



County of Monterey

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

Board Report

File #: 19-0572, **Version:** 1

Consider options for an ordinance related to attorney and non-attorney communications with members of the Board of Supervisors and other decision-makers acting in an adjudicative capacity.

RECOMMENDATION:

It is recommended that the Board of Supervisors consider options for an ordinance of the County related to attorney and non-attorney communications with members of the Board of Supervisors and other decision-makers acting in an adjudicative capacity and provide direction to County Counsel.

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' obligation to constituents is 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 to include contact with members of administrative bodies hearing matters in an adjudicative capacity, also referred to as "quasi-judicial." Land use and other entitlement hearings are adjudicative proceedings. Some employment matters may also be considered adjudicative. Such entitlement matters come before the Board of Supervisors, the Planning Commission and the Zoning Administrator, and may include other bodies.

New California Rules of Professional Conduct Rule 4.2 prohibits lawyers from contacting clients of another lawyer, with exceptions. Recognizing the Constitutional right to petition your government representative, Rule 4.2 allows lawyers to contact elected representatives and other high-level government officials even if they are represented by County Counsel. Monterey County Code requires Board members to seek consent of County Counsel before meeting with opposing counsel in a matter involved in active litigation. New Rule 3.5 which prohibits contact with members of administrative hearing bodies in adjudicative matters may conflict with Rule 4.2 and the Constitutional right to petition the government.

Thus, the drafters of Rule 3.5 recognized that there may be a need for exceptions. The Code of Professional Conduct allows the local administrative body to adopt procedural rules to permit Ex Parte contacts, which is the purpose the proposed ordinance. In addition, there may be a desire to level the playing field between lawyer and non-lawyer advocates, as well as to 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 or a project are not bound by the Rules of Professional Conduct. Advocates for or against a project are often non-lawyers. At the same time, lawyers often 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 Ex Parte contacts, 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 duties, other attorneys employed by the County may be subject to the rule.

County Counsel raised these issues with former judge and now Chair 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. Below is a list of options for your consideration.

I. Internal County Attorneys, Officers and Employees Who Are Attorneys, & Outside Counsel Representing the County

- A. Exemption from Rule 3.5 for County Counsel & outside counsel. County Counsel and outside counsel are probably exempt by virtue of laws allowing the Board to appoint a County Counsel and retain outside counsel for legal advice. A Board procedure codifying the exemption would make the protection stronger.
- B. Exemption from Rule 3.5 for County employees acting on behalf of the County. Over the years, County employees working in RMA/Planning and elsewhere have been licensed attorneys. The Board may want to exempt these employees, especially when they are merely performing their job duties.
- C. Exemption from Rule 3.5 for Members of the Board of Supervisors, Planning Commissioners and other others acting in an adjudicative capacity. Currently there are members of the Board of Supervisors and Planning Commission who are licensed attorneys. A strict interpretation of Rule 3.5 would preclude such members from discussing a project with a colleague or high-level County staff. Such statutory construction was probably not the intent of the rule and therefore the Board should consider an exemption.
- D. Exemption from Rule 3.5 for County employees who are licensed attorneys advocating for themselves or family. Licensed attorneys who are County employees may find themselves contacting decision-makers to advocate for or against a project as a personal matter or for a family member. Rule 3.5 could trip-up an unwitting attorney who doesn't practice in this area of the law. Without this exemption, an employee who is not an attorney could contact Board members and advocate Ex Parte while an employee who is an attorney may be precluded by Rule 3.5.

II. Private Attorneys

- A. Exemption from Rule 3.5 for private attorneys acting on their own behalf or for a family member. Similar to I.D above, a private attorney may find themselves contacting decision-makers to advocate for or against a project as a personal matter or for a family member. Rule 3.5 could trip-up an unwitting

attorney who doesn't practice in this area of the law.

- B. Exemption from Rule 3.5 for private attorneys representing a client. As noted above, both attorneys and non-attorneys have clients and petition their elected officials for or against projects regularly. Without this exemption, an advocate who is not an attorney could contact Board members and advocate Ex Parte while an advocate who is an attorney may be precluded by Rule 3.5.

III. Disclosures

Principles of procedural due process require the County to hold fair hearings for land use approvals, other entitlement applications as well as many employment related proceedings. Due process and fair hearing principles are flexible based on the circumstances and generally do not encompass strict rules. California has, however, adopted a 10-day notice requirement for many land use matters going to public hearing. The basic principles include reasonable notice, an opportunity to be heard, unbiased decision-makers, decisions based on evidence presented, and no decisions based on evidence acquired after the hearing. Unbiased in this context does not mean an absence of an opinion but rather having an open mind.

Disclosure of Ex Parte contacts regarding pending adjudicative matters is required when a decision-maker relies on evidence that is not presented at the hearing. Interested parties must be apprised of such evidence so that they can controvert it.

Rules on disclosure of Ex Parte contact across the State range from the basic requirements of the principles of due process and fair hearing noted above to public announcements of every contact prior to the opening of the hearing. The California Coastal Commission and other State administrative hearing bodies are required by the Administrative Procedures Act (APA) to announce all Ex Parte contacts. Local entities are not bound by the APA and thus most local entities have no formal Ex Parte disclosure requirements. Some local entities require written disclosures of all contacts or only contacts where Ex Parte information impacts a decision.

Options for public disclosure of Ex Parte contacts include:

- A. Disclosure of Ex Parte contacts required pursuant to principles of due process and fair hearing. As noted above, this is when evidence or information obtained in the Ex Parte contact helps form the basis of a decision.
1. Written
 2. Oral
- B. Disclosure of all Ex Parte contacts, regardless of whether evidence or information received impacts a decision.
1. Written
 2. Oral

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

OTHER AGENCY INVOLVEMENT:

No other County department or agency has been involved.

FINANCING:

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

BOARD OF SUPERVISORS STRATEGIC INITIATIVES:

One or two sentences explaining how this recommendation supports/advances the Board of Supervisors Strategic Initiatives. Reference to any Key Objectives and/or Milestones that are related.

Mark a check to the related Board of Supervisors Strategic Initiatives

☐ Economic Development
☒ Administration
☐ Health & Human Services
☐ Infrastructure
☐ Public Safety

Prepared by:

By:

Charles J. McKee, County Counsel

Approved by:

By:

Charles J. McKee, County Counsel

Attachments:

Board Report
California Rule of Professional Conduct 3.5
California Rule of Professional Conduct 4.2
Memo from 2 Bar Trustees Regarding Rule 3.5