TO: Francisco Gomez
California State Bar
Office of the Executive Director

FROM: Michael G. Colantuono, Trustee
Sean SeLegue, Trustee

RE: Rules of Professional Conduct, Rule 3.5

DATE: March 17, 2017

As you know, the Board of Trustees approved Rule 3.5 for transmission to the Supreme Court on the condition that Bar staff communicate to the Supreme Court reservations the Board has about the impact of this prohibition of ex parte contacts between lawyers and members of "tribunals," defined to include small and informal local government bodies when they act in a quasi-judicial capacity.

There are several related rules here, only one of which is of concern. Rule 1.01(m) defines "tribunal" to include "an administrative body acting in an adjudicative capacity and authorized to make a decision that can be binding on the parties involved." Rule 3.3 obliges attorneys — but not others — to honor the obligations of candor to such "tribunals".

Participants in the Rules Revision Commission's discussions expressed concern this rule would lead to mischief in highly politicized land use and similar disputes before local governments by allowing attorneys to be attacked for a lack of the candor required by these Rules, but not non-attorneys engaged in the very same conduct. While our discussion noted this concern, the Trustees did not adopt it as our own.

The Board did have concern regarding proposed Rule 3.5, which would forbid ex parte contacts between attorneys and members of tribunals (as defined in rule 1.01(m)) and "judges" defined by Rule 3.5(c) to include members of tribunals "except as permitted by statute[,] an applicable code of judicial ethics, code of judicial conduct, or standards governing employees of a tribunal."

As applied to small and informal local governments, this Rule struck the Trustees as problematic for the reasons noted below. Rather than prevent the Supreme Court from moving forward with the beneficial changes to the Rule as applied in other contexts, and given General Counsel's conclusion that changes to address the concern would require an additional notice and comment period that could not be completed by the March 31, 2017 deadline established by the Court, we withdraw our motion to modify the proposed rule, restating it to direct Bar staff to communicate our concerns. While we defer to your judgment in representing the views of the Board as a whole, as two of the principal commenters on this issue in the Board's discussion and the maker and second of the motion, we thought this memo might assist you.

California local governments are many and diverse, including 482 cities, 58 counties (the City and County of San Francisco are included in both figures), and some 7,000 special districts. They range from large and sophisticated (Los Angeles County has 10 million constituents) to the small and impecunious (there are so many "small" cities in California that the League of California Cities limits its "small city division" to those with fewer than 5,000 residents). Many lack regular access to legal counsel (as is typical of most school districts). Many have constituents who expect regular, frequent and informal contact with their elected officials — such as discussions of land use policy in the produce aisle of the supermarket. Yet nearly all of these engage in some adjudication: most common are land use decision-making (cities, counties, and Local Agency Formation Commissions) and civil service and other employment matters (nearly all governments). In small, informal governments, lawyers are sometimes regular players and sometimes not, but it is plain that many non-lawyers participate in these forums — as do lawyers who do not regularly practice in these settings — such as a Deputy District Attorney or Deputy Public Defender arguing against a land use approval in his or her neighborhood.

In proceedings to which it applies, the California Administrative Procedures Act regulates ex parte contacts by all persons, lawyers and non-lawyers alike, with narrow, specified exemptions. But none of these local governments are subject to the California Administrative Procedures Act unless they adopt it by reference. Procedural rules are few, commonly local or governed by sparse case law under federal and state due process and California's common law, "fair hearing" requirement. Absent express adoption of a procedural rule by a local entity barring all ex parte contact with officials "acting in an adjudicative capacity," proposed Rule 4.2 would bar attorneys – but not non-attorneys – from ex parte contact with officials. That outcome would present at least two problems: (1) a client represented by an attorney would not be able to have their chosen representative engage in ex parte contact with the officials, while non-attorney representatives or parties themselves could do so, thereby presenting an issue of fairness and (2) determining when officials are "acting in an adjudicative capacity" is not always simple and can be the source of dispute. With regard to the latter point, the courts have recognized that the ex parte contact rule is an area in which "a bright line test" is essential. As a practical matter, an attorney must be able to determine beforehand whether particular conduct is permissible; otherwise, an attorney would be uncertain whether the rules had been violated until ... he or she is disqualified. Unclear rules risk blunting an advocate's zealous representation of a client." *Snider v. Superior Court*, 113 Cal.App.4th 1187, 1197—1198 (2003). At the Board of Trustee's meeting, one of the Rules Commission's representatives acknowledged that determining whether any particular proceeding was within the new "acting in an adjudicative capacity" could require complex and subtle determinations; bringing such uncertainty into the ex parte contact rule would violate the policy enunciated in *Snider* and the decisions on which it relies.

Many local governments lack the legal support and sophistication to adopt formal rules governing ex parte contacts and even if they do, the Rule allows these to trigger an exception only as to rules governing ex parte contacts with "employees of a tribunal." It is not clear that elected City Councilmembers, County Supervisors, and special district Directors will be

considered “employees” for this purpose. Even if they are, if may be politically difficult for many local governments to explain in the sound-bite world of contemporary politics why they would adopt a rule allowing “ex parte contacts,” an abstruse term the average resident may instinctively view in negative terms.

Other rules account for the unique circumstances of government. In particular, the rule that an attorney may not contact a represented party without the consent of that party’s counsel does not apply to “communications with a public official, board, committee or body” out of respect for the First Amendment right to petition government. (Proposed RPC, Rule 4.2(c)(1).) Similar First Amendment concerns would arise if the Rules of Professional Conduct were to prevent lawyers from having the informal contact with their elected officials allowed to non-lawyers merely because a matter is technically “adjudicatory” rather than “legislative” under substantive land use or other law the lawyer involved may not practice.

Two means to address this issue occur to us: (i) re-define “tribunal” either generally or for purposes of Rule 3.5 to exclude application to local governments, or (ii) reverse the presumption of rule 3.5 against ex parte contacts in the absence of statutory or local law expressly allowing them and provide instead that it violates the Rules of Professional Conduct for an attorney to engage in ex parte contacts with a “judge” or “tribunal” in violation of the law applicable to the forum. In the latter approach, care should be taken to use an encompassing term like “law” to include state and local legislation and decisional law as well as legislation. This will level the playing field for attorneys and non-attorneys, apply only when there is an articulate rule regulating ex parte contacts applicable to a forum, and allow for the great diversity of local government forums to which the rule will apply.

Thank you for considering our recollection of the concerns expressed. If it would be helpful to discuss these thoughts or, if there is more we can do to be helpful, please let us know.