

Dear Members of the Commission:

I urge the Commission to not expand the definition of “Tribunal” in Rule 1.01 to include quasi-adjudicatory proceedings before a legislative or administrative body. The definition of “tribunal” should be limited to “a court or an arbitrator in a binding arbitration proceeding” and should not include “a legislative body, administrative agency or other body acting in an adjudicative capacity.”

As written, the definition is unclear in that it uses terminology that is not used in most proceedings before a legislative or administrative body. For example, administrative agencies generally do not issue judgments and the impartiality rules that apply in court are not the same in the administrative process. An administrative proceeding is referred to as “quasi-adjudicatory” and is not strictly an adjudicatory proceeding. The imprecise terminology will result in unnecessary uncertainty regarding the definition’s application, particularly among those who practice in this field.

However, fixing the language does not resolve the fundamental problem with expanding the definition. This definition would mean that rules such as Model Rule 3.3 and 3.5, which are designed for judicial proceedings, would now apply to permitting and other entitlement decisions before cities, counties and other public agencies. These are proceedings in which the litigation privilege in Civil Code § 47(b) applies broadly. The expanded definition would expose lawyers to unique liabilities for activities in which the client can engage legally and freely. As a result, expanding the reach of the tribunal rules to public agency decisions creates conflicts between the lawyer’s interests and the client’s interests that are not justified.

California has a history of retaliatory litigation that was used to chill free speech in administrative proceedings. Extending the definition as proposed opens the door to new abuses in the form of strategic State Bar complaints (or fear of such complaints) that can chill a lawyer’s representation of clients in these proceedings with respect to conduct to which the client is immune from any legal consequence.

One need only review the history of California’s SLAPP statute to see that this concern is real. “SLAPP is an acronym for Strategic Lawsuit Against Public Participation. SLAPP litigation, generally, is litigation without merit filed to dissuade or punish the exercise of First Amendment rights of defendants.” (*Lafayette Morehouse, Inc. v. Chronicle Publishing Co.* (1995) 37 Cal.App.4th 855, 858.) CCP §425.16(a) (California’s SLAPP statute)

states, “The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process.”

We know from the history of the SLAPP statutes that these types of abuses were prevalent enough to justify the Legislature taking action. Expanding the definition of a “tribunal” as proposed creates a new forum for same type of abuse to occur.

Administrative proceedings are not the same as judicial proceedings in that the litigation privilege in Civil Code §47(b) applies more broadly. For a good discussion of the privilege in administrative proceedings, see *People ex rel Gallegos v. Pacific Lumber Company* (2008) 158 Cal.App.4th 950. The rule is that the immunity applies unless there is clear legislative intent to the contrary and that any doubt must be resolved in favor of upholding the privilege. The California Rules of Professional Conduct cannot carve out exceptions to a statutory privilege. To the extent there is any dispute about the scope of the privilege, we would be talking about a question of law that is not settled and should not be decided in a rule of professional conduct.

With respect to judicial proceedings, the State Bar Act carves out exceptions in Sections 6068 and 6128, which, in turn, are the basis for the trial conduct rules the Rules of Professional Conduct. However, each of these statutes focuses on court proceedings. For example:

- Bus. & Prof. Code §6068(b) – attorney duty to maintain the respect due to the courts of justice and judicial officers.
- Bus. & Prof. Code §6068(d) – attorney duty to never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.
- Bus & Prof. Code §6128 - attorney guilty of misdemeanor for any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party

These and other prohibitions in the State Bar Act are specific to the courts. They do not mention or refer to administrative proceedings. They

are also prohibitions that are consistent with the rules in judicial proceedings that apply to lawyer and client alike. In other words the lawyer and the client are both prevented from doing the same things and, therefore, there is no conflict between what a client is permitted to do and what the lawyer is permitted to do on the client's behalf.

The prohibitions on what lawyer and client can do in the courts do not carry over to quasi-adjudicatory proceedings before legislative or administrative bodies. For example, in *People ex rel Gallegos v. Pacific Lumber Company* (2008) 158 Cal.App.4th 950, the government alleged that a lumber company had violated California's unfair competition law for actions that are remarkably similar to the kinds of acts that Rules 3.3 and 3.5 would prohibit, including (i) submitting false information in order to obtain a governmental approval, (ii) concealing adverse findings from a consultant, and (iii) delaying submission of corrected data and delivering that data to the wrong agency address. The government alleged that these acts precluded preparation of an accurate environmental impact report under the California Environmental Quality Act and resulted in an approval based on incorrect information.

The trial court sustained demurrers without leave to amend with respect to these allegations, which the Court of Appeal affirmed. *Gallegos* held that the lumber company's communications "whether fraudulent or not, fall squarely within the scope of the litigation privilege." In explaining the policy, the *Gallegos* court stated, "As several California courts have explained in recognizing that the litigation privilege has its costs, "***[it] is desirable to create an absolute privilege ... not because we desire to protect the shady practitioner, but because we do not want the honest one to have to be concerned with [subsequent derivative] actions ...***" (*Gallegos, supra*, at 963, citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 214, quoting *Thornton v. Rhoden* (1966) 245 Cal.App.2d 80, 99, emphasis added.)

The highlighted language underscores my concern. Expanding the definition of "tribunal" undermines a privilege that protects clients by assuring that their lawyer's representation of the clients' interests in a public forum is not chilled by concerns about retaliatory proceedings. That protection is necessary because we practice in a state with a well documented history of retaliatory litigation that has been directed to that end. And the chill would not just be felt by a lawyer representing an applicant. Litigation that promoted enactment of the SLAPP statute was commonly pursued against project opponents, including public interest and

environmental advocates and organizations, whose lawyers would now be potential targets for strategic State Bar complaints. The chill would extend to the city attorney or county counsel who sits with the decision makers and who speaks in a public hearing. That lawyer must consider the risk of defending a State Bar complaint brought by a disgruntled or opportunistic citizen, applicant or advocacy group in evaluating how they advise their administrative agency client in the public hearing. The absolute privilege in Civil Code §47(b) removes these types of clouds over the quasi-adjudicatory proceedings before legislative and administrative agencies.

Extending the application of disciplinary rules to lawyers representing clients in administrative proceedings also raises a host of practical problems for clients in these proceedings. For example, administrative decisions are usually challenged in court by way of a petition for writ of mandate. The rules regarding exhaustion of administrative remedies require (with limited exceptions) that issues raised in the writ litigation must first be raised in the administrative proceeding. A litigant can bring a challenge based on any issue raised by anyone in the administrative proceeding. It is not difficult to conceive of circumstances where compliance with rules 3.3 or 3.5 would require a lawyer to raise a point that would form a basis for a legal challenge affecting the client's interests, which would not exist if the lawyer had not raised it and which the client is under no duty to reveal.

This is just one more example of the types of unnecessary and ill-advised conflicts between lawyer and client that result from extending the definition of "tribunal" to cover quasi-adjudicatory proceedings before a legislative or administrative agency.

The draft definition of "tribunal" is a big step in the wrong direction. For these reasons, I urge the Commission to limit the definition to of "tribunal" to "a court or an arbitrator in a binding arbitration proceeding."

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