



Monterey County

Board Report

Legistar File Number: 19-0661

Board of Supervisors
Board of Supervisors
Chambers
168 W. Alisal St., 1st Floor
Salinas, Ca 93901

August 27, 2019

Introduced: 8/20/2019

Version: 1

Current Status: Agenda Ready

Matter Type: General Agenda Item

- a. Introduce, waive reading, and consider an ordinance of the County of Monterey, State of California, adding Section 2.04.355 to the County Code related to attorney communications with members of the Board of Supervisors and other decision-makers acting in an adjudicative capacity; and
- b. Set September 10, 2019, at 10:30 a.m., or later, as the date and time for adoption of the ordinance.

RECOMMENDATION:

It is recommended that the Board of Supervisors:

- a. Introduce, waive reading, and consider an ordinance of the County of Monterey, State of California, adding Section 2.04.355 to the County Code allowing attorney communications with members of the Board of Supervisors and other decision-makers acting in an adjudicative capacity; and
- b. Set July 10, 2019, at 10:30 a.m., or later, as the date and time for adoption of the ordinance.

SUMMARY/BACKGROUND:

The U.S. and California Constitutions provide everyone the right to petition their government through their elected and appointed representatives. As a general principle, elected officials have an obligation to constituents to be involved in matters of public importance. These principles and rights do not require elected officials to meet with everyone nor to conduct independent investigations of important public matters, but they do require adherence to principles of due process and fair hearings.

Historically, lawyers have been prohibited from Ex Parte contact with judges involving contested matters, such as lawsuits. Ex Parte contact means contact with a decision-maker in a contested matter for the benefit of one side/party where the other side/party is excluded. New Rule 3.5 of the California Rules of Professional Conduct for lawyers expanded the Ex Parte contact prohibition in the judicial context to also preclude contact with members of administrative bodies hearing matters in an adjudicative capacity, which is also referred to as “quasi-judicial.” Land use and other entitlement hearings at the county level are considered adjudicative or quasi-judicial proceedings. Some employment matters may also be considered adjudicative because a decision-maker may be taking away an employee’s Constitutional property rights. Such entitlement matters may come before the Board of Supervisors, the Planning Commission, the Zoning Administrator, and other decision-makers and decision-making bodies.

The drafters of Rule 3.5 appeared to recognize that there may be a need for exceptions to a blanket prohibition on contacting members of administrative bodies sitting in an adjudicative capacity. Thus,

the Code of Professional Conduct allows local administrative bodies (such as the Board of Supervisors) to adopt procedural rules to permit Ex Parte contacts, which is the purpose of this proposed ordinance. Adopting this ordinance would level the playing field between lawyer and non-lawyer advocates, as well as protect County employees and officials who are licensed attorneys from unnecessary State Bar discipline, in situations that were not the intent of Rule 3.5. Non-lawyers advocating for clients are not bound by the Rules of Professional Conduct. Advocates for or against a project are often non-lawyers. At the same time, lawyers occasionally are not representing a client but may advocate for their own interests, for or against a project. A strict interpretation of Rule 3.5 may also preclude County officials and other County staff who are licensed attorneys from having Ex Parte contacts with Board members, though the contact may have been part of their job duties. Although County Counsel would probably not be precluded from advising decision-makers because of our statutory roles, other attorneys employed by or serving the County may be subject to the rule. For example, licensed attorneys have worked for RMA and the CAO, and licensed attorneys currently sit on the Board of Supervisors and Planning Commission. County Counsel raised these issues with former judge, and now Chair, Supervisor John Phillips. To address the many concerns, Chair Phillips submitted Referral 2019.02 requesting County Counsel draft rules of procedure so that licensed attorneys have the same access to decision-makers as non-attorneys.

DISCUSSION:

When the proposed ordinance was introduced on June 25, 2019, the Board directed County Counsel to return with options for Board consideration, including options for public disclosure of Ex Parte contacts. On July 16, 2019, the Board considered various options and directed County Counsel return with an ordinance that allows Ex Parte contacts by any lawyer with decisionmakers (on the same basis as with non-attorney contacts) and makes no change to current practice regarding disclosure of such contacts. The ordinance before you for consideration accomplishes the Board direction.

If the Board approves the recommended action, this ordinance will be placed on your September 10, 2019 agenda for adoption.

We are pleased to make any changes directed by the Board.

OTHER DEPARTMENT/AGENCY INVOLVEMENT:

NA

FINANCING:

The financial impact of this item is limited to publishing the ordinance.

BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

Eliminates uncertainty and therefore promotes more efficient administration.

Mark a check to the related Board of Supervisors Strategic Initiatives

- Economic Development
- Administration
- Health & Human Services
- Infrastructure
- Public Safety

Prepared by:

Charles J. McKee, County Counsel x.5312

Approved by:

Charles J. McKee, County Counsel x.5312

Attachments: Ordinance Section 2.04.355
California Rule of Professional Conduct 3.5
California Rule of Professional Conduct 4.2