

McCurdy, Lauren

RE: Rule 3.9
6/25&26/10 Commission Meeting
Open Session Agenda Item III.SS.

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Thursday, June 17, 2010 3:49 PM
To: Ruvolo, Ignazio; Difuntorum, Randall; Foy, Linda; Lamport, Stanley W.
Cc: Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; pwwapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: RE: Rule 3.9

I agree with Nace.

Mark L. Tuft
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San Francisco, CA 94111
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=====
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=====
From: Ruvolo, Ignazio [mailto:Ignazio.Ruvolo@jud.ca.gov]
Sent: Thursday, June 17, 2010 2:10 PM
To: 'Difuntorum, Randall'; Foy, Linda; Lamport, Stanley W.
Cc: Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; Mark Tuft; pwwapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: RE: Rule 3.9

Randy,

McCurdy, Lauren

From: Lamport, Stanley W. [SLamport@coxcastle.com]
Sent: Thursday, June 17, 2010 2:38 PM
To: Ruvolo, Ignazio; Difuntorum, Randall; Foy, Linda
Cc: Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: RE: Rule 3.9

Nace:

This was discussed in detail at the Commission. I was responsible for the drafter's recommendations on the Rule. The final version of the Rule came about after Jerry recommended the New York rule, which the Commission adopted with some changes. The following summarizes the Commission's position.

"In light of the comments received in opposition to the proposed Rule, the Commission believes that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. Given the empirical experience that led to the enacted California SLAPP statute and the experience provided in other comments, there is a real risk that a Rule incorporating the requirements of Rule 4.1 could be misused to chill the speech of lawyers on behalf of clients. A Rule incorporating the requirements of Rule 4.1 would subject lawyers to unique risks that do not apply to anyone else who participates in nonadjudicative proceedings. As a result, such a Rule could chill lawyer speech on behalf of clients in nonadjudicative proceedings without resulting in any improvement to the honesty and integrity of such proceedings. The Commission believes that these risks outweigh adopting the Rule incorporating the requirements of Rule 4.1."

With respect to the differences between judicial proceedings and non-adjudicative proceedings, the Commission's position is stated as follows:

"There are differences between adjudicative and nonadjudicative proceedings that justify treating nonadjudicative proceedings differently. The sections of Rules 3.3, 3.4 and 3.5 to which the Model Rule refers relate to a process that is very different from what occurs in a nonadjudicative proceeding in California. Formal rules of evidence and procedure do not apply to these proceedings...The decision makers in these proceedings - whether quasi-legislative or quasi-judicial - are not judicial officers and instead are often lay people in the eyes of the law. There are no rules of discovery in these types of proceedings. Participants are permitted to withhold information and frequently do. The evidentiary standard of review is substantial evidence, which does not require a full resolution of the facts. The decision is upheld based on whether there is credible evidence in the record to support the decision, even if the preponderance of the evidence is to the contrary. The focus is not on truth seeking, as in an adjudicatory proceeding, but on presentation of information to justify an agency decision. Nonadjudicative decision makers do not make judicial decisions, are not bound by stare decisis and, therefore, are not required to consider all of the legal authority on an issue in making a decision. Subject to campaign

contribution rules, lawyers and everyone else who participates in the process are permitted to make political contributions to decision makers."

Both of these statements come from the response to the last round of comments we received. I am working off of the response on my office system, which is what I have handy at the moment; but I don't think the final version is materially different.

We received comments from Louise Renne, several prominent land use lawyers and the California Building Industry Association, all of which expressed concern that the Rule was inappropriate in quasi-adjudicatory and quasi-legislative proceedings. We thus had input from the city attorney, private lawyer and client perspective that reinforced the conclusion the Commission reached. A number of comments talked about the history of SLAPP litigation and the fact that such suits were frequently used to chill the speech of persons participating in the process. The comments talked about how the rule would open the door for lawyers to be subject to the same kind of deterrence that the Legislature sought to end with the SLAPP statute.

I think we should respond to the Zitrin et al comment with this information. I don't think we should reconsider the Rule.

STAN

From: Ruvolo, Ignazio [mailto:Ignazio.Ruvolo@jud.ca.gov]
Sent: Thursday, June 17, 2010 2:10 PM
To: 'Difuntorum, Randall'; Foy, Linda; Lamport, Stanley W.
Cc: Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvwapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: RE: Rule 3.9

Randy,

I don't know why we omitted references to 3.3-3.5, or why we decided to deviate from ABA 3.9 in this fashion. Maybe this should also be revisited.

Nace

From: Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Thursday, June 17, 2010 2:00 PM
To: Ruvolo, Ignazio; Foy, Linda; Lamport, Stanley W.
Cc: Lee, Mimi; McCurdy, Lauren; hbsondheim@verizon.net; mtuft@cwclaw.com; pwvwapnek@townsend.com; kevin_e_mohr@csi.com; kemohr@charter.net; kevinm@wsulaw.edu
Subject: Rule 3.9

Nace, Linda & Stan:

Both OCTC and the Zitrin/Law Professor letter comments on Rule 3.9 (see below). Do you recommend any revisions in response to these comments? –Randy D.

OCTC Comment on Rule 3.9:

Rule 3.9. Non-adjudicative Proceedings.

1. OCTC is concerned with the Commission's departing from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule.
2. If the rule is changed to be like Model Rules 3.9, then the Comments will have to be changed or deleted. Comments 1-2 are too general and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC would also request a comment that other rules may apply depending on the facts and circumstances.

Zitrin/Law Professor Comment on Rule 3.9:

4. Rule 3.9 – Advocate in non-adjudicative proceeding

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance is required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

Randall Difuntorum
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Rule 3.9 Advocate in Nonadjudicative Proceedings
(Commission's Proposed Rule – Clean Version)

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative 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.

COMMENT

- [1] In representation before non-judicial bodies such as legislatures, city councils, boards of supervisors, commissions, and administrative agencies acting in a legislative, administrative or ministerial capacity (including without limitation a quasi-judicial proceeding, an administrative action, a rate-making proceeding, and a quasi-legislative proceeding, see Government Code sections 11440.60, 82002(a),(b),(c)), lawyers present facts, formulate issues and advance arguments regarding the matters under consideration. These governmental bodies are entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen.
- [1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

June 9, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

Attached is a comprehensive assignment table that lists all of the rules for which you are the lead drafter, along with the names of your codrafters. This message addresses your assignments for the June 25 & 26, 2010 meeting. To minimize email traffic and potential confusion, this message will be copied to your codrafters only after all of the lead drafter assignment messages have been sent.

ASSIGNMENT SUBMISSION DEADLINE: The assignment submission deadline for all assignments is **5:00 pm on Wednesday, June, 16, 2010.**

As mentioned at the June 4 meeting, the agenda for the Commission's June 25 & 26 meeting will involve final action on all of the rules recommended for adoption as well as those not recommended for adoption. This means that there are 85 items that require action. To alleviate some of the burden on Commission members, rules that either receive no comments at all or only comments in support will be prepared by staff and will be acted upon en masse by the Commission through the use of a consent agenda. At present, there are about 45 items that fall into this category.

This message provides the assignment background materials for the assignments listed below for which you are the lead drafter, and which are not being handled by staff as anticipated consent agenda items. The materials attached to this message are a staff prepared draft Public Commenter Chart synopsising all comments/testimony received to date & the current clean draft of a rule as posted for public comment. Consistent with the consent agenda plan, we are only providing assignment materials for those rules that have received a comment in opposition, or a comment stating an "Agree if Modified" position. Your assignment is to review these comments and to prepare a Public Commenter Chart with recommended Commission responses. If the drafters conclude that any revisions to a rule are warranted based on comments received, then a revised draft rule should be prepared. (Note: Where a drafting team decides not to recommend any revisions to a rule, that drafting team recommendation will be included in a second category of consent agenda items for action at the June 25 & 26 meeting.)

If revisions to a rule are recommended, then an updated Dashboard, Introduction, and Model Rule comparison chart also should be prepared to complete the rule package for Board submission. As soon as you or your drafting team determines that it will be recommending revisions to an assigned rule, please promptly inform staff and provide us with your revised Rule. We will create a new Model Rule redline version and middle column of the comparison chart, and provide you with the Word version of that document and any other necessary documents (Dashboard, etc . . .). Please contact us for this assistance once you or your team has determined that a revised rule will be recommended.

Because the comment period deadline of June 15th has not arrived, we may be updating your assignments. For example, a rule that presently has received no comments might receive an opposition comment prior to the June 15th comment deadline and, in that case, we would alert you with an email and provide you with the relevant background materials.

LIST OF ASSIGNED RULES (As explained above, these are rules that presently have received a comment in opposition or a comment stating an "Agree if Modified" position):

- 1.4 (Agenda Item III.E)
- 1.8.3 (Agenda Item III.M)
- 1.8.10 (Agenda Item III.U)
- 1.12 (Agenda Item III.Z)

Please note: The clean Word version of each rule is imbedded in the attached “Clean Version” PDF for each rule. You will see it and be able to open it when you open and view the PDF file.

Use the following link to the Proposed Rules page to find a copy of the Discussion Draft materials for all of the proposed rules as circulating for public comment:

www.calbar.org/proposedrules

Use the following link to review the full text of public comment letters or transcripts of the public hearings:

<http://sites.google.com/site/commentsrrc/>

Please don't hesitate to contact us with any questions you have.

Attached:

- RRC - PubCom - 06-25 & 06-26-10 Meeting Assignments - RUVOLO - DFT1 (06-09-10).pdf
- RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - [1-12] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT1 (04-22-10).doc
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.pdf
- RRC - 3-310 [1-12] - Rule - PCD [6] (02-17-10) - CLEAN-LAND.doc
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.pdf
- RRC - 3-500 [1-4] - Rule - PCD [8] (09-14-10) - CLEAN-LAND.doc
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.pdf
- RRC - 4-400 [1-8-3] - Rule - PCD [5.1] (10-18-09) - CLEAN-LAND.doc
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.pdf
- RRC - 3-120 [1-8-10] - Rule - PCD [8] (12-14-09) - CLEAN-LAND.doc

June 16, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

Additional comments in opposition or recommending modifications have been received for the following rules, and those **comments not previously sent to you** are attached here for your review. The Google site is also up-to-date (<http://sites.google.com/site/commentsrrc/byrule>).

- 1.4 (Agenda Item III.E) - 2 Comments: **COPRAC (attached)**; and OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.3 (Agenda Item III.M) – OCTC (sent with Randy's 6/15/10 e-mail)
- 1.8.10 (Agenda Item III.U) - OCTC (sent with Randy's 6/15/10 e-mail)
- 1.12 (Agenda Item III.Z) - OCTC (sent with Randy's 6/15/10 e-mail)
- 2.4 (Agenda Item III.II) - OCTC (sent with Randy's 6/15/10 e-mail)

**RRC – Rule 3.9 [MR 3.9]
E-mails, etc., -- Revised (6/21/2010)**

3.9 (Agenda Item III.SS) – 2 Comments: OCTC; and Zitrin/Law Professors (sent with Randy's 6/15/10 e-mail)

8.2 (Agenda Item III.UUU) - OCTC (sent with Randy's 6/15/10 e-mail)

NOTE: As previously mentioned, the most important information needed for the assignment deadline and for preparing the agenda is the codrafters' decision as to whether revisions to a rule are being recommended. We need to know this in order to determine which rules will be consent items and which rules will not be consent items.

In reviewing public comments, although drafting RRC responses are important and need to be completed prior to the meeting, the primary information that must be submitted for the agenda are any and all proposed language changes to the rules. Please keep this mind when reviewing the public comments and when preparing your assignment submissions.

This message may include assignments for rules for which staff has not yet provided a draft commenter chart. We hope to provide any such charts as soon as possible, by a separate message.

Please note that the assignment deadline for these rules remains the same as previously stated -- **5:00 pm on Wednesday, June, 16, 2010.**

Attached:

RRC - 3-500 [1-4] - 06-11-10 COPRAC Comment.pdf

June 17, 2010 Difuntorum E-mail to Drafters (Ruvolo, Foy & Lamport), cc Chair, Vice-Chairs & Staff:

Nace, Linda & Stan:

Both OCTC and the Zitrin/Law Professor letter comments on Rule 3.9 (see below). Do you recommend any revisions in response to these comments? –Randy D.

OCTC Comment on Rule 3.9:

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1. OCTC is concerned with the Commission's departing from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule.
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Zitrin/Law Professor Comment on Rule 3.9:

4. Rule 3.9 – Advocate in non-adjudicative proceeding

Rule 3.9 has been adopted in the Commission's proposal. Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance is required by ABA MR 3.9.

We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings. (Moreover, this is another further problematic example of why the definition of "tribunal" must be broadened, in order to narrow the scope of what is meant in Rule 3.9 about a "nonadjudicative proceeding.")

This rule should conform to the ABA language and apply 3.3, 3.4, and 3.5.

Attached:

RRC – [3-9] – Public Comment Complete – REV (06-17-10).pdf

June 17, 2010 Ruvolo E-mail to Drafters, Chair, Vice-Chairs & Staff:

I don't know why we omitted references to 3.3-3.5, or why we decided to deviate from ABA 3.9 in this fashion. Maybe this should also be revisited.

June 17, 2010 Tuft E-mail to Drafters, Chair, Vice-Chairs & Staff:

I agree with Nace.

June 17, 2010 Lampert E-mail to Drafters, Chair, Vice-Chairs & Staff:

This was discussed in detail at the Commission. I was responsible for the drafter's recommendations on the Rule. The final version of the Rule came about after Jerry recommended the New York rule, which the Commission adopted with some changes. The following summarizes the Commission's position.

"In light of the comments received in opposition to the proposed Rule, the Commission believes that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. Given the empirical experience that led to the enacted California SLAPP statute and the experience provided in other comments, there is a real risk that a Rule incorporating the requirements of Rule 4.1 could be misused to chill the speech of lawyers on behalf of clients. A Rule incorporating the requirements of Rule 4.1 would subject lawyers to unique risks that do not apply to anyone else who participates in nonadjudicative proceedings. As a result, such a Rule could chill lawyer speech on behalf of clients in nonadjudicative proceedings without resulting in any improvement to the honesty and integrity of such proceedings. The Commission believes that these risks outweigh adopting the Rule incorporating the requirements of Rule 4.1."

With respect to the differences between judicial proceedings and non-adjudicative proceedings, the Commission's position is stated as follows:

"There are differences between adjudicative and nonadjudicative proceedings that justify treating nonadjudicative proceedings differently. The sections of Rules 3.3, 3.4 and 3.5 to which the Model Rule refers relate to a process that is very different from what occurs in a nonadjudicative proceeding in California. Formal rules of evidence and procedure do not apply to these proceedings...The decision makers in these proceedings - whether quasi-legislative or quasi-judicial - are not judicial officers and instead are often lay people in the eyes of the law. There are no rules of discovery in these types of proceedings. Participants are permitted to withhold information and frequently do. The evidentiary standard of review is substantial evidence, which does not require a full resolution of the facts. The decision is upheld based on whether there is credible evidence in the record to support the decision, even if the preponderance of the evidence is to the contrary. The focus is not on truth seeking, as in an adjudicatory proceeding, but on presentation of information to justify an agency decision. Nonadjudicative decision makers do not make judicial decisions, are not bound by stare decisis and, therefore, are not required to consider all of the legal authority on an issue in making a decision. Subject to campaign contribution rules, lawyers and everyone else who participates in the process are permitted to make political contributions to decision makers."

Both of these statements come from the response to the last round of comments we received. I am working off of the response on my office system, which is what I have handy at the moment; but I don't think the final version is materially different.

We received comments from Louise Renne, several prominent land use lawyers and the California Building Industry Association, all of which expressed concern that the Rule was inappropriate in quasi-adjudicatory and quasi-legislative proceedings. We thus had input from the city attorney, private lawyer and client perspective that reinforced the conclusion the Commission reached. A number of comments talked about the history of SLAPP litigation and the fact that such suits were frequently used to chill the speech of persons participating in the process. The comments talked about how the rule would open the door for lawyers to be subject to the same kind of deterrence that the Legislature sought to end with the SLAPP statute.

I think we should respond to the Zitrin et al comment with this information. I don't think we should reconsider the Rule.

June 17, 2010 Ruvolo E-mail to Lamport, cc Drafters, Chair, Vice-Chairs & Staff:

Thanks Stan. Things are happening too fast now to process what to do in a thoughtful way.

June 21, 2010 McCurdy E-mail to Ruvolo, cc Chair, Vice-Chairs & Staff:

Nace,

This message provides a public commenter chart for every rule you are assigned as a lead or co-lead drafter. We have reconciled all of the comments received against each commenter chart and there should now be a synopsis for every comment received. However, there are a number of comments for which an RRC Response is needed. Please take a look at each table and fill in any missing RRC Responses.

Our goal is to send out a supplemental mailing providing a copy of all of the final or near-final commenter charts on Tuesday or Wednesday, for receipt prior to the meeting this week.

If possible, please provide us with any revised charts no later than 5:00 pm, Tuesday, June 22nd.

p.s. We realize you are not able to be present at the meeting, but we're hoping you can give us your final additions and/or edits to these charts for consideration at this meeting.

Attached:

RRC - 1-710 [2-4-1] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 1-700 [8-2] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [3-9] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - [1-12] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 4-400 [1-8-3] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc
RRC - 3-500 [1-4] - Public Comment Chart - By Commenter - XDFT1 (06-21-10)ML.doc
RRC - 3-120 [1-8-10] - Public Comment Chart - By Commenter - XDFT2 (06-21-10).doc
RRC - 1-720 [2-4] - Public Comment Chart - By Commenter - XDFT2 (06-21-10)ML.doc

June 22, 2010 Ruvolo E-mail to McCurdy, cc Chair, Vice-Chairs & Staff:

Here you are Lauren. 3.9 is the only one that is controversial at this point.

Attached:

RRC - 1-700 [8-2] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML.doc
RRC - [3-9] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML.doc

June 22, 2010 KEM E-mail to McCurdy, cc Difuntorum:

As we discussed, I've attached the following updated public comment charts:

RRC - 1-700 [8-2] - Public Comment Chart - By Commenter - XDFT2.2 (06-22-10)ML-IR-KEM.doc

RRC - [3-9] - Public Comment Chart - By Commenter - XDFT2.1 (06-22-10)ML-KEM.doc

In the case of the latter, Nace was working off the initial public comment chart and I revised the chart based on the public comment received during the final public comment period.

Please let me know if you have any questions.

June 22, 2010 Kehr E-mail to RRC:

I wrote this message a day or two ago and thought I had sent it, but apparently did not. Having found it, I now forward it on to all of you:

I generally agree with Stan's recommended approach to this Rule, which distinguishes between duties to a court and duties in other settings, but I disagree on one point. At agenda p. 80, Stan quotes the Commission's explanation of why Rule 3.9 does not incorporate Rule 4.1. This says that doing so would chill lawyer's speech and refers to the experience that led to the enactment

**RRC – Rule 3.9 [MR 3.9]
E-mails, etc., -- Revised (6/21/2010)**

of California's anti-SLAPP statute. Apples and oranges. Adopting Rule 4.1 would place in the rules what in any event is in § 6106. Doing so would no more change the scope of potential lawyer liability than does the existence of § 6106. I continue to believe that Rule 4.1 should be adopted.

Also, the Commission's narrower Rule 3.9 is supported by S.D. and by COPRAC.

June 22, 2010 Lamport E-mail to Kehr, cc RRC:

I have been tied up on some things that have made it almost impossible to meet the e-mail deadline today despite my best intentions. I have only about 30 minutes before I have to jump back into a meeting, so please forgive the abbreviated response.

There is an important distinction here. Civil Code section 47 provides a statutory privilege for statements made in the types of proceedings covered by Rule 3.9. To my knowledge there is no authority that attempts to reconcile 6106 and 47. I think most who practice in the field would expect section 47 to extend to situations otherwise governed by 6106 (Civil Code section 47 being the more specific statute for the situation) . Rule 3.9 is a game changer in that it specifically makes disciplinary rules applicable to proceedings that otherwise are subject to the privilege. I think it does change the scope of potential lawyer liability for that reason.

**Rule 3.9 Non-adjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 4 Agree = 2
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	COPRAC	A	Yes		Support as drafted.	No response required.
3	Office of Chief Trial Counsel ("OCTC")	M	Yes		OCTC is concerned with the Commission's departing from the language in ABA Rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule. If the rule is changed to be like Model Rule 3.9, then the Comments will have to be changed or deleted.	See response to SDCBA, below.
				Comments [1]-[2]	Comments [1]-[2] are too general and cover subjects and discussions best left to treatises, law review articles, and ethics opinions.	As the Commission has noted with respect to other Rules, the comments are an important part of the Rules modeled on the ABA Model Rules, providing clarification of the black letter and guidance to

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

**Rule 3.9 Non-adjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 4 Agree = 2
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					OCTC would also request a Comment that other rules may apply depending on the facts and circumstances.	<p>lawyers on how to be in compliance with their professional obligations. This holds true for Comments [1] and [2].</p> <p>The Commission disagrees that such a comment is necessary.</p>
1	San Diego County Bar Association Legal Ethics Committee ("SDCBA")	A	Yes		We approve the new rule in its entirety. A minority suggests the Rule should be omitted entirely (as it has in several states) because it would take lawyers out of the protections of Civil Code section 47...However, given the proposed Rule's minimal requirements and the policy of seeking to bring California's rules in line with the ABA Model Rules...the Rule should be adopted as proposed.	In light of the comments received in opposition to the proposed Rule, the Commission believes that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. Given the empirical experience that led to the enactment of the California SLAPP statute and the experience provided in other comments, there is a real risk that a Rule incorporating the requirements of Rule 4.1 could be misused to chill the speech of lawyers on behalf of clients. A Rule incorporating the requirements of Rule 4.1 would subject lawyers to unique risks that do not apply to anyone else who participates in nonadjudicative proceedings. As a result, such a Rule could chill lawyer speech on behalf of clients in nonadjudicative proceedings without resulting in any improvement to the honesty and integrity of such proceedings. The Commission believes that these risks outweigh adopting a rule incorporating the requirements of Rule 4.1
4	Zitrin, Richard (law professors group)	M	Yes		"Inexplicably, however, the CRPC version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4, and 3.5. Such compliance is required	See response to SDCBA, above.

**Rule 3.9 Non-adjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 4 Agree = 2
Disagree =
Modify = 2
NI =

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>by ABA MR 3.9.</p> <p>We cannot explain the Commission's resistance to common statements about attorney honesty, such as this and those set forth above. Given the reputation of lawyers in today's marketplace, we believe that it is better for rules of conduct to make it abundantly clear that lawyers will act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings."</p>	