

Proposed Rule 3.9 [N/A]

“Advocate In Nonadjudicative Proceedings”

(Draft #3, (3/27/10))

Summary: This rule addresses a lawyer’s role as a client’s advocate before a legislative body or administrative agency in a nonadjudicative proceeding. It requires a lawyer to disclose that the lawyer’s appearance is in a representative capacity. The proposed Rule is derived primarily from N.Y. Rule 3.9.

Comparison with ABA Counterpart

Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input checked="" type="checkbox"/> Some material additions to ABA Model Rule <input checked="" type="checkbox"/> Some material deletions from ABA Model Rule <input type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

- Existing California Law
 - Rules
 - Statutes
 - Case law
- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

New York Rule 3.9
- Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption 5

Opposed Rule as Recommended for Adoption 4

Abstain 1

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

A minority of the Commission is concerned that limiting the scope of this Rule as recommended by the Commission, together with the definition of “tribunal” in proposed Rule 1.0.1 and the Commission’s rejection of Model Rule 4.1(a), will create a regulatory gap in the Rules and cause confusion among lawyers. See Minority Dissent.

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 3.9 Advocate in Nonadjudicative Proceedings*

April 2010

(Draft rule following consideration of public comment.)

INTRODUCTION:

Proposed Rule 3.9 regulates a lawyer's conduct as a client advocate in a nonadjudicative proceeding, such as a proceeding before a legislative body or an administrative agency. The Rule, which is derived verbatim from New York Rule 3.9, requires a lawyer to disclose that his or her appearance is in a representative capacity, except when the lawyer is simply seeking from an agency information that is available to the public. The Commission recommends that the Model Rule's requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct before a tribunal not be adopted. The Commission believes this departure from the Model Rule approach is necessary because the provisions referenced in the Model Rule include concepts that are meaningful in representations before adjudicative tribunals, such as the concept of "evidence," but these same concepts are confusing, or outright incorrect, for setting clear standards in a non-adjudicative proceeding. The Commission concluded that there are material differences between the functioning of law courts and of legislative and administrative bodies that reflect on a lawyer's role in representing clients in these different settings. Moreover, First Amendment protections apply in dealing with legislative and administrative bodies, involved in such things as writing statutes and administrative regulations and granting and denying governmental licenses and permits, but do not similarly apply to court proceedings. For these reasons, the Commission recommends that proposed Rule 3.9 be more limited in scope and application than the corresponding Model Rule.

Minority. A minority of the Commission dissents from (i) the Commission's rejection of the public comment version of the Rule and adoption of New York Rule 3.9, and (ii) the Commission's concomitant rejection of proposed Rule 4.1, which would have imposed a duty of honesty in circumstances governed by Rule 3.9. See full Minority Dissent, below.

Variations in Other Jurisdictions. Every state except for North Carolina and Virginia have adopted some version of Model Rule 3.9. Nearly every state that has adopted the Rule has adopted the Model Rule verbatim. Only New York substantively diverges from the Model Rule by limiting the lawyer's duties under the Rule to disclosing the fact of the lawyer's representative capacity.

* Proposed Rule 3.9, Draft 3 (3/27/10).

<p style="text-align: center;"><u>ABA Model Rule</u></p> <p style="text-align: center;">Rule 3.9 Advocate in Nonadjudicative Proceedings</p>	<p style="text-align: center;"><u>Commission’s Proposed Rule*</u></p> <p style="text-align: center;">Rule 3.9 Advocate in Nonadjudicative Proceedings</p>	<p style="text-align: center;"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.</p>	<p>A lawyer representing<u>communicating in</u> a client<u>representative capacity with</u> a legislative body or administrative agency in <u>connection with a nonadjudicative pending non-adjudicative matter or</u> proceeding shall disclose that the appearance is in a representative capacity, <u>except when the lawyer seeks information from an agency that is available to the public</u> and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.</p>	<p>Proposed Rule 3.9 is taken verbatim from New York Rule 3.9, which is a substantial revision of Model Rule 3.9. After the initial public comment period, the Commission voted against recommending the public comment version of proposed Rule 3.9, which more closely tracked Model Rule 3.9. The public comment version of the Rule had substituted a requirement that lawyers appearing as an advocate in non-adjudicative proceedings were required to conform their conduct to Rule 4.1 for the Model Rule’s references to “Rules 3.3(a) through (c), and 3.5” because a standard requiring conformance to Rule 4.1 was more appropriate for conduct governed by the proposed Rule. With the Commission’s recommendation not to adopt a rule counterpart to Model Rule 4.1, that reference is no longer accurate. Moreover, the Commission determined that the New York Rule more clearly stated when a lawyer is required to disclose that the lawyer’s appearance is in a representative capacity.</p>

* Proposed Rule 3.9, Draft 3 (03/27/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u> Rule 3.9 Advocate in Nonadjudicative Proceedings Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.</p>	<p>[1] In representation before <u>non-judicial</u> bodies such as legislatures, <u>municipal</u> <u>city</u> councils, and executive boards of supervisors, commissions, and administrative agencies acting in a <u>rule</u> <u>legislative, administrative or ministerial capacity (including without limitation a quasi-judicial proceeding, an administrative action, a rate-making or policy-making capacity proceeding, and a quasi-legislative proceeding, see Government Code sections 11440.60, 82002(a),(b),(c)).</u> lawyers present facts, formulate issues and advance <u>argument in arguments regarding</u> the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. 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. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.</p>	<p>Proposed Comment [1] similarly is taken from New York Rule 3.9, cmt. [1], but is revised to provide better guidance on the kinds of proceedings to which the Rule is applicable in California, and the rationale underlying the Rule's disclosure requirement. The references in the Model Rule to Rules 3.3 and 3.5 have been deleted because those Rules are not applicable following the revisions to the black letter. See Explanation of Changes for the black letter of the rule, above.</p>

* Proposed Rule 3.9, Draft 3 (03/27/10). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.9 Advocate in Nonadjudicative Proceedings</p> <p align="center">Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.9 Advocate in Nonadjudicative Proceedings</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
	<p><u>[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.</u></p>	<p>Comment [1A], which is also derived from New York Rule 3.9, has no counterpart in the Model Rule. It has been added to clarify that a lawyer's conduct will be governed by the specific rules of a tribunal when appearing before such a body.</p>
<p>[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.</p>	<p>[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.</p>	<p>The Commission recommends that Model Rule 3.9, cmt. [2], not be adopted because it neither explains nor clarifies the application of the Rule.</p>
<p>[3] 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. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs</p>	<p>[3] 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. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs</p>	<p>The Commission recommends that Model Rule 3.9, cmt. [3], not be adopted because it neither explains nor clarifies the application of the Rule.</p>

<p align="center"><u>ABA Model Rule</u></p> <p align="center">Rule 3.9 Advocate in Nonadjudicative Proceedings Comment</p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center">Rule 3.9 Advocate in Nonadjudicative Proceedings Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.</p>	<p>conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.</p>	

Rule 3.9 Advocate in Nonadjudicative Proceedings

(Comparison of the Current Proposed Rule to the initial Public Comment Draft)

A lawyer ~~representing~~communicating in a client before~~representative capacity~~with a legislative body or administrative agency in connection with a nonadjudicative~~pending non-adjudicative matter or~~ proceeding shall disclose that the appearance is in a representative capacity ~~and shall conform, except when the lawyer seeks information from an agency that is available to the provisions of Rule 4.1~~public.

Comment

[1] In representation before non-judicial bodies such as legislatures, city councils, boards of supervisors, commissions, and ~~executive 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 ~~argument in~~arguments regarding the matters under consideration. ~~The decision-making body, like a court, should be able~~These governmental bodies are entitled to rely on~~know that the integrity of the submissions made to it.~~A lawyer is appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. ~~Although a lawyer does not have all of~~representative capacity. Ordinarily the obligations owed a court under Rules 3.3(a) through (c) when appearing before such a body client will consent to being identified, but if not, such as ~~correcting misrepresentations made by third parties, when~~ the lawyer nevertheless is prohibited from making a false statement appearing on behalf of fact or law to 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.

~~[2] Lawyers, as well as nonlawyers, have a right to appear before nonadjudicative bodies. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers.—~~

[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.

~~[3] 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. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income tax returns. Nor does it apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.~~

Rule 3.9 Advocate in Nonadjudicative Proceedings
Dissent To Recommendation Not To Adopt Proposed Rule 3.9 and Rule 4.1

The public comment version of Rule 3.9 required lawyers to do two things: to announce in certain legislative and administrative circumstances that they are acting as advocates for others (because failing to do so would be dishonest), and to comply with Rule 4.1. The public comment version of Rule 4.1, in turn, generally required that lawyers may not make false statements to others (because doing so would be dishonest). The requirement of lawyer honesty is long-standing and currently is found in Bus. & Prof. C. section 6106. That section subjects a lawyer to discipline for any "... act involving moral turpitude, dishonesty or corruption"

The Commission finally decided to recommend against adoption of Rule 4.1 and to modify Rule 3.9 to eliminate the duty of honesty previously found in its cross-reference to Rule 4.1. A minority of the Commission dissents from both decisions. While the minority hopes that the lawyer's section 6106 duty of honesty remains in the circumstances described in Rules 3.9 and 4.1, the Commission's vote will make this unclear to many readers. The complete absence of any Rule 4.1 naturally will lead readers to think that the Commission intended to say that lawyers have no such duty of honesty. If that duty does remain, it will be hidden in the Business & Professions Code, outside the easier reference of the Rules and therefore less likely to be known to lawyers.

We want to note that the Commission's Rule 3.9 recommendation was to adopt the N.Y. version of Rule 3.9, but the Commission has substantively strayed from N.Y. Although N.Y. Rule 3.9 does not refer to Rule 4.1, N.Y. did adopt Model Rule 4.1(a) (the prohibition on making any false statement of material fact or law to others). Thus, the crucial duty of honesty is absent from the Commission's proposal but is found in N.Y. Rule 4.1, and N.Y. Rule 4.1 by its terms would cover the Rule 3.9 circumstances. While the Rule 3.9 minority differs as to how stringent its requirements should be, it is unanimous that it should at the very least expressly require compliance with the duty of honesty found in Model Rule 4.1(a).

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.

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
2	Brownstein Hyatt Farber Schreck, LLP	M		Comment [3]	<p>Comment [3] does not specify whether the Rule would apply when a lawyer represents a client in a “quasi-legislative” or “quasi-judicial proceeding.” (Section 11440.60 of the Government Code defines “quasi-judicial proceeding”). As written, the Rule is unclear as to whether this Rule would apply to a lawyer representing a client in connection with obtaining a land use permit, proposed ordinance or local policy matter being considered by a planning commission. These hearings are in the nature of legislative or adjudicative hearings, conducted by a local agency as to local matters. The Rule expressly states that it applies to a non-adjudicatory proceeding.</p> <p>We respectfully request that the Commission revise proposed Rule 3.9 Comment [3] so that it clearly states whether or not it applies to lawyers representing clients in “quasi-judicial proceedings.” Members of our firm maintain the highest ethical standards in our presentations before any decision makers, but</p>	<p>Comment [1] has been revised to include references to quasi-legislative and quasi-judicial proceeding within the scope of the Rule.</p> <p>In light of the comments the Commission has received, the Commission concurs that a revised Rule based on the New York version of Model Rule 3.9 should be adopted. The Commission believes that the revision addresses the commenter’s concern by eliminating the reference to compliance with Rule 4.1.</p>

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

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					we concur with commentators who have noted that holding lawyers to the strict standard proposed can place attorneys at a distinct disadvantage because, in these kind of proceedings, different witnesses have differing versions of what is and is not a falsehood.	
3	California Building Industry Association	D			<p>We are opposed to Proposed Rule 3.9 because we believe that the net effect of the rule will be to chill the role of lawyers who represent clients in non-adjudicative proceedings without any resulting improvement to the integrity, honesty or candor in such proceedings.</p> <p>Before the Legislature enacted California's SLAPP statutes, California had a history of litigation arising out of advocacy for or against a pending project. That litigation was frequently without merit, but was used to chill speech...Our experience prior to the SLAPP statutes is that victory consists in either quieting or restraining the target by the claim. It is not likely to matter whether the suit or State Bar complaint is successful. Indeed, the case or complaint probably will not be resolved until long after the proceedings before the agency are over.</p> <p>Rule 3.9 would single out lawyers for potential prosecution for their statements before a</p>	The Commission agrees with this Comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>legislative or executive branch of government. Our experience suggests that it will open the door to largely groundless claims and complaints that will be motivated by the desire to silence lawyers representing clients before the agency.</p> <p>Further complicating Proposed Rule 3.9 is its reference to Rule 4.1. Rule 4.1, Comment [1] appears to prohibit a lawyer from incorporating or affirming another person's statement that the lawyer knows is false. Would this mean that merely repeating what another says, not adopting it as her or his own statement, would place a lawyer in jeopardy of violating the Proposed Rule?</p> <p>Rule 4.1 Comment [1] also prohibits making a partially true but misleading material statement. Unfortunately the Comment does not specify that the statement must be made knowingly. Many statements may be misleading without any knowledge on the part of the speaker. This seems inappropriate in this context.</p>	
4	Committee on Professional Responsibility and Conduct ("COPRAC")	M			COPRAC generally supports the Rule.	Based on other comments it is has received, the Commission recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
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					<p>COPRAC recommends replacing the word “all” with “any” in the last sentence of Comment [1]. The use of the word “all” implies or allows for the possibility that some of such obligations might apply in a non-adjudicative proceeding. However, since none of such obligations are applicable, COPRAC recommends changing “all” to “any” to clarify that the lawyer does not have “any” such obligations.</p> <p>COPRAC recommends deletion of Comment [3]. This Comment, which tracks Comment [3] of the Model Rule, is no longer applicable as a result of the modification of the Rule itself.</p>	<p>The Commission deleted the last sentence of Comment [1]. No further action is required.</p> <p>Comment [3] has been deleted.</p>
5	Herum/Crabtree [Jolley, Brett]	D			<p>Opposes the proposed Rule “which imposes requirements upon attorneys during administrative hearings and exposes those attorneys to potential liability to which no other class of participant or representative would be subject.</p> <p>Proposed Rule 3.9 is unsettling as it will eliminate certain protections that facilitate open communication between the public and governmental agencies. To this end, we agree with the minority dissent and urge the Commission to <u>not</u> adopt the Rule.</p>	<p>The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
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					<p>Rule 3.9 could open the door for individuals who do not agree with an attorney's statements made during a public hearing to retaliate by filing a complaint against that attorney with the State Bar...</p> <p>This Rules goes far beyond the issue of truthfulness and clearly eliminates the level playing field currently enjoyed by all who participate in administrative proceedings.</p> <p>While such a rule may properly apply in court, the same cannot be said of administrative proceedings. Unlike court proceedings, parties to land use proceedings are often represented by lawyers, as well as political and environmental consultants, architects, engineers and even themselves. Formal rules of evidence and procedure do not apply. The decision makers in land use proceedings – whether quasi-legislative or quasi-judicial are not judicial officers and instead are often laypeople.</p> <p>The Rule places an unfair burden on lawyers that may discourage clients from using attorneys in heated situations.</p> <p>California's SLAPP statute was enacted to eliminate threats discouraging individuals from exercising their rights of petition and free speech in connection with public issues. The comment attaches the 1991 Senate</p>	

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

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Modify = 3
NI = 0

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					<p>Committee on Judiciary analysis of SB 10, which enacted the SLAPP statute, which states, among other things: "[SLAPP] suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits...are filed for the sole purpose of intimidation."</p> <p>Rule 3.9 has the potential to counteract the purpose for enacting the SLAPP statute; subjecting attorneys to standards and discipline during public hearings to which no other participants are held and will discourage lawyers from engaging in open discussion with government officials.</p> <p>The mere threat of Rule 3.9 sanctions may be inappropriately used to chill attorney participation in administrative proceedings, just as SLAPP suits chilled public participation. The comment provides an example of how use of Rule 3.9 during an administrative proceeding by an adverse party could adversely affect the lawyer's representation of a client in the proceeding.</p>	
6	Ivester, David	D			<p>Lawyers naturally should conduct themselves honestly when representing clients, and existing law affords means of addressing gross misconduct by lawyers in this regard. Proposed Rules 3.9 and 4.1, though, would unnecessarily and unwisely overlay</p>	<p>The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

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					<p>disciplinary rules on this existing law—rules that do not adequately address the complexity of the subject and that uniquely expose lawyers to risks for statements made before legislative and administrative bodies, risks that may interfere with their representation of clients. Adversaries in sometimes highly charged legislative and administrative proceedings may well resort to threatening lawyers for what they say in such proceedings, a risk that may distract lawyers from their representation of their clients in order to address the risk to themselves.</p> <p>I note that several states that have rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. for the reason noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.</p>	
7	Latham & Watkins, LLP	D			<p>We have only recently become aware of Proposed Rule 3.9 and are concerned that other members of the State Bar may likewise not be aware of the proposed rule.</p> <p>We are concerned that Proposed Rule 3.9, and the minority dissent of the proposed rule, raise significant and complicated issues, the implications of which may not be fully understood by members of the State Bar who</p>	<p>The Commission recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 . The commenter will have an opportunity to comment on a revised draft of the Rule.</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12
Agree = 3
Disagree = 6
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No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>practice before legislative and administrative bodies.</p> <p>We respectfully request that the Commission provide additional time for public comment prior to taking action on Proposed Rule 3.9.</p>	
8	Office of the Chief Trial Counsel	M			<p>OCTC is concerned with the Commission's departure 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 make no difference whether it is in litigation or a non-adjudicative proceeding. There is no reason to depart from the ABA's Rule.</p>	<p>The Commission does not agree that it should be revised as proposed. 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</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

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NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Comments [1] – [2] are too general.</p> <p>OCTC also requests a Comment that other rules may apply depending on the facts and circumstances.</p>	<p>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. The OCTC comment does not present a rationale that would justify treating nonadjudicative proceedings the same as adjudicatory proceedings.</p> <p>Comments [1] and [2] have been revised to conform to the revised Rule the Commission adopted. Comment [1] contains a modified version of the first sentence of Comment [1] in the public comment draft. Its describes the type of proceedings to which the Rule applies. The Commission believes the Comment language should be retained for that purpose. The OCTC comment does not suggest how the Comment [1] language should be revised to be more specific. The Commission is not able to envision a revision that would respond to the comment.</p> <p>The Commission does not believe the proposed change is warranted. The concerns raised in opposition to the Rule present a compelling case not only for why the Rule should not be adopted, but also for why other Rules should not be made applicable to nonadjudicative proceedings.</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
9	Orange County Bar Association	D			<p>The proposed Rule should not be adopted in any form because it exposes lawyers to unique risks and disciplinary measures that are not faced by others who appear before the same legislative and administrative bodies and could have the effect of chilling communications with the government.</p> <p>First, we believe that the first part of the proposed Rule, requiring a lawyer to disclose that his or her appearance is in a representative capacity, may occasionally conflict with the interests of his or her client and, in certain circumstances, may directly conflict with actual instructions of the client that the representation not be disclosed.</p> <p>Second, we oppose any specific reference to Rule 4.1 or any other reference to a lawyer's other duties. Of course, a lawyer should observe all Rules of Professional Conduct and the State Bar Act that are applicable to any particular circumstance. Moreover, like all other persons who appear before legislative bodies or administrative agencies, a lawyer should also abide by and comply with other applicable laws and rules, including rules promulgated by the specific government body that regulate conduct of persons appearing before it. However, we believe that a lawyer should not be considered</p>	<p>Commission agrees and has recommended adoption of a Rule based on the New York version of Model Rule 3.9 .</p> <p>The Commission does not agree that the disclosure requirement is a reason not to recommend adoption of the Rule. The Rule requires only that the lawyer disclose the appearance is in a representative capacity. It does not require a lawyer to disclose the identity of the client if that needs to be confidential.</p> <p>The Commission agrees with the second comment to the extent that it relates back to the concern that the Rule should not expose lawyers to risks not faced by others who appear in nonadjudicative proceedings. It is recommending adoption of a revised version based on the New York version of Model Rule 3.9 that would address this concern.</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					subject to additional constraints and discipline in this context simply because of the fact that he or she is a lawyer – whether acting for a client or on his or her own behalf.	
10	Renne, Louise H.	D			<p>I write to urge the Commission not to adopt Proposed Rule 3.9. The Proposed Rule would eliminate existing statutory privileges and protections enjoyed by all speakers before Boards, Councils, and other legislative bodies, but only as to lawyers appearing before those bodies to advocate on behalf of clients. I believe that the Proposed Rule carries the unintended consequences of reducing representation of citizens at public meetings, and of chilling speech.</p> <p>The concerns raised by the dissent are valid. The level of discourse in the public arena has been increasingly hostile for some time...In this context, it is not difficult to imagine how one might use Rule 3.9 to punish an opponent, or restrain or chill an advocate's participation in the public process.</p> <p>The Legislature has long recognized the importance of open and unfettered discussion in public meetings. Since 1872, Civil Code section 47 has created a privilege for statements made in legislative or other official proceedings from prosecution. The</p>	The Commission agrees with this comment and recommends adoption of a revised Rule based on the New York version of Model Rule 3.9 .

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					<p>Legislature also established a special motion to strike to prevent lawsuits aimed a chilling public participation. These statutes reflect a recognition that all public participation should be encouraged, even if that occasionally results in untruthful statements being made to legislative bodies. Boards and councilmembers are sufficiently experienced to winnow the false from the true. Proposed Rule 3.9 would be antithetical to the goals advanced by the Legislature in these statutes, unfairly restricts only attorney-advocates, and should be rejected.</p>	
11	San Diego County Bar Association Legal Ethics Committee	A			<p>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.</p>	<p>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 lead 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</p>

**Rule 3.9 Advocate in Nonadjudicative Proceedings
[Sorted by Commenter]**

TOTAL = 12 **Agree = 3**
Disagree = 6
Modify = 3
NI = 0

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
						believes that these risks outweigh adopting the Rule incorporating the requirements of Rule 4.1
12	Santa Clara County Bar Association	A			No comment.	In light of the reasons provided by comments in opposition to the proposed Rule, the Commission has decided to adopt the Rule based on the New York version of Model Rule 3.9.

Rule 3.9: Nonadjudicative Proceedings

STATE VARIATIONS

(The following is an excerpt from Regulation of Lawyers: Statutes and Standards (2010 Ed.)
by Steven Gillers, Roy D. Simon and Andrew M. Perlman.)

California has no direct counterpart to ABA Model Rule 3.9.

Colorado adds the following in lieu of the second sentence of ABA Model Rule 3.9:

Further, in such a representation, the lawyer:

(a) shall conform to the provisions of Rules 3.3(a)(1), 3.3(a)(3), 3.3(b), 3.3(c), and 3.4(a) and (b);

(b) shall not engage in conduct intended to disrupt such proceeding unless such conduct is protected by law; and

(c) may engage in ex parte communications, except as prohibited by law.

District of Columbia: Rule 3.9 applies to a lawyer representing a client before a “legislative or administrative body” (rather than “legislative body or administrative agency”).

Florida omits the reference to Rule 3.5.

New Jersey: Rule 3.9 tracks ABA Model Rule 3.9 essentially verbatim, but New Jersey’s cross-references to Rules 3.3, 3.4, and 3.5 differ slightly due to differences in New Jersey’s versions of those rules.

New York: In the rules effective April 1, 2009, Rule 3.9 is reworded as follows: “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 1A emphasizes that “Rule 3.9 does not apply to adjudicative proceedings before a tribunal.”

North Carolina omits Rule 3.9.

Virginia omits Rule 3.9.