

Agenda Date: February 6, 2019
Agenda Placement: Regular
Estimated Time: 10 minutes
Continued Item: No

Hearing Board Agenda Item

TO: Air Pollution Control District Hearing Board

FROM: Jerry F. Czuleger, Senior Deputy County Counsel 

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

RECOMMENDATION:

That the Board:

- A. Adopt a Resolution that will govern communications with members of the Hearing Board pursuant to new Rule 3.5 of California's Rules of Professional Conduct for lawyers which became effective on November 1, 2018, that:
 - i. The legal advisor to the Hearing Board, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters to members of the Hearing Board;
 - ii. All lawyers may continue to communicate with members of the Hearing Board on the merits of adjudicative matters and those communications will be subject to *ex parte* disclosure by the member;
 - iii. Any gifts from lawyers to members of the Hearing Board, shall be regulated by the Political Reform Act, Government Code § 81000 *et seq*; and
- B. 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. (See, *Attachment 1*). 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.) Most of the Hearing Board's matters are "adjudicative" in nature, and thus the Board is 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 Hearing 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, new Rule 3.5 probably already treats County Counsel attorneys, as Hearing Board legal counsel, as permitted "by law" to continue to engage in confidential attorney-client communications with members of the Hearing Board concerning contested adjudicative matters pending before the Board. (See, *Health and Safety Code Section 40809, and Roberts v. City of Palmdale* (2006) 5 Cal.4th 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 A.i. would reinforce and adopt as a local rule that the legal advisor to the Hearing Board, may continue to provide confidential attorney-client legal advice to the Hearing Board on the merits of adjudicative matters. Until new Rule 3.5 is interpreted through State Bar Ethics Opinions and/or court decisions, the Hearing Board's approval of Recommendation A.i. would help to clarify how County Counsel performs its statutory legal duties concerning the Hearing Board's adjudicative actions. Recommendation A.ii. allows continued communications by all lawyers about adjudicative matters with members of the Hearing Board.

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 A.iii. 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 Hearing Board. 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:

- 1) Attachment 1 – Rule 3.5 of California Rules of Professional Conduct
- 2) Proposed Board Resolution implementing 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.

Attachment 1

**New Rule 3.5 of
California's Rules of Professional Conduct for Lawyers**

**Rule 3.5 Contact with Judges, Officials, Employees, and Jurors
(Rule Approved by the Supreme Court, Effective November 1, 2018)**

(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.

(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:

(1) in open court;

(2) with the consent of all other counsel and any unrepresented parties in the matter;

(3) in the presence of all other counsel and any unrepresented parties in the matter;

(4) in writing* with a copy thereof furnished to all other counsel and any unrepresented parties in the matter; or

(5) in ex parte matters.

(c) As used in this rule, “judge” and “judicial officer” shall also include: (i) administrative law judges; (ii) neutral arbitrators; (iii) State Bar Court judges; (iv) members of an administrative body acting in an adjudicative capacity; and (v) law clerks, research attorneys, or other court personnel who participate in the decision-making process, including referees, special masters, or other persons* to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.

(d) A lawyer connected with a case shall not communicate directly or indirectly with anyone the lawyer knows* to be a member of the venire from which the jury will be selected for trial of that case.

(e) During trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror.

(f) During trial, a lawyer who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the lawyer knows* is a juror in the case.

(g) After discharge of the jury from further consideration of a case a lawyer shall

not communicate directly or indirectly with a juror if:

- (1) the communication is prohibited by law or court order;
- (2) the juror has made known* to the lawyer a desire not to communicate; or
- (3) the communication involves misrepresentation, coercion, or duress, or is intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(h) A lawyer shall not directly or indirectly conduct an out of court investigation of a person* who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person* in connection with present or future jury service.

(i) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person* who is either a member of a venire or a juror.

(j) A lawyer shall reveal promptly to the court improper conduct by a person* who is either a member of a venire or a juror, or by another toward a person* who is either a member of a venire or a juror or a member of his or her family, of which the lawyer has knowledge.

(k) This rule does not prohibit a lawyer from communicating with persons* who are members of a venire or jurors as a part of the official proceedings.

(l) For purposes of this rule, "juror" means any empaneled, discharged, or excused juror.

Comment

[1] An applicable code of judicial ethics or code of judicial conduct under this rule includes the California Code of Judicial Ethics and the Code of Conduct for United States Judges. Regarding employees of a tribunal* not subject to judicial ethics or conduct codes, applicable standards include the Code of Ethics for the Court Employees of California and 5 United States Code section 7353 (Gifts to Federal employees). The statutes applicable to adjudicatory proceedings of state agencies generally are contained in the Administrative Procedure Act (Gov. Code, § 11340 et seq.; see Gov. Code, § 11370 [listing statutes with the act].) State and local agencies also may adopt their own regulations and rules governing communications with members or employees of a tribunal.*

[2] For guidance on permissible communications with a juror in a criminal action after discharge of the jury, see Code of Civil Procedure section 206.

[3] It is improper for a lawyer to communicate with a juror who has been removed, discharged, or excused from an empaneled jury, regardless of whether notice is given to other counsel, until such time as the entire jury has been discharged from further service or unless the communication is part of the official proceedings of the case.

**RESOLUTION OF THE HEARING BOARD 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

APCDHB RESOLUTION NO. _____

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 Hearing Board of the Santa Barbara County Air Pollution Control District (“Hearing Board”) wishes to adopt this Resolution that adopts local rules to implement Rule 3.5 for adjudicatory proceedings before this Hearing Board in order to clearly define what communications may be made to the Hearing Board by lawyers, including Hearing Board legal counsel; and

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

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

1. Through this Resolution, the Hearing Board hereby adopts the following as local rules for the Hearing Board:

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

- a. The Hearing 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 Hearing Board.
 - b. All lawyers may continue to communicate with members of the Hearing 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 Hearing Board shall be regulated by the Political Reform Act, Government Code § 81000 et seq.
2. The Hearing 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 Santa Barbara County Air Pollution Control District Hearing Board, this 6th day of February, 2019, by the following vote:

Ayes:

Noes:

Abstain:

Absent:

SANTA BARBARA COUNTY
AIR POLLUTION CONTROL DISTRICT
HEARING BOARD

ATTEST:

AERON ARLIN GENET
Clerk of the Board

By _____
Deputy

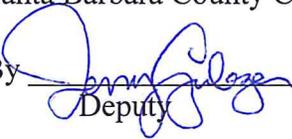
By _____
Chair

Date _____

APCDHB 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