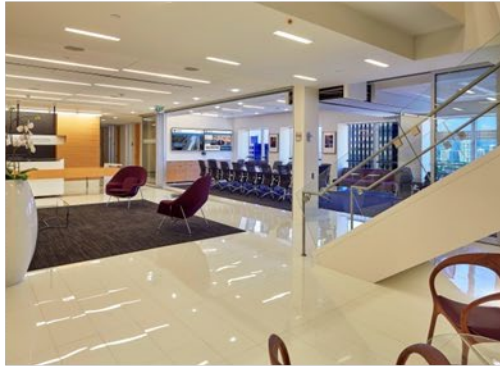


Ethics Discussion



Stanley Lamport

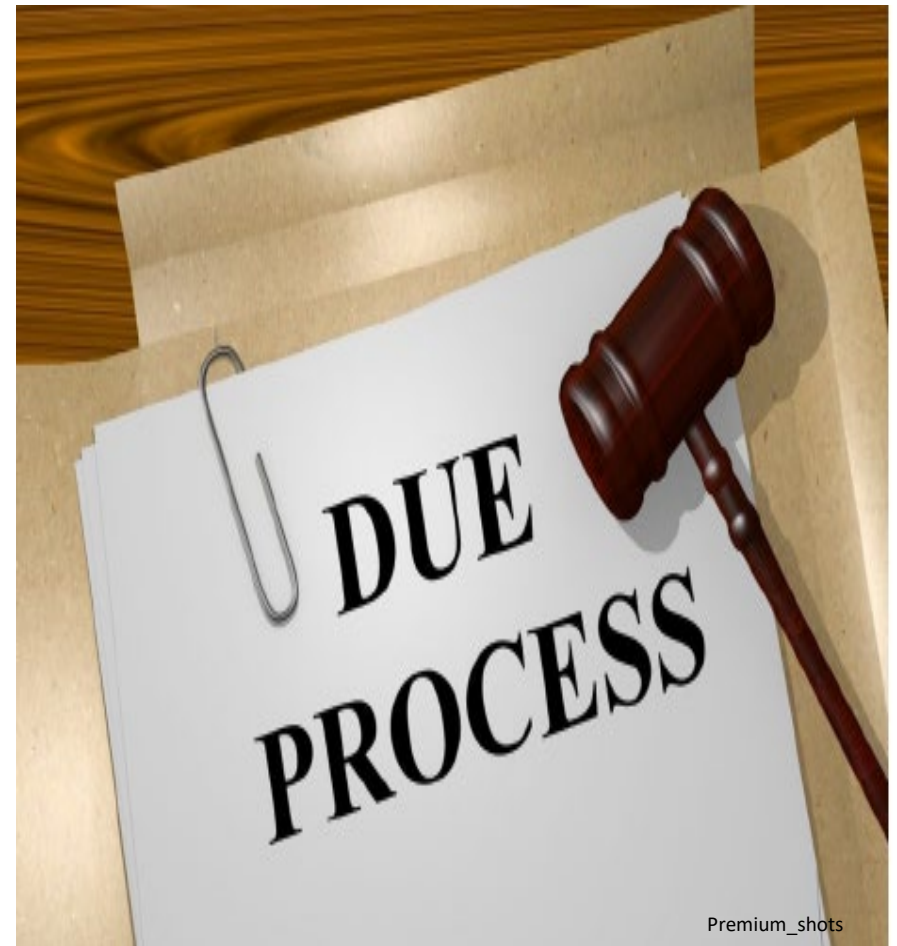
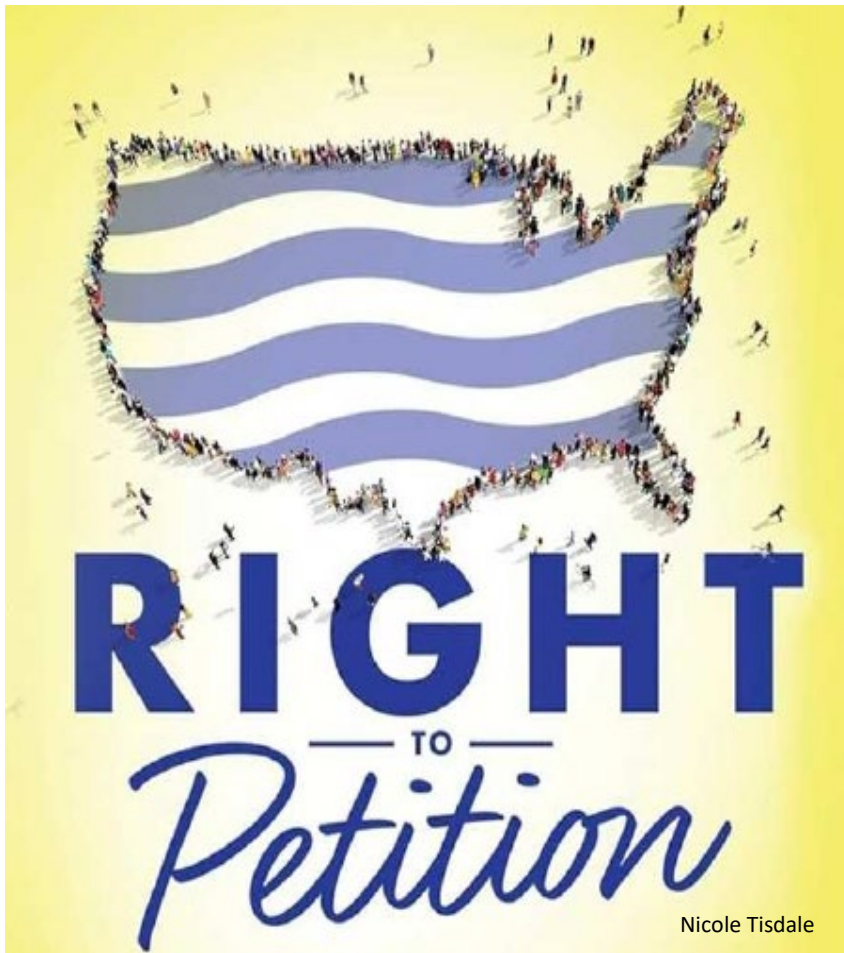
Cox, Castle & Nicholson



COX CASTLE
NICHOLSON

Ex Parte Communications with Agencies Stanley W. Lampport

Competing Issues



Right to Communicate

Congress OF THE *United States*

*begun and held at the City of New-York, on
Wednesday the fourth of March, one thousand seven hundred and eighty nine.*

ARTICLE 1 (FIRST AMENDMENT)

Freedom of Religion, Speech, and the Press

“CONGRESS SHALL MAKE NO LAW respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Ellis County Press

Cal. Motor Trans. V. Trucking Unlimited (1972) 404 U.S. 508, 510

The right to petition includes the right of the people to freely inform the government of their wishes .

Joe Ravi CC-BY-SA 3.0

Article 1 Section 3

“(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.”

“(b) (1) The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny”

Wikipedia

Weaver v. Jordan (1966) 64 Cal.2d 235, 241-242

“Inasmuch as...free speech...[is] worthless without an effective means of expression, the guaranty extends to both the content of the communication and the means employed for its dissemination.”

Wikipedia

City of Fairfield v. Superior Court (1975) 14 Cal.3d 768, 780

A city council member has “not only a right, but an obligation to discuss issues of vital concern with constituents....”

Wikipedia

Due Process

14th Amendment

...nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Move to Amend

Article 1 Section 7



CONSTITUTION

“(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws...”

STATE of CALIFORNIA.

*We the People of California,
grant and do hereby give our assent, in order to secure to ourselves and our posterity the
benefits and protection of the Constitution*

Wikipedia

Horn v. County of Ventura (1979) 24 Cal.3d 609

Due process is required before governmental deprivation of a significant property interest.

Applies only those governmental decisions which are *adjudicative* in nature --*Legislative* action is not burdened by such requirements.



Horn v. County of Ventura (1979) 24 Cal.3d 609

Due process applies to land use decisions that are adjudicatory in nature – where the decision is “determined by facts peculiar to the individual case”.

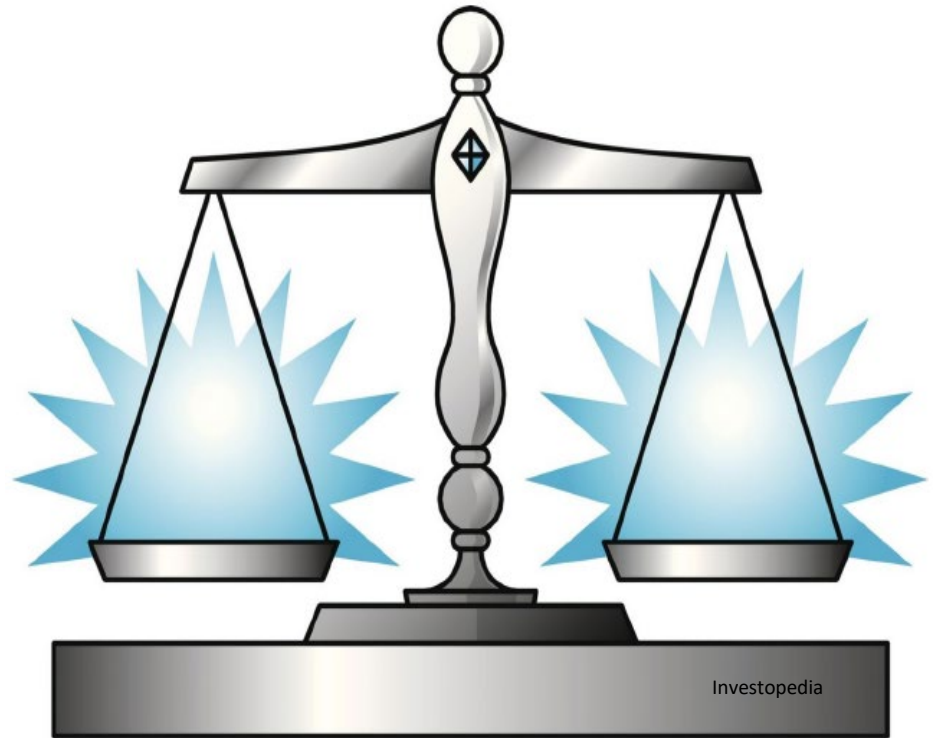
Land use decisions which “substantially affect” the property rights of adjacent parcel owners may constitute “deprivations” of property within the context of procedural due process..



Quasi-Adjudicatory Proceedings

An administrative proceeding

- (i) to determine the rights or duties of a person under existing laws, regulations, or policies;**
- (ii) involving the issuance, amendment, or revocation of a permit or license; or**
- (iii) to enforce compliance with existing law or to impose sanctions for violations of existing law.**



Fair Hearing

Clark v. City of Hermosa Beach
(1996) 48 Cal.App.4th 1152;

Cohan v. City of Thousand Oaks
(1994) 30 Cal.App.4th 547

- Information on which the decision maker bases a decision must be incorporated into the record before the close of the public hearing.
- Interested persons must be afforded a reasonable opportunity to respond to evidence in the record.



Competing Rights

PETITION

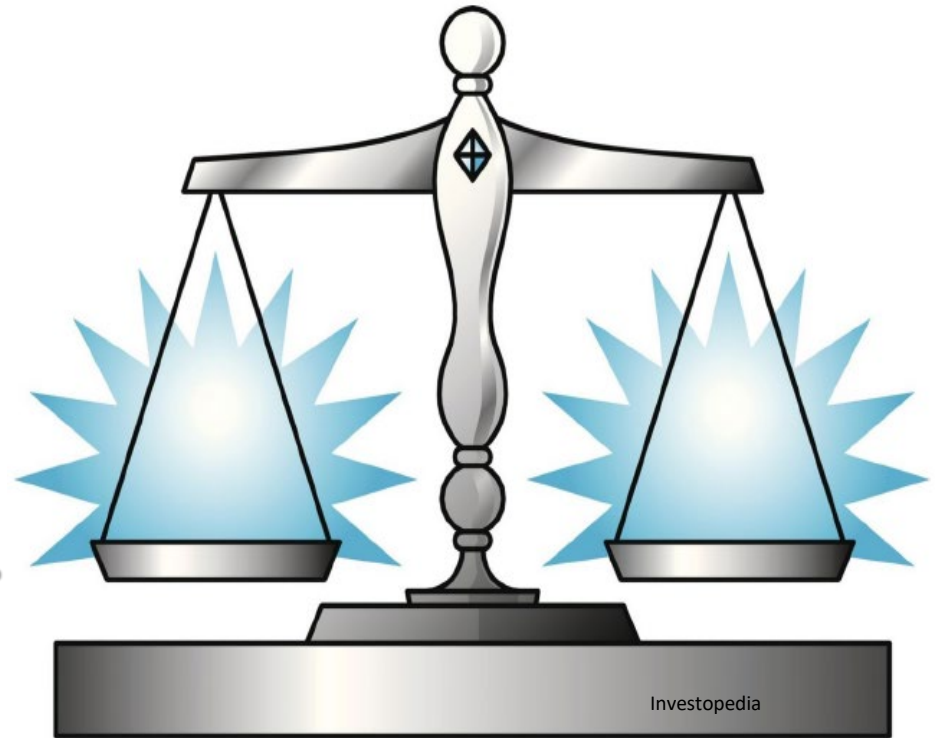
- Right to communicate with government and instruct representatives.
- Includes the right to effectively communicate.
- May include the right to communicate ex parte.

DUE PROCESS

- Must have a fair hearing
- A decision cannot be based on information not in the record
- Persons with property interest must be allowed to respond to evidence in the record.

Constitutional Resolution

- (i) Ex parte communications may occur.**
- (ii) Information obtain that would be a basis for a decision must be disclosed on the record.**
- (iii) Persons with due process rights must have an opportunity to respond**



AGENCY REGULATIONS

California Coastal Commission

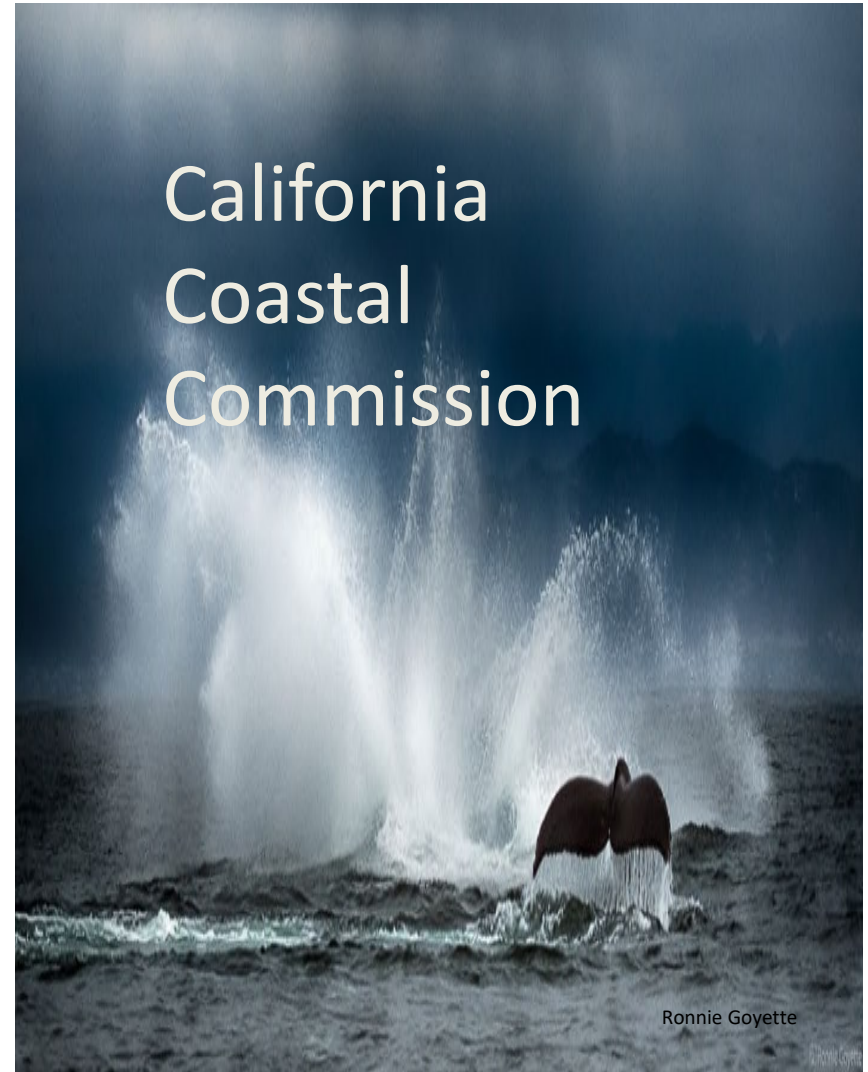
Ronnie Goyette

© Ronnie Goyette

Pub. Res. Code § 30324(a)

“No commission member, nor any interested person, shall conduct an ex parte communication unless

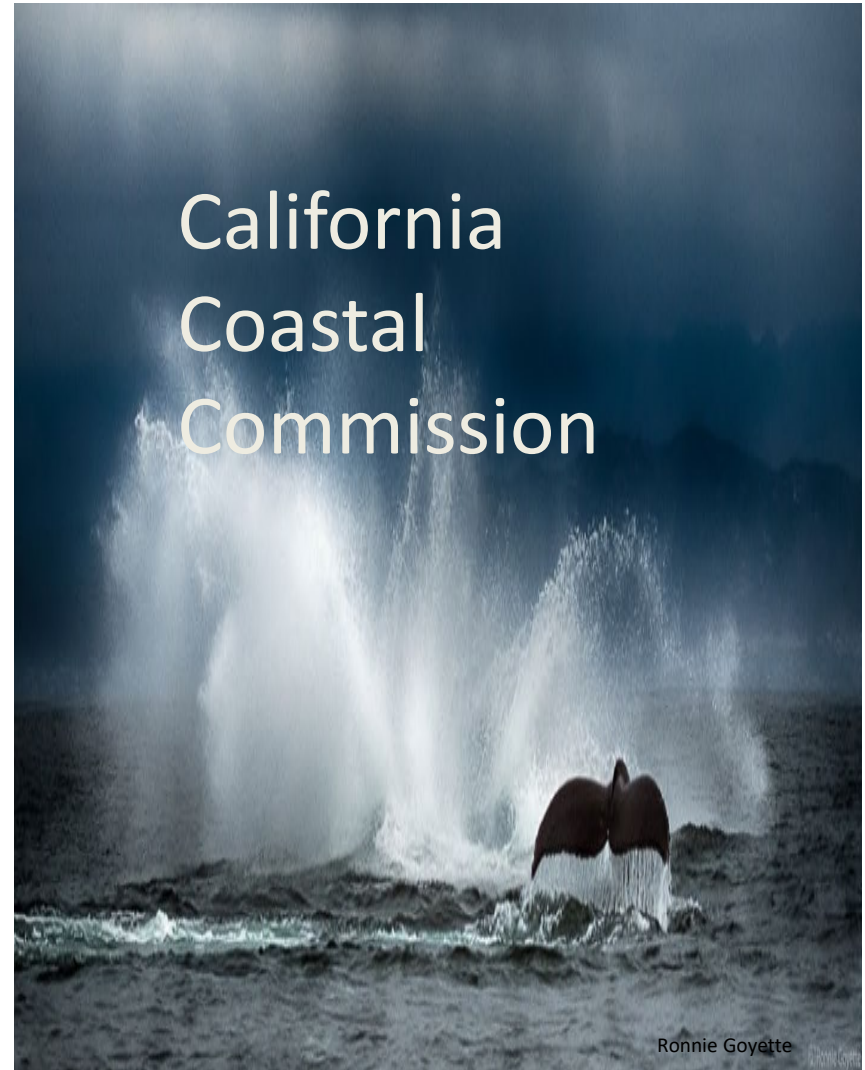
- (i) the commission member fully discloses...by providing a full report of the communication to the executive director within seven days or.**
- (ii) if the communication is within seven day days of the next commission hearing, to the commission on the record of the proceedings at that hearing.”**



Pub Res Code § 30322

An Ex Parte Communication is:

- (i) Any oral or written communication between a Commissioner [not staff] and an interested person
- (ii) About a matter within the Commission's jurisdiction other than about procedure.
- (iii) Which does not occur in a public hearing, workshop or other official proceeding or on the official record of the proceeding in the matter.

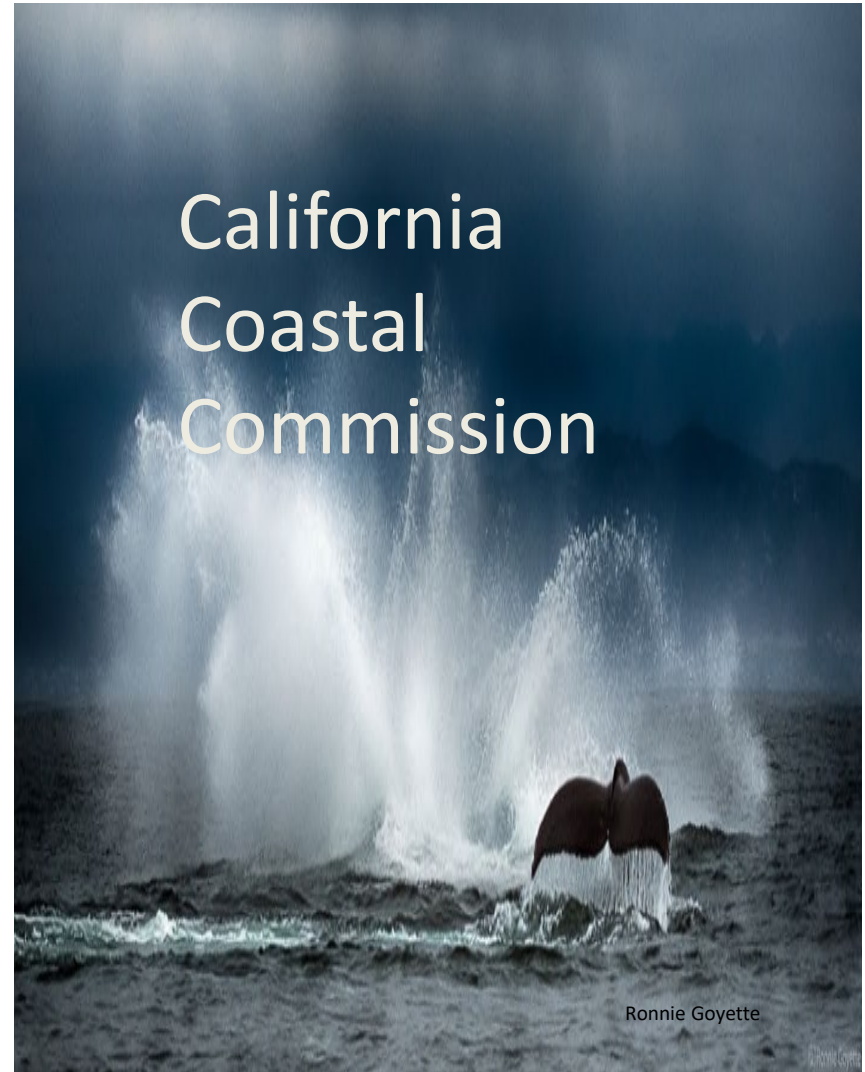


Pub. Res. Code § 30321

A matter within the commission's jurisdiction is:

- (i) Any quasi-judicial matter requiring Commission action, for which an application has been submitted to the Commission.**
- (ii) Does not apply before an application is submitted.**

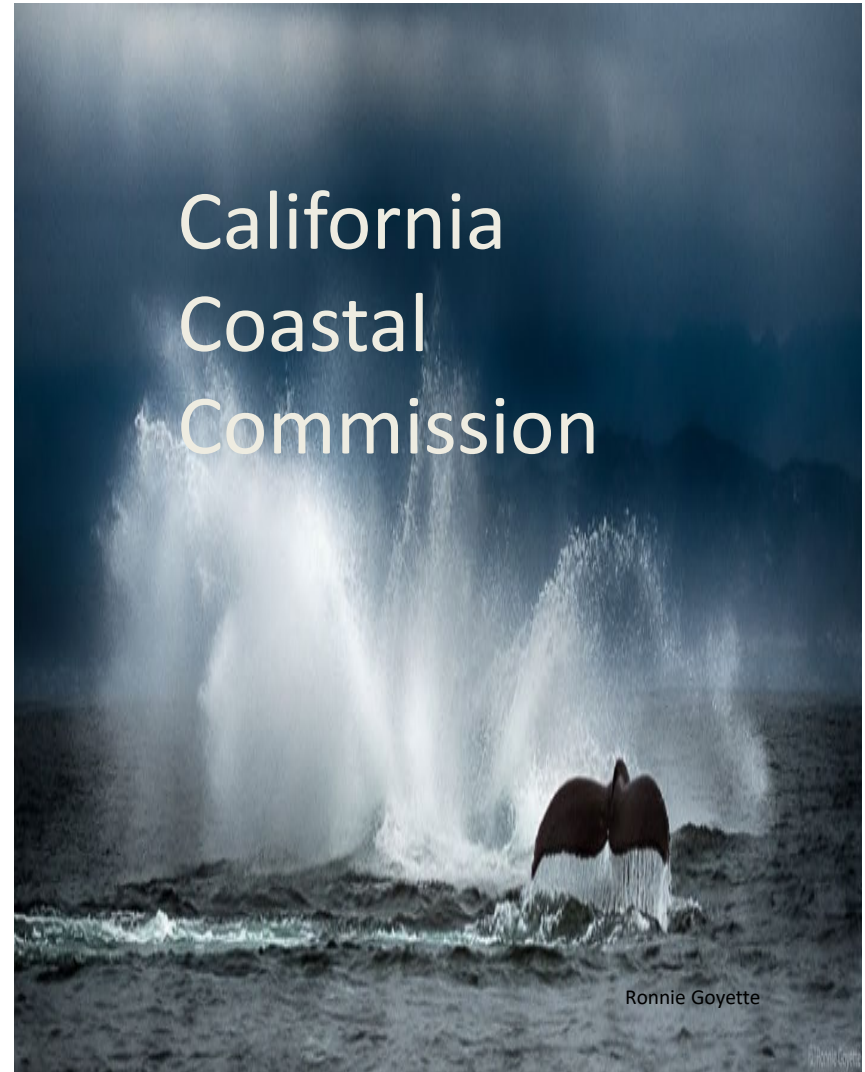
The AG has advised the Commission it does not involve an enforcement matter.



Pub. Res. Code § 30323(a)

An Interested Person is:

- (i) An applicant or its paid agent or employee
- (ii) “A participant in the proceeding on any matter before the Commission.”
- (iii) A person with a financial interest in a matter (per Gov. Code §87100 et seq.)
- (iv) An agent or employee of such a person or a person paid to represent such a person.

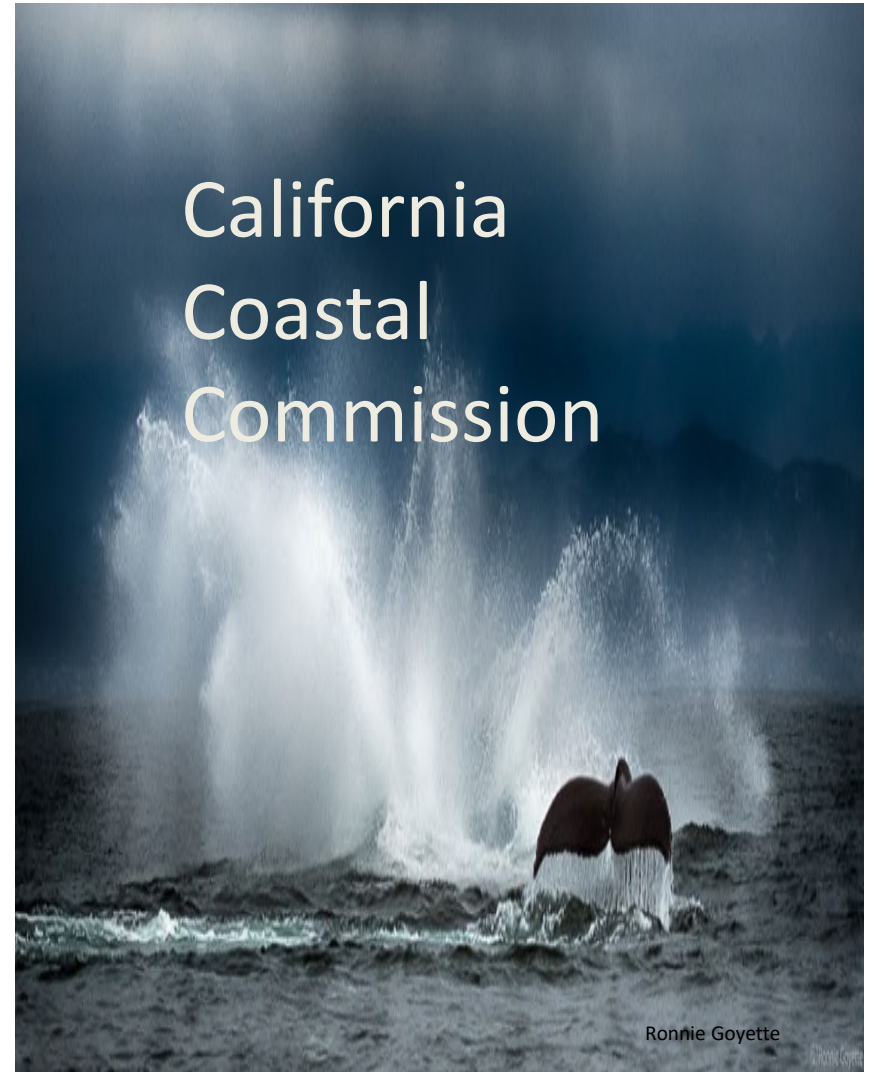


Pub. Res. Code § 30328

Remedies:

If a violation occurs and a commission decision may have been affected by the violation...

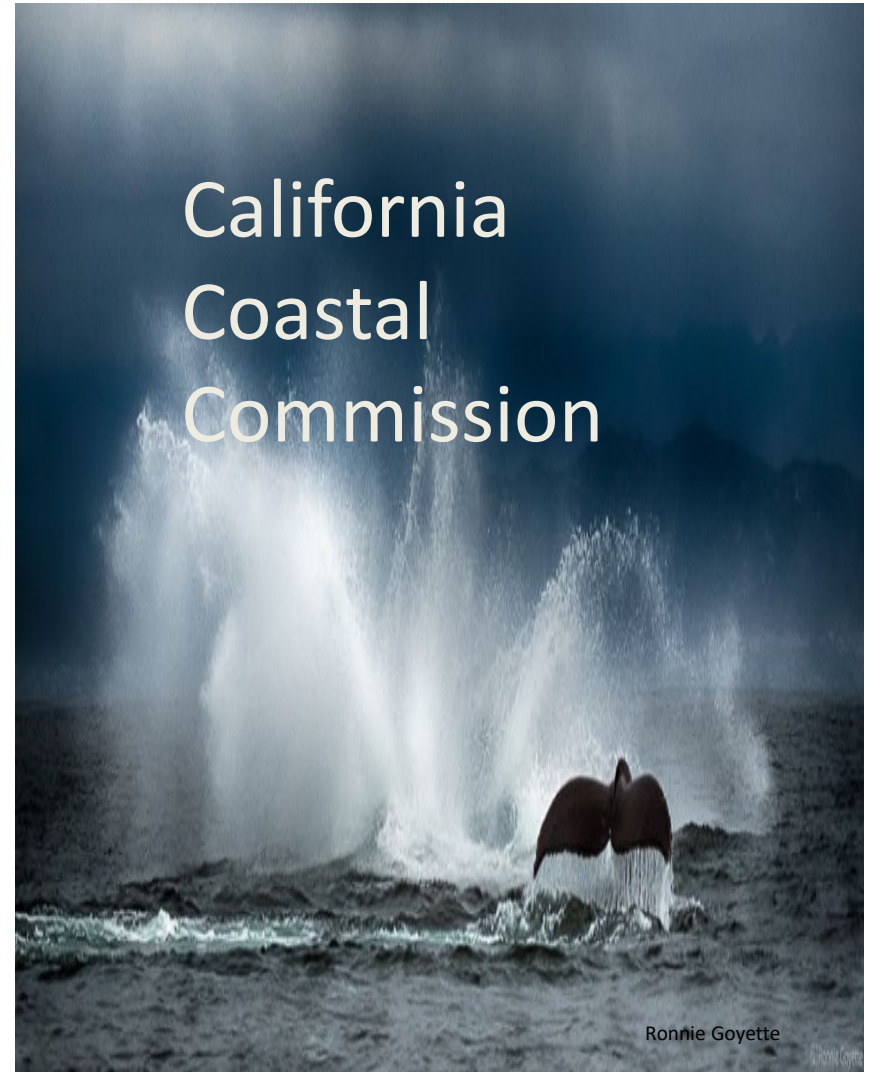
...an aggrieved person, may seek a writ of mandate from a court requiring the commission to revoke its action and rehear the matter.



Pub. Res Code § 30327(a) & (b)

Penalties:

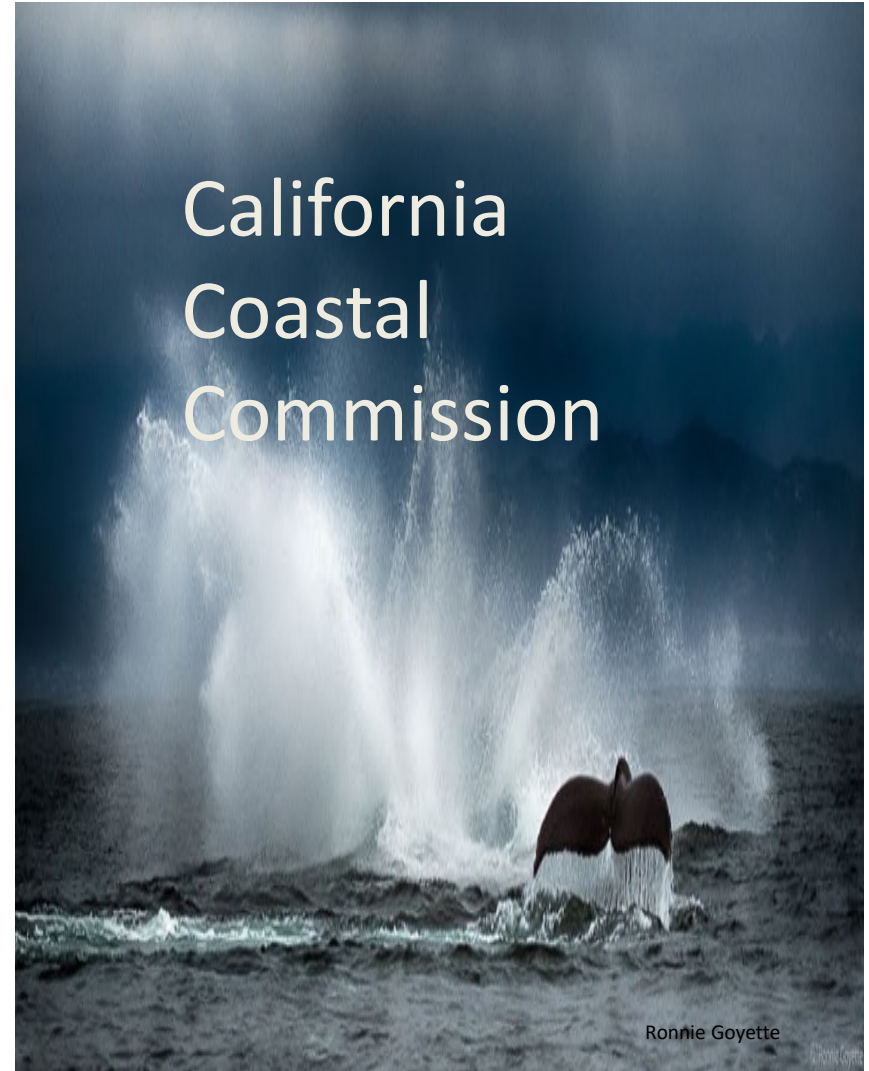
- (i) A commissioner who has an unreported ex parte communication cannot participate or influence a Commission decision.**
- (ii) A commissioner who violates this requirement is subject to a civil fine up to \$7,500.**



Pub. Res. Code § 30824

Penalties:

- (i) In addition to other penalties, a commissioner who knowingly violates the ex parte rules is subject to a separate civil penalty of up to \$7,500.**
- (ii) A prevailing party is may recover attorney fees.**



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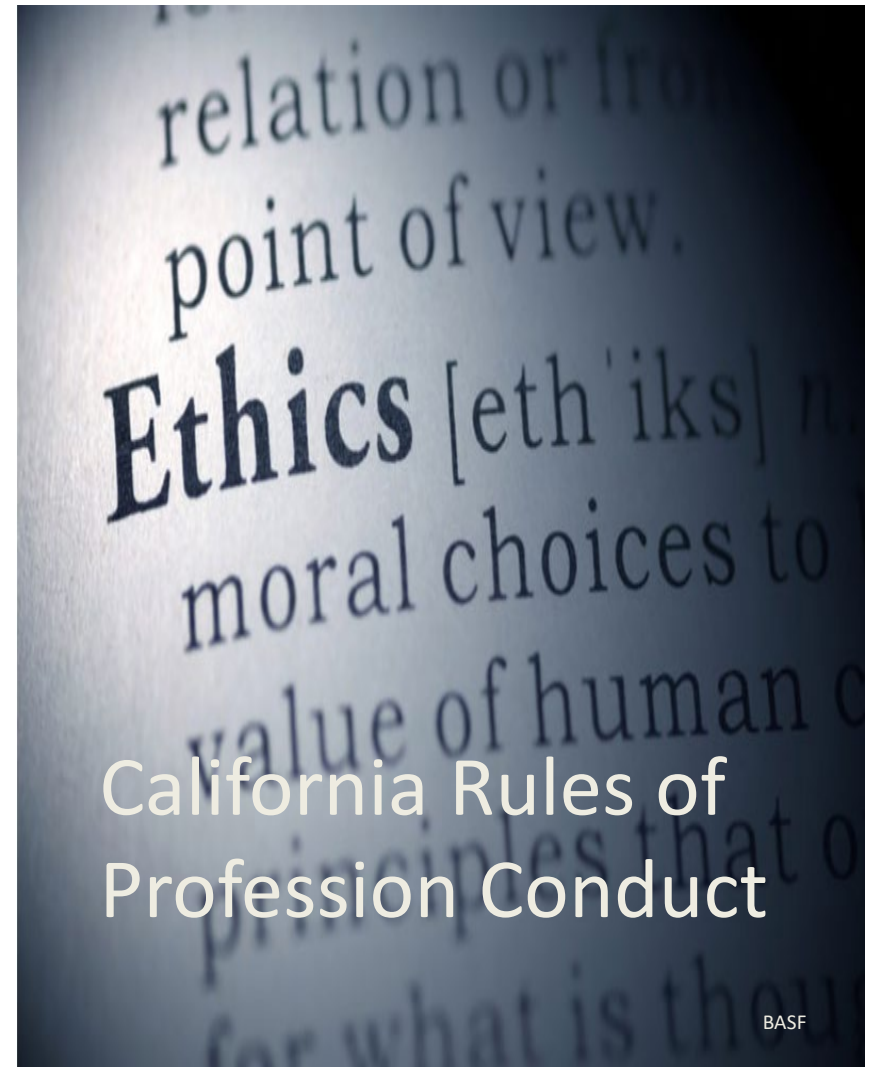
California Rules of Prof Conduct

Ronnie Goyette

BASF

Rule 3.5(b)

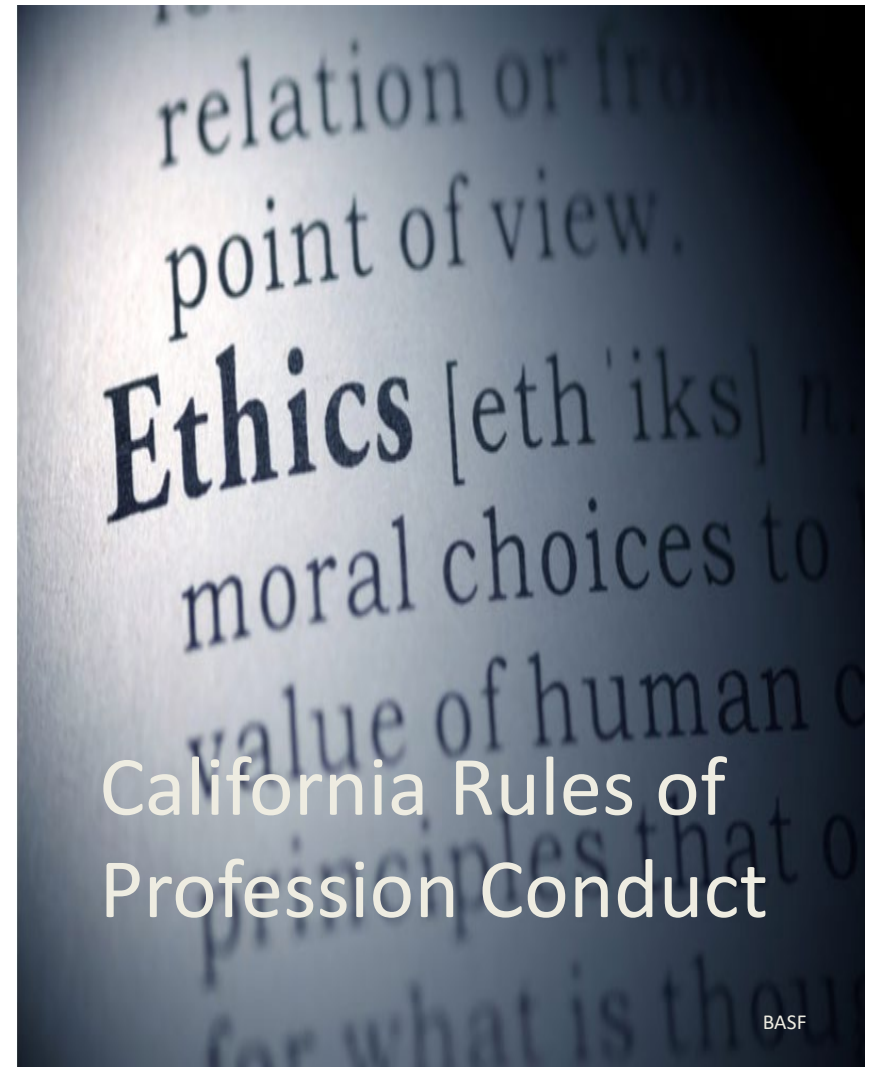
- **Unless permitted to do so by law...[or] a rule or ruling of a tribunal...**
- **a lawyer shall not directly or indirectly communicate with or argue to a judge or judicial officer...**
 - **upon the merits of a contested matter pending before the judge or judicial officer**



Rule 3.5(b)

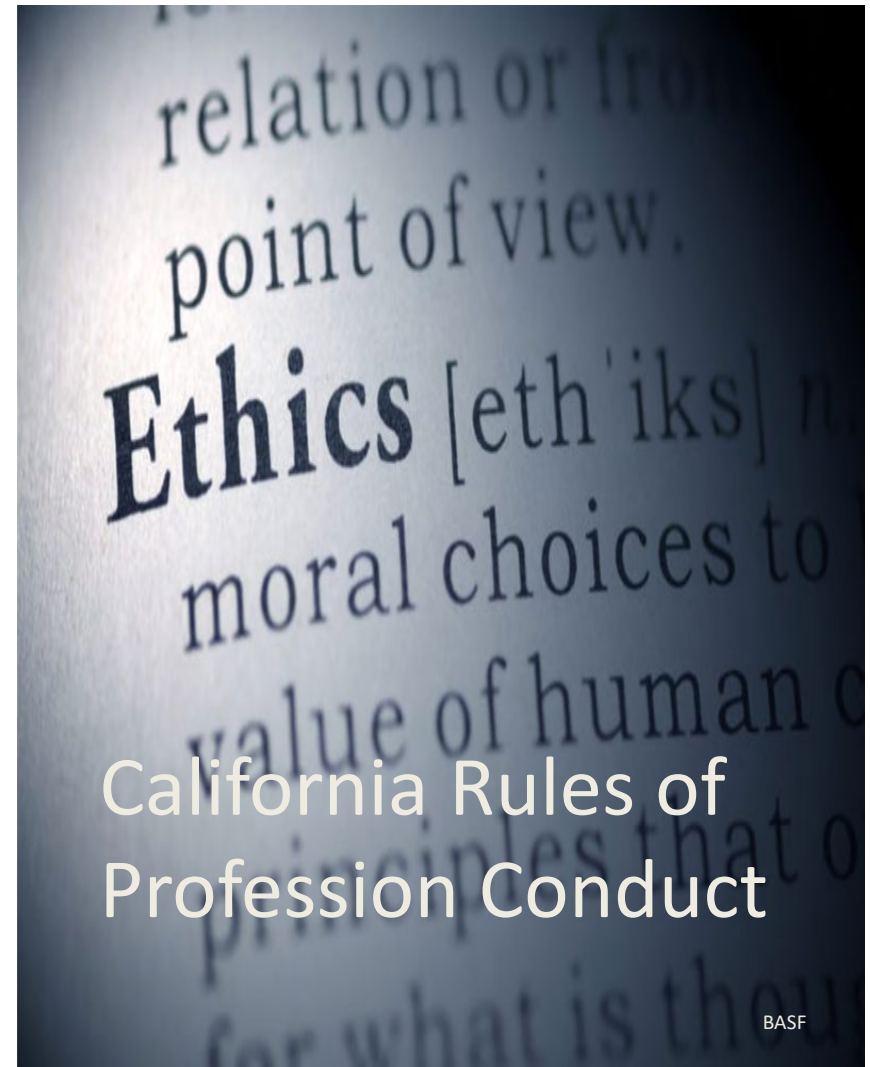
Except:

- (1) in open court;
- (2) with the consent of all parties in the matter;
- (3) in the presence of all other parties in the matter;
- (4) in writing with a copy furnished to all other parties in the matter; or
- (5) in ex parte matters.



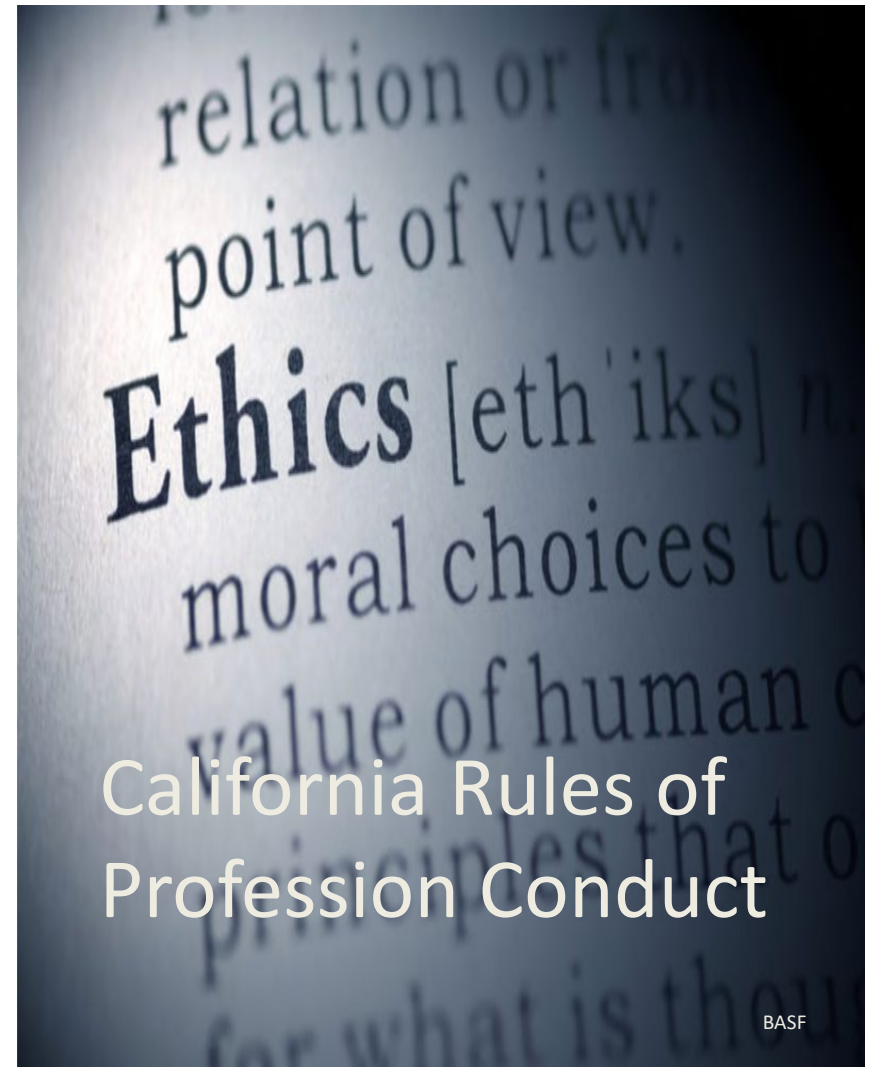
Rule 3.5(c)

- As used in this rule, “judge” and “judicial officer” shall also include:
- members of an administrative body acting in an adjudicative capacity...



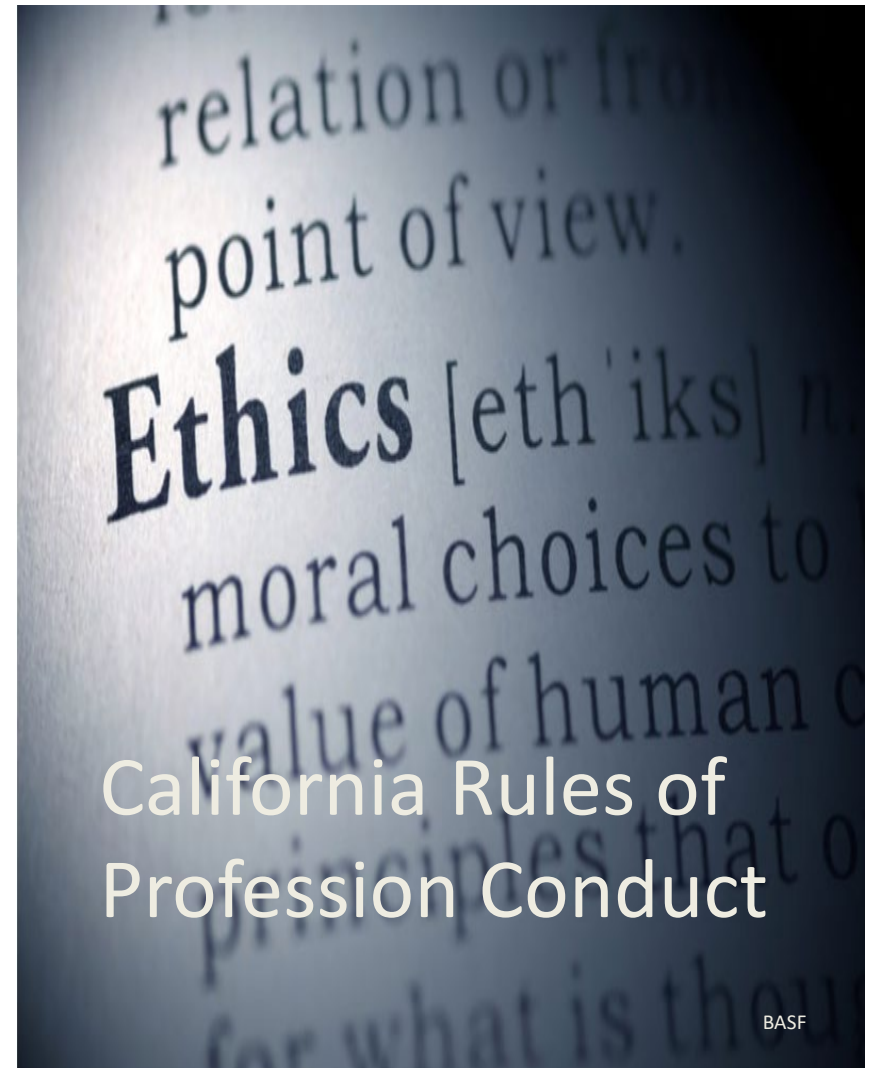
Two Issues

- Is an ex parte communication permitted by law?
 - When an agency has a procedure.
 - When the client is permitted under the constitution.



Two Issues

- When is an administrative body acting in an adjudicative capacity?
- Is a quasi-adjudicatory proceeding an adjudicative proceeding?

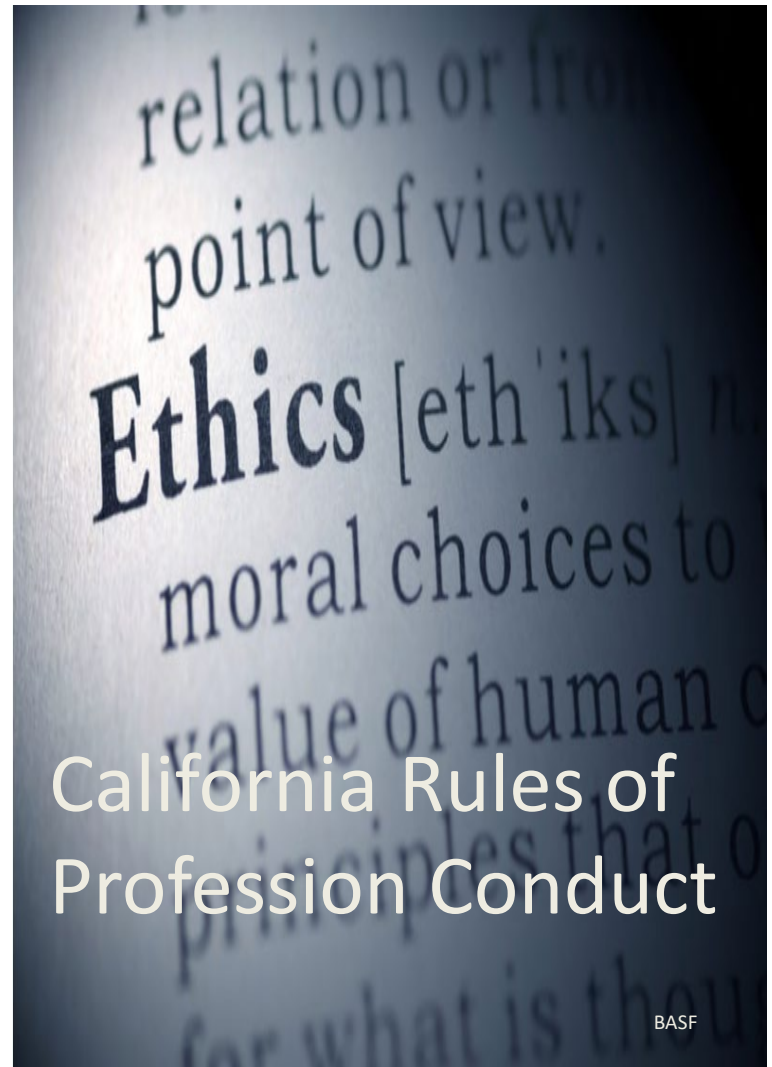


Pacific Lumber Co. v. State Water Resources Control Board (2006) 37 Cal.4th 921

For purposes of collateral estoppel an agency and approval process must possess a judicial character.

Indicia of proceedings undertaken in a judicial capacity include...

- (1) A hearing before an impartial decision maker;
- (2) Testimony given under oath or affirmation;
- (3) A party's ability to subpoena, call, examine, and cross-examine witnesses.

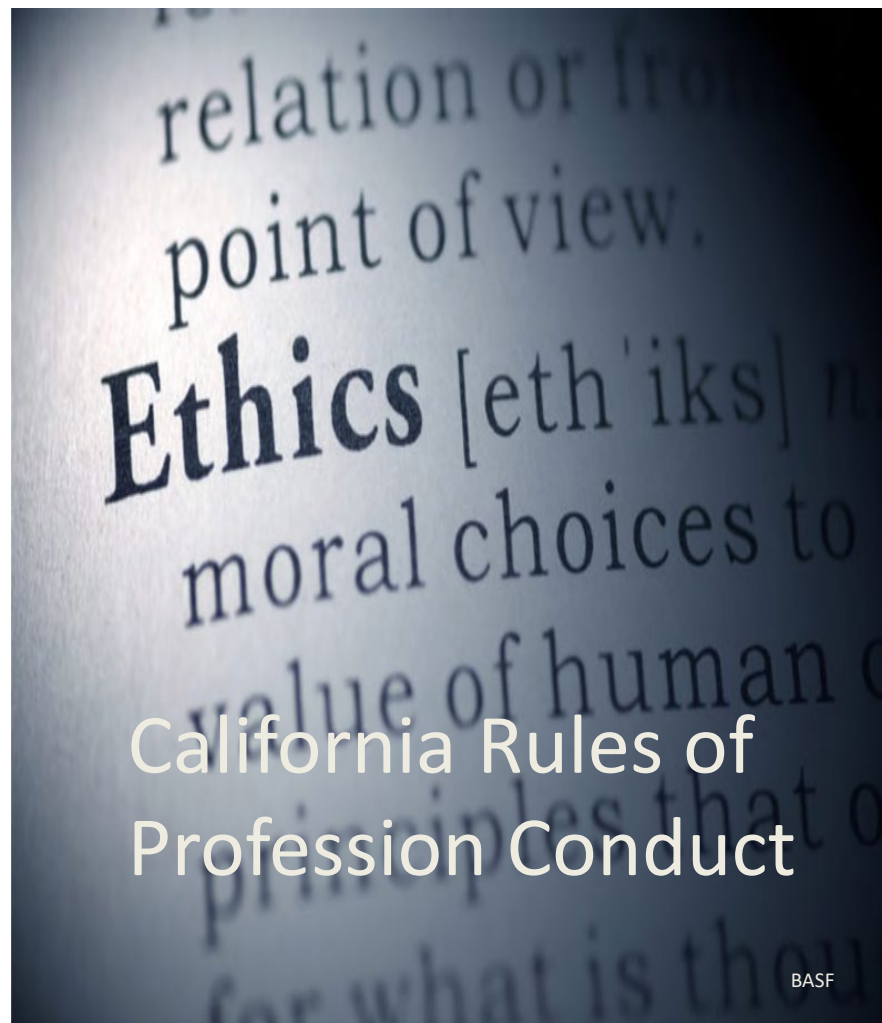


Rule 3.9 - Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative agency in connection with a pending **nonadjudicative matter or proceeding**...

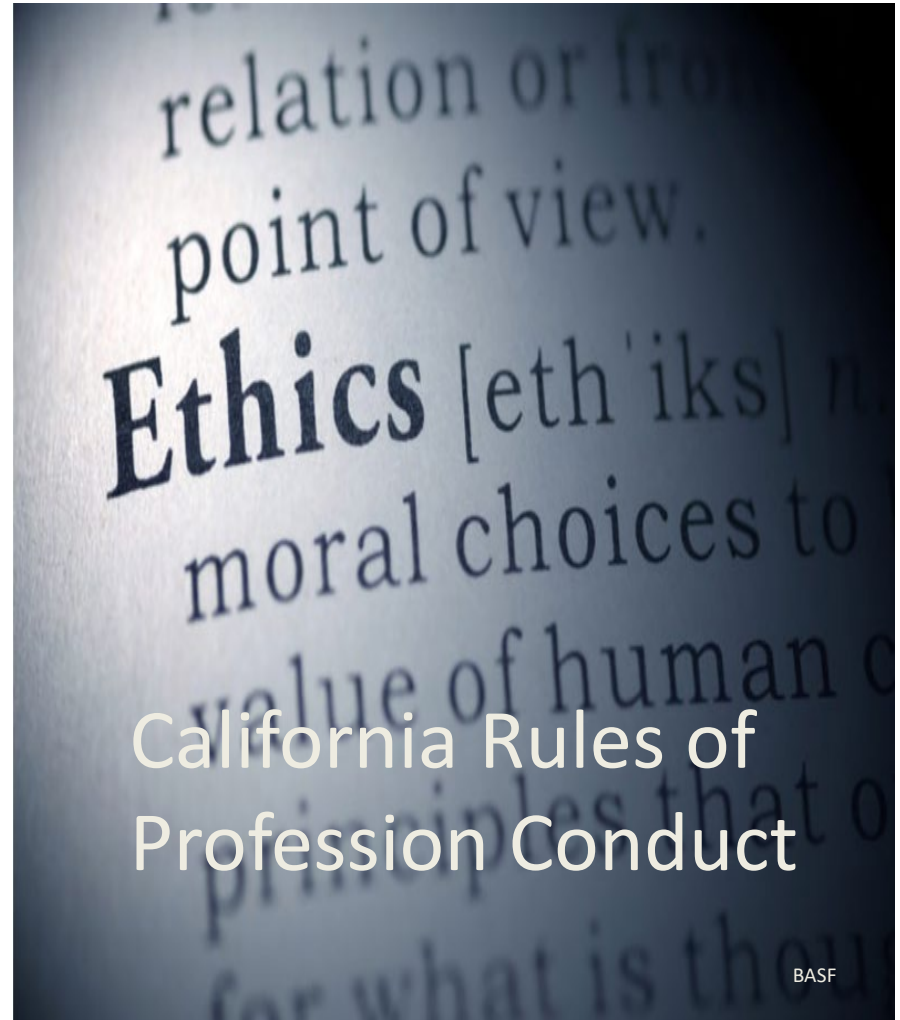
shall disclose that the appearance is in a representative capacity,

except when the lawyer seeks information from an agency that is available to the public.



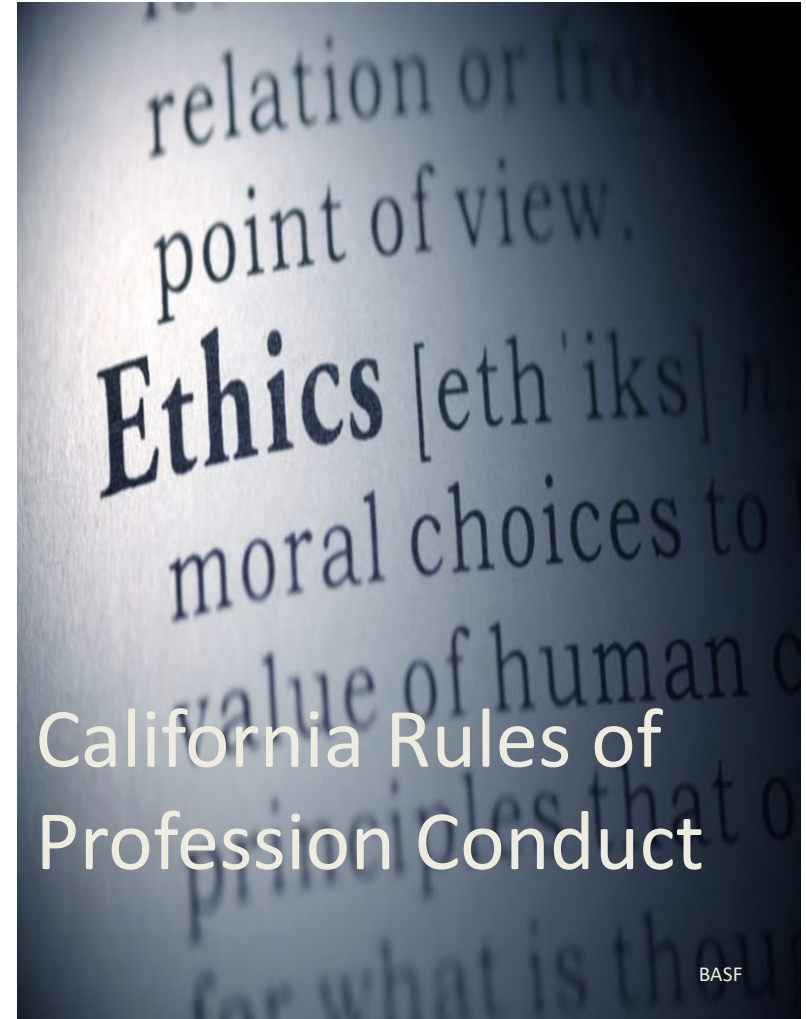
Rule 3.9 - Comment

This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument.



Rule 4.2 – Communication with a Represented Person

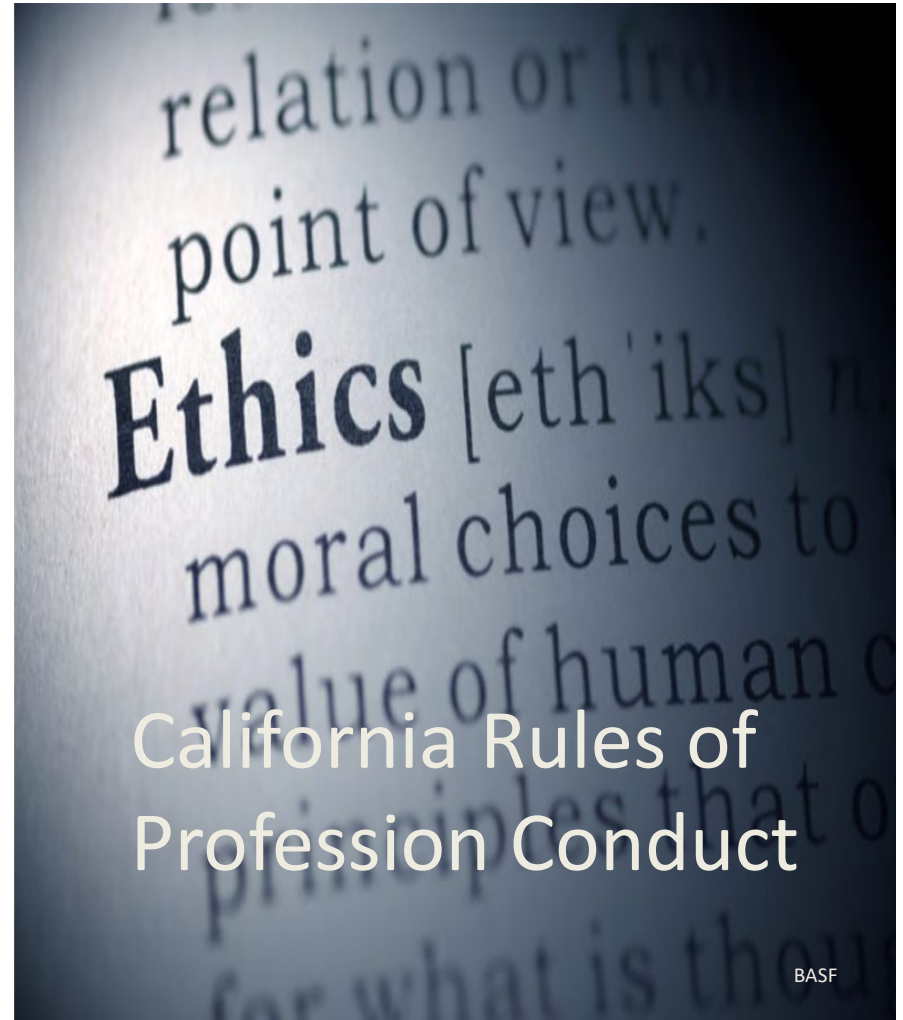
In representing a client,
a lawyer shall not communicate directly or indirectly
about the subject of the representation
with a person the lawyer knows to be represented by another lawyer in the matter,
unless the lawyer has the consent of the other lawyer.



Rule 4.2 – (c)(1) ((d)(2)

This rule shall not prohibit ... with a public official, board, committee, or body.

“Public official” means a public officer of the United States government, or of a state, county, city, town, political subdivision, or other governmental organization, **with the comparable decision-making authority and responsibilities as [as officer director or managing agent of an of an organizational].**



Rule 4.2(b) – Agency Employees

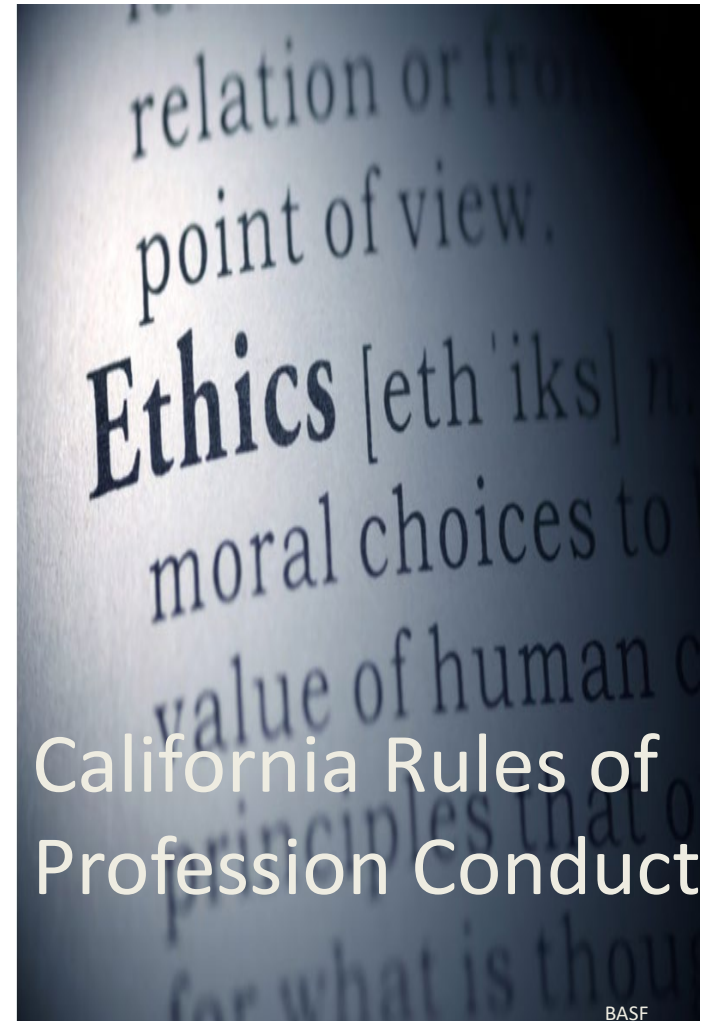
The rule prohibits communications with

A current employee, member, agent, or other constituent ...

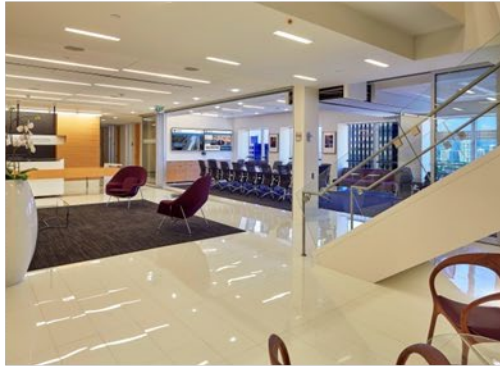
if the subject of the communication is...

any act or omission of such person in connection with the matter

which may be binding upon or imputed to the organization for purposes of civil or criminal liability.



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THE END