



OFFICE OF THE CITY ATTORNEY

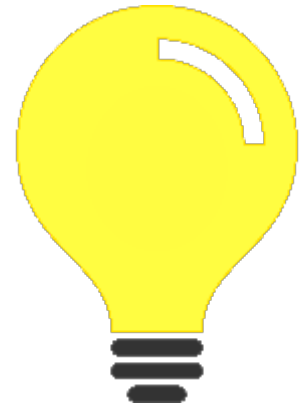
# EX PARTE COMMUNICATIONS

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League of California Cities 2016 Annual Conference

# Today's Goals

- Examine the Law of Ex Parte Communications
- Provide an Understandable Framework for Educating and Advising Clients
- Promote Consistency



# THE LAW OF EX PARTE COMMUNICATIONS

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# Well, . . . How Did I Get Here?





“No **free man** shall be taken, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.” (Ch. 39.)



**“It’s an American dream, includes  
Indians too.”**



***San Franciscan Nights (1967), Eric Burdon & The Animals***

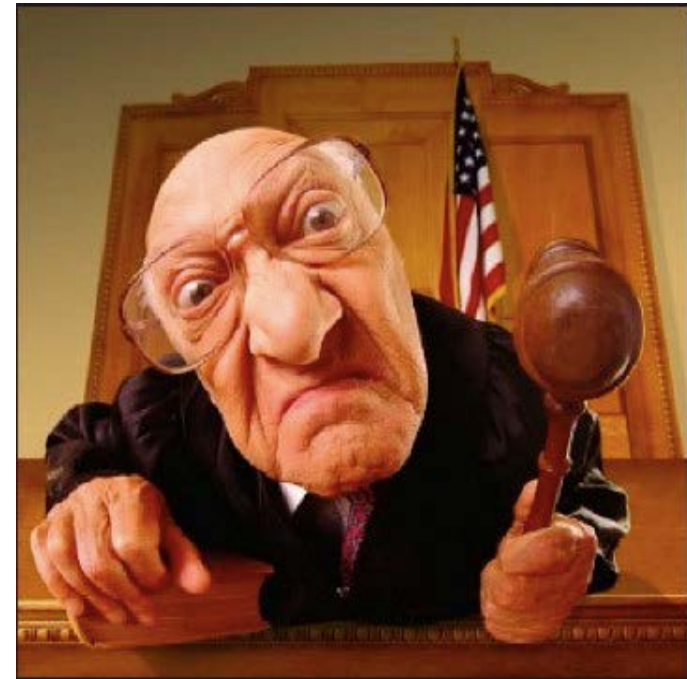
# Fifth and Fourteenth Amendments

“No person shall . . . be deprived of life, liberty, or property, without due process of law;. . . .” (U.S. Const. amend. V.)

“. . . nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . .” (U.S. Const. amend. XIV.)

# California Civil Code

“The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.” (Civ. Code, § 22.2.)





# California Constitution

“A person may not be deprived of life, liberty, or property without due process of law . . . .”

(Cal. Const., art. I, § 7.)



*Today's Fresh Start Charter School: Excellence in Education*



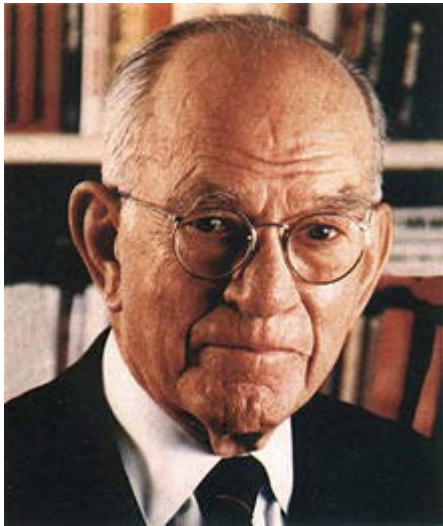
Dr. Jeanette Grattan Parker

“In light of the virtually identical language of the federal and state guarantees, we have . . . treated the state clause's prescriptions as substantially overlapping those of the federal Constitution.”

(*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2013) 57 Cal.4th 197, 212.)

# Due Process in a Nutshell

“ . . . a ‘fair trial in a fair tribunal is a basic requirement of due process.’” (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.)



“When public men indulge themselves in abuse, **when they deny others a fair trial**, when they resort to innuendo and insinuation, to libel, scandal, and suspicion, then our democratic society is outraged, and democracy is baffled. It has no apparatus to deal with the boor, the liar, the lout, and the antidemocrat in general.” Senator J. William Fulbright, remarks in the Senate, February 2, 1954, *Congressional Record*, vol. 100, p. 1105.



# THE FAIRNESS CONSIDERATIONS BEHIND EX PARTE COMMUNICATIONS LAW

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# Two Precepts of Fundamental Fairness in Ex Parte Communication Law

- **Judicial Impartiality**
- **The Value of “Adversarial Testing”**





# Judicial Impartiality

“While . . . administrative agencies have considerable leeway . . . , they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters,

***one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in***

***private.***” (Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, 5.)



# Judicial Impartiality

“ . . . the judge whom due process requires to be impartial in weighing the evidence . . . called on his own personal knowledge and impression of what had occurred . . . the **accuracy of which could not be tested** by adequate cross-examination. . . . The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.”

(*In re Murchison* (1955) 349 U.S. 133, 138-39.)



# Judicial Impartiality

“In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature . . . . In the absence of financial or other personal interest, **and when rules . . . prohibiting ex parte communications are observed**, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.)

# **The Value of “Adversarial Testing”**

- **“Debate between Adversaries”  
Enhances the “Truth-Seeking”  
Function of Hearings**
- **“Notice” of the Evidence  
Allows Parties to “refute, test  
and explain it”**



# The Value of “Adversarial Testing”



Query whether “adversarial testing” as a rationale for requiring disclosure of ex parte communications remains vital in light of the flexibility of due process, particularly after *Today’s Fresh Start*

***“... the due process clause does not mandate importation of the adversary trial model into the administrative context.”***

*(Today’s Fresh Start, Inc. v. Los Angeles County Office of Educ. (2013) 57 Cal.4th 197, 220.)*

# EDUCATING AND ADVISING CLIENTS

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# Two Teaching Premises

- Ex Parte Communication Rules are Confusing and Counterintuitive for Many Local Officials
- Elected Officials are Rightfully Skeptical of Laws that Impede Constituent Communications



# Three Questions to Consider with Your Clients

- What is an ex parte communication?
- Why is the law concerned about ex parte communications?
- How can the city protect itself against improper ex parte communications?



# What's an Ex Parte Communication?

Any material and substantive oral or written communication, or sensory observation, with or by a decisionmaker, that is relevant to the merits of an adjudicatory proceeding, and which takes place outside of a noticed proceeding open to all parties to the matter



*“ . . . the party of the first part shall be known in this contract as the party of the first part.”*

The “contract” scene in *Night at the Opera*  
Groucho and Chico Marx, 1935

# What's an Ex Parte Communication?

Getting information about certain city decisions outside of a public hearing

**simple is  
beautiful.**

# Why is the Law Concerned with Ex Parte Communications?

Ex parte communications with City decisionmakers can violate the constitutional and statutory due process rights of the parties to a quasi-judicial City proceeding because these communications create an appearance that the decisionmakers are not impartial and they deprive the non-present parties of the opportunity to challenge evidence in an adversarial proceeding

# Why is the Law Concerned with Ex Parte Communications?

Getting information about a decision outside a public hearing is unfair to the people whose rights are being decided by the City

make it  
clear



# **How Can the City Protect Itself Against Improper Ex Parte Communications?**

The city must develop and adopt, and decisionmakers must adhere to a, written policy which requires pre-hearing written or oral disclosure of ex parte communications on quasi-judicial decisions. The policy must prohibit post-hearing ex parte communications until the final decision is adopted.

# How Can the City Protect Itself Against Improper Ex Parte Communications?

- Avoid discussing City decisions before a public hearing.
- If a discussion does happen, disclose what you talked about during the meeting before the public hearing is opened.
- After the hearing, if a decision is not final, don't have any discussions about the matter.

# DRAFTING AN EX PARTE COMMUNICATIONS POLICY

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## Five Key Considerations

# 1 Procedural Due Process Relates to Adjudicatory Proceedings

The Characteristics of Adjudicatory or Quasi-Judicial Proceeding:

1. Does the matter require advance notice and a hearing?
2. Must the decision be predicated upon specific findings of fact?
3. Does the decision apply existing law to specific facts to make an individualized determination of a specific person's rights or interests in life, liberty, or property?



# 2 Ex Parte Communication is Evidence-Gathering Outside the Formal Proceedings

Ex parte communications include oral and written information, but can also include any other sensory communication, such as visual or auditory information obtained during a site visit





# 3 Ex Parte Communications Must Be Substantive and Relevant to the Matter in Order to Impact Due Process Rights

- Casual or non-substantive communications do not violate the due process rights of non-present parties
- This limitation is important to local elected officials because they are often expected to be available so that concerns or complaints may be expressed by their constituents
- The mere expression of support or opposition to a particular decision does not raise due process concerns unless it is accompanied by substantial factual information that influences the decisionmaker's analysis or conclusions



# 4 Prehearing Disclosure of Ex Parte Communications Fulfills Due Process Requirements

- California case law is clear that pre-hearing disclosure of *ex parte* communications adequately protects the due process interests of the non-present parties to the matter
- The disclosure should be complete, detailed and as early in the process as is reasonable
- Many agencies and some cities require written disclosure

## EX PARTE COMMUNICATION DISCLOSURE FORM

Filed by Commissioner: \_\_\_\_\_

1) Name or description of project: \_\_\_\_\_

2) Date and time of receipt of communication: \_\_\_\_\_

3) Location of communication: \_\_\_\_\_

(If not in person, include the means of communication, e.g., telephone, e-mail, etc.)

4) Identity of person(s) initiating communication: \_\_\_\_\_

5) Identity of person(s) on whose behalf communication was made: \_\_\_\_\_

6) Identity of persons(s) receiving communication: \_\_\_\_\_

7) Identity of all person(s) present during the communication: \_\_\_\_\_

Complete, comprehensive description of communication content (attach complete set of any text or graphic material presented):

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date \_\_\_\_\_

Signature of Commissioner \_\_\_\_\_

**TIMING FOR FILING OF DISCLOSURE FORM:** File this form with the Executive Director within seven (7) days of the ex parte communication, if the communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication. If the communication occurred within seven (7) days of the hearing, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication. This form may be filed with the Executive Director in addition to the oral disclosure.

# 5

## **Ex Parte Communications Must Be Prohibited After a Quasi-Judicial Hearing If the Decision is Not Final**

- There must be no ex parte communications during the interstitial period between closure of a hearing and a final decision because there is no opportunity for rebuttal. This arises most often when a city decisionmaker closes a quasi-judicial hearing and directs the preparation of written findings by staff.
- Cities have differing approaches to ex parte communications during post-hearing Brown Act public testimony. An admonition on the record advising the decisionmakers not to consider Brown Act-required public comment should be sufficient.



# Fiat Justitia