



## MEMORANDUM

**TO:** CITY COUNCIL

**FROM:** HEATHER K. WHITHAM, CITY ATTORNEY

**SUBJECT:** CONSIDERATION OF ADOPTION OF RESOLUTION APPROVING A RULE REGARDING EX-PARTE COMMUNICATIONS BY ATTORNEYS REPRESENTING THE CITY IN QUASI-JUDICIAL PROCEEDINGS

**DATE:** JANUARY 8, 2019

**SUMMARY OF ACTION:**

Adoption of a local rule will allow ex-parte communications by attorneys representing the City in quasi-judicial proceedings.

**IMPACT TO FINANCIAL AND PERSONNEL RESOURCES:**

There is no fiscal impact from this action.

**RECOMMENDATION:**

It is recommended the City Council adopt a Resolution approving a local rule regarding ex-parte communications by attorneys representing the City in quasi-judicial proceedings.

**BACKGROUND:**

The City's legal counsel and other attorneys providing legal representation for the City typically provide confidential legal advice to the City Council on an attorney-client basis, as may be necessary given the circumstances of a particular matter.

A new State Bar Rule relating to the Rules of Professional Conduct for attorneys, however, could potentially limit the ability of the City's legal counsel, acting in a neutral, non-adversarial capacity, to give advice on a matter that is deemed to be "quasi-judicial" unless the City Council adopts a local rule related to such "ex-parte" communications. An "ex parte" communication is any communication between a judge and a party to a legal proceeding about the case, outside of the presence of the opposing party or the opposing party's attorney.

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**CONSIDERATION OF ADOPTION OF RESOLUTION APPROVING A RULE REGARDING EX-PARTE COMMUNICATIONS BY ATTORNEYS REPRESENTING THE CITY IN QUASI-JUDICIAL PROCEEDINGS**

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**ANALYSIS OF ISSUES:**

Effective November 1, 2018, a new Rule 3.5(b) of the California Rule of Professional Conduct generally prohibits “ex parte” communications between a lawyer and a “judge” unless otherwise permitted to do so by law or rule of the tribunal or some other stated exception. Rule 3.5(c) now defines “judge” to include “members of an administrative body acting in an adjudicative capacity.”

This agenda item is being brought to the City Council to adopt a “rule” applicable to any quasi-judicial proceedings that might come before the City Council or other administrative bodies of the City, which will allow attorneys advising the City Council or other administrative body of the City and acting in a neutral, non-adversarial capacity to continue to communicate with the City council or other administrative body of the City without conflicting with the new State Bar Rule.

It should be emphasized that this issue only applies to adjudicative “quasi-judicial” matters. Generally speaking, there is a distinction between actions that the City Council takes that are “legislative” and those that are adjudicative or “quasi-judicial.” “Legislative” actions make rules (for example, adoption of an ordinance establishing the rules for the issuance of conditional use permits). Adjudicative or “quasi-judicial” actions apply those rules to specific sets of facts (for example, a request for a conditional use permit). 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.) The City Council or other administrative body of the City is an “administrative body” within the meaning of Rule 3.5 when acting in a quasi-judicial capacity.

The attached Resolution would adopt the following Rule that would apply to any adjudicative quasi-judicial proceeding held by the City Council or other administrative body of the City.

1. Pursuant to new Rule 3.5(b) of California’s Rules of Professional Conduct for lawyers which became effective on November 1, 2018, the City Attorney, Assistant or Deputy City Attorneys or other outside counsel hired by the City of Arroyo Grande to serve as the legal advisor to the City Council or other administrative bodies of the City, may contact the City Council or other administrative bodies of the City acting in an adjudicative capacity ex parte on non-substantive or procedural matters (such as scheduling or other legal requirements). Also, when acting in a neutral, non-adversarial capacity, those attorneys may communicate oral or written confidential attorney-client legal advice on the merits of adjudicative matters to the City Council or other administrative bodies of the City as allowed by state or federal law, and as

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consistent with statutory fair hearing rights and constitutional due process principles.

2. The forgoing local rule shall apply to all hearings being held by the City Council or other administrative bodies of the City that constitute a “quasi-judicial” proceeding in which the City Council or other administrative body of the City is acting in an adjudicative capacity.

As drafted, the proposed Rule applies when the City Attorney, Assistant or Deputy City Attorney or an outside counsel retained by the City serves as a legal advisor to the City Council or other administrative body of the City and are acting in a neutral, non-adversarial capacity. In situations where the City’s legal counsel or another attorney is retained by the City to act as an advocate for a particular position or point of view, other due process related rules apply and ex-parte communications by that attorney are not proper or permissible. This can come up, for example, when an attorney presents a case on behalf of the City involving a denial of a permit, while another attorney acts as the neutral, non-adversarial legal advisor to the City Council on that same appeal of a permit denial.

**ALTERNATIVES:**

The following alternatives are provided for the Council’s consideration:

1. Adopt the Resolution;
2. Modify and adopt the Resolution; or
3. Provide other direction to staff.

**ADVANTAGES:**

Adoption of the Resolution will allow the City’s legal counsel to continue to provide confidential attorney-client legal advice to the City Council and other administrative bodies related to adjudicative matters without conflicting with the new State Bar Rule.

**DISADVANTAGES:**

No disadvantages are identified.

**ENVIRONMENTAL REVIEW:**

No environmental review is required for this item.

**PUBLIC NOTIFICATION AND COMMENTS:**

The Agenda was posted in accordance with Government Code Section 54954.2.

**RESOLUTION NO.**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF  
ARROYO GRANDE ADOPTING A LOCAL RULE REGARDING  
EX-PARTE COMMUNICATIONS BY ATTORNEYS  
REPRESENTING THE CITY OF ARROYO GRANDE IN QUASI-  
JUDICIAL PROCEEDINGS**

**WHEREAS**, the City of Arroyo Grande (“City”)’s legal counsel and other attorneys providing legal representation for the City typically provide confidential legal advice to the City Council on an attorney-client basis; and

**WHEREAS**, new State Bar Rule 3.5 of the Rules of Professional Conduct for attorneys could potentially limit the ability of the City’s legal counsel, acting in a neutral, non-adversarial capacity, to give advice on a “quasi-judicial” matter unless the City Council adopts a local rule related to such “ex-parte” communications, since the new rule now defines “judge” to include “members of an administrative body acting in an adjudicative capacity;” and

**WHEREAS**, the City’s Municipal Code has a number of provisions that provide for hearings to be held by the City Council or other administrative bodies of the City that would constitute “quasi-judicial” proceedings in which the City Council or another administrative body would act in an adjudicative capacity; and

**WHEREAS**, adoption of a local rule will allow an attorney, serving as the legal advisor to the City Council or another administrative body of the City, acting in a neutral, non-adversarial capacity, to continue to provide confidential attorney-client legal advice related to adjudicative matters, and therefore the City Council desires to adopt such a rule.

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Arroyo Grande as follows:

1. Pursuant to new Rule 3.5(b) of California’s Rules of Professional Conduct for lawyers which became effective on November 1, 2018, the City Attorney, Assistant or Deputy City Attorneys or other outside counsel hired by the City of Arroyo Grande to serve as the legal advisor to the City Council or other administrative bodies of the City, may contact the City Council or other administrative bodies of the City acting in an adjudicative capacity ex parte on non-substantive or procedural matters (such as scheduling or other legal requirements). Also, when acting in a neutral, non-adversarial capacity, those attorneys may communicate oral or written confidential attorney-client legal advice on the merits of adjudicative matters to the City Council or other administrative bodies of the City as allowed by state or federal law, and as consistent with statutory fair hearing rights and constitutional due process principles.
2. The forgoing local rule shall apply to all hearings being held by the City Council or other administrative bodies of the City that constitute a “quasi-judicial”

**RESOLUTION NO.**  
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proceeding in which the City Council or other administrative body of the City is acting in an adjudicative capacity.

On motion of Council Member \_\_\_\_\_, seconded by Council Member \_\_\_\_\_, and on the following roll call vote, to wit:

**AYES:**

**NOES:**

**ABSENT:**

the foregoing Resolution was passed and adopted this January 8<sup>th</sup> of January, 2019.

\_\_\_\_\_  
**CAREN RAY RUSSOM, MAYOR**

**ATTEST:**

\_\_\_\_\_  
**KELLY WETMORE, CITY CLERK**

**APPROVED AS TO CONTENT:**

\_\_\_\_\_  
**JAMES A. BERGMAN, CITY MANAGER**

**APPROVED AS TO FORM:**

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**HEATHER WHITHAM, CITY ATTORNEY**