

LAFCO

Santa Barbara Local Agency Formation Commission
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December 6, 2018 (Agenda)

Local Agency Formation Commission
105 East Anapamu Street
Santa Barbara CA 93101

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

Dear Members of the Commission:

RECOMMENDATION

It is recommended that the Commission consider,

1. Adopting as local rules for communications with members of the Commission in the Santa Barbara LAFCO Commissioner Handbook, 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 Commission’s Legal Counsel, as the advisor to the Commission, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters to members of the Commission.
 - b. All lawyers may continue to communicate with members of the Commission 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 Commissions and/or to LAFCO employees, shall be regulated by the Political Reform Act, Government Code § 81000 *et seq.*
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

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“members of an administrative body acting in an adjudicative capacity.” (Former Rules 5-300 and 5-320.) While most of the Commission’s matters are quasi-legislative, concerning “adjudicative” or quasi-judicial matters, the Commission 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 Commission. (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 LAFCO’s legal counsel, as permitted “by law” to continue to engage in confidential attorney-client communications with members of the Commission concerning contested adjudicative matters pending before the Commission. (See *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 (1)(a) would reinforce and adopt as a local rule that LAFCO’s legal counsel, as the legal advisor to the Commission, may continue to provide confidential attorney-client legal advice to the Commission on the merits of adjudicative matters. Until new Rule 3.5 is interpreted through State Bar Ethics Opinions and/or court decisions, the Commission’s approval of Recommendation (1)(a) would help to clarify how LAFCO Legal Counsel performs its statutory legal duties concerning the Commission’s quasi-judicial actions. Recommendation (1)(b) allows continued communications by all lawyers about adjudicative matters with members of the Commissions.

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 Commission or to LAFCO 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.*).

EXHIBIT

Exhibit A Proposed Amendments to Santa Barbara LAFCO Commissioner Handbook in response to new Rule of Professional Conduct 3.5

Please contact the LAFCO office if you have any questions.

Sincerely,


William Dillon

Senior Deputy County Counsel

Exhibit A

Proposed Amendments to Santa Barbara LAFCO Commissioner Handbook
In response to New Rule of Professional Conduct 3.5

December 6, 2018

Santa Barbara LAFCO Commissioner's Handbook, Rules and Procedures, is hereby amended to add a new section G as follows:

RULES AND PROCEDURES

...

G. Communications with Members of the Commission and Gifts

Section 1. LAFCO's Legal Counsel. Pursuant to Rule 3.5(b) of California's Rules of Professional Conduct for lawyers which became effective on November 1, 2018, the Commission's Legal Counsel, as the advisor to the Commission, may continue to provide confidential attorney-client legal advice on the merits of adjudicative matters to members of the Commission.

Section 2. All Attorneys. Pursuant to Rule 3.5(b) of California's Rules of Professional Conduct for lawyers which became effective on November 1, 2018, and in addition to the local rule at Section 1, above, all lawyers may continue to communicate with members of the Commission on the merits of adjudicative matters and those communications will be subject to *ex parte* disclosure by the member.

Section 3. Gifts. Pursuant to Rule 3.5(a) of California's Rules of Professional Conduct for lawyers which became effective on November 1, 2018, any gifts from lawyers to members of the Commissions and/or to LAFCO employees, shall be regulated by the Political Reform Act, Government Code § 81000 *et seq.*

H. Amendment ...

Except as amended herein, all other provision of the Santa Barbara LAFCO Commissioner Handbook remain unchanged and shall continue in full force and effect.