

**Rule 3.9 Advocate in Nonadjudicative Proceedings**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity, except when the lawyer seeks information from an agency that is available to the public.

**Comment**

This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. 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. This Rule also does not 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. This Rule does not require a lawyer to disclose a client's identity.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 3.9  
(No Current Rule)  
Advocate In Nonadjudicative Proceedings**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has reviewed and evaluated American Bar Association (“ABA”) Model Rule 3.9 (Advocate In Nonadjudicative Proceedings) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The evaluation was made with a focus on the function of the rules as disciplinary standards, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. The result of this evaluation is proposed rule 3.9 (Advocate in Nonadjudicative Proceedings). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Proposed rule 3.9 requires that a lawyer communicating in a representative capacity with a legislative body or administrative agency regarding a pending nonadjudicative matter or proceeding disclose that the lawyer’s appearance is in a representative capacity. The rule does not apply when the lawyer seeks information from a body or agency that is available to the public. Proposed rule 3.9 adopts the blackletter portion of New York Rule of Professional Conduct 3.9 verbatim. While both the proposed rule and the New York rule are derived from ABA Model Rule 3.9, they depart from the ABA Model Rule by eliminating the reference to specific rule provisions that are applicable to conduct before a tribunal.<sup>1</sup> The departure from the Model Rule approach is warranted because the provisions referenced in the Model Rule include concepts that are meaningful in representations before *adjudicative* tribunals, such as the concepts of evidence and inappropriate contact with a judge or juror. However, these same concepts are confusing and inapplicable for setting a clear disciplinary standard in a nonadjudicative proceeding.

There is one comment to the rule. This comment is derived from ABA Model Rule 3.9, Comment [3] and it provides specific guidance as to how the rule should be applied. The proposed comment has been revised to explain that the rule does not require disclosure of the client’s identity.

**National Background – Adoption of Model Rule 3.9**

As California does not presently have a direct counterpart to Model Rule 3.9, this section reports on the adoption of the Model Rule in United States’ jurisdictions. Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.<sup>2</sup>

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<sup>1</sup> ABA Model Rule 3.9 requires that a lawyer comply with certain provisions of Rule 3.3 (Candor Toward The Tribunal), Rule 3.4 (Fairness to Opposing Party And Counsel), and Rule 3.5 (Impartiality and Decorum Of The Tribunal).

<sup>2</sup> The two jurisdictions are: North Carolina and Virginia.

The ABA State Adoption Chart for ABA Model Rule 3.9 is posted at:

- [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpc\\_3\\_9.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf)

Thirty-one states have adopted Model Rule 3.9 verbatim.<sup>3</sup> Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.<sup>4</sup> Three states have adopted a version of the rule that substantially diverges from Model Rule 3.9.<sup>5</sup>

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<sup>3</sup> The thirty-one states are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>4</sup> The fourteen jurisdictions are: Alaska, District of Columbia, Florida, Georgia, Hawaii, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Tennessee, Texas, and Washington.

<sup>5</sup> The three states are: Colorado, Maine, and North Dakota.

## Rule 3.9 Advocate ~~In~~In Nonadjudicative Proceedings (Redline Comparison of the Proposed Rule to ABA Model Rule)

A lawyer ~~representing a client before~~communicating in a representative capacity with a legislative body or administrative agency in ~~a~~connection with a pending nonadjudicative ~~matter or~~ 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, except when the lawyer seeks information from an agency that is available to the public.~~

### Comment

~~[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.~~

~~[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.~~

~~[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. ~~Not~~This Rule also does ~~it~~not 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. This Rule does not require a lawyer to disclose a client's identity.~~