to members of the Board;
  - b) All lawyers may continue to communicate with members of the Board on the merits of adjudicative matters and those communications will be subject to *ex parte* disclosure by the member when *ex parte* disclosures are required;
  - c) Any gifts from lawyers to members of the Board and/or to District employees, shall be regulated by the Political Reform Act, Government Code § 81000 *et seq*; and
2. 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.

## **DISCUSSION**

Effective November 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. 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.) While most of the Board's matters are quasi-legislative, concerning "adjudicative" or quasi-judicial matters, the Board appears 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. (New Rule 3.5(b) and Comment 1; new Rule 1.01(m); *City of Santa Cruz v. LAFCO* (1978) 76 Cal.App.3d 381.)

Although not entirely clear without an implementing rule, new Rule 3.5 probably already treats County Counsel attorneys, as District Legal Counsel, as permitted "by law" to continue to engage in confidential attorney-client communications with members of the Board concerning contested adjudicative matters pending before the Board. (See *Roberts v. City of Palmdale* (2006) 5 Cal.4<sup>th</sup> 363, 380-381.) 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." Recommendation (1)(a) would reinforce and adopt as a local rule that District's Legal Counsel, as the legal advisor to the Board, may continue to provide confidential attorney-client legal advice to the Board on the merits of adjudicative matters. Until new Rule 3.5 is interpreted through State Bar Ethics Opinions and/or court decisions, the Board's approval of Recommendation (1)(a) would help to clarify how District Legal Counsel performs its statutory legal duties concerning the Board's quasi-judicial actions. Recommendation (1)(b) allows continued communications by all lawyers about adjudicative matters with members of the Boards.

New Rule 3.5(a) 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. Recommendation (1)(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 or to District 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.*).

Please contact the District office or County Counsel if you have any questions.

## **ATTACHMENT:**

- A. Proposed Board Resolution adopting new Rule of Professional Conduct 3.5

## **SPECIAL INSTRUCTIONS:**

If the Resolution is approved, the Clerk is asked to have the Chair sign the Resolution.

**RESOLUTION OF THE BOARD OF DIRECTORS OF  
THE SANTA BARBARA COUNTY  
AIR POLLUTION CONTROL DISTRICT**

IN THE MATTER OF APPROVING  
LOCAL RULES TO IMPLEMENT NEW  
RULE 3.5 OF CALIFORNIA RULES OF  
PROFESSIONAL CONDUCT FOR  
LAWYERS

APCD RESOLUTION NO. \_\_\_\_\_

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**RECITALS**

**WHEREAS**, Effective November 1, 2018, the California State Bar adopted new Rule 3.5(b) of California’s Rules of Professional Conduct for lawyers that 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; and

**WHEREAS**, The Board of Directors for the Santa Barbara County Air Pollution Control District wishes to adopt this Resolution that adopts local rules to implement Rule 3.5 for adjudicatory proceedings before this Board in order to clearly define what communications may be made to the Board by lawyers, including District’s Legal Counsel; and

**WHEREAS**, The Board further wishes to adopt a local rule that requires any gifts from lawyers to members of the Board and/or to District employees, shall be regulated by the Political Reform Act, Government Code § 81000 et seq.

**NOW, THEREFORE, IT IS HEREBY RESOLVED**, as follows:

1. The Board has held a public hearing on this matter and considered public testimony regarding the adoption of this resolution.
2. Through this Resolution, the Board hereby adopts the following as local rules for this Board and the District:

APCD RESOLUTION IN THE MATTER OF APPROVING LOCAL RULES  
TO IMPLEMENT NEW RULE 3.5 OF CALIFORNIA RULES OF  
PROFESSIONAL CONDUCT FOR LAWYERS

- a. The Board’s Legal Counsel, as the advisor to the Board, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters to members of the Board.
  - b. All lawyers may continue to communicate with members of the Board on the merits of adjudicative matters and those communications will be subject to *ex parte* disclosure by the member.
  - c. Any gifts from lawyers to members of the Board and/or to District employees, shall be regulated by the Political Reform Act, Government Code § 81000 et seq.
3. The Board finds that these 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.

**PASSED, APPROVED AND ADOPTED** by the Air Pollution Control District Board of the Santa Barbara County, State of California, this 20th day of December, 2018, by the following vote:

Ayes:

Noes:

Abstain:

Absent:

SANTA BARBARA COUNTY  
AIR POLLUTION CONTROL DISTRICT

**ATTEST:**

AERON ARLIN GENET  
Clerk of the Board

By \_\_\_\_\_  
Chair

Date \_\_\_\_\_

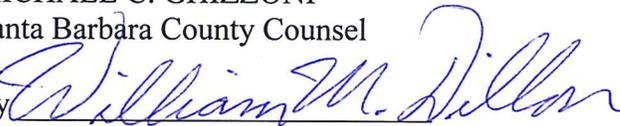
By \_\_\_\_\_  
Deputy

APCD RESOLUTION IN THE MATTER OF APPROVING LOCAL RULES  
TO IMPLEMENT NEW RULE 3.5 OF CALIFORNIA RULES OF  
PROFESSIONAL CONDUCT FOR LAWYERS

**APPROVED AS TO FORM:**

MICHAEL C. GHIZZONI  
Santa Barbara County Counsel

By

  
Deputy