

NOTE: This is a partially completed chart. A final version will be distributed prior to the meeting.

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

TOTAL = __ Agree = __
 Disagree = __
 Modify = __
 NI = __

No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
1	Esther	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	
2	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	
3	Santa Clara County Bar Association	A			No comment.	
4	Brownstein Hyatt Farber Schreck, LLP	M		Comment [3]	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. We respectfully request that the Commission	The RRC does not agree that any further explanation of the scope of the rule, as set forth in Comment [3], is necessary.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED

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No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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 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.	
5	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</p>	The RCC disagrees with this comment which tracks the minority position submitted with this rule.

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Rule 3.9 Non-adjudicative Proceedings

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No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					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 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.	
6	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>Rule 3.9 would single out lawyers for potential prosecution for their statements before a 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</p>	

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					<p>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>	
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 practice before legislative and administrative</p>	

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No.	Commentator	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
					bodies. We respectfully request that the Commission provide additional time for public comment prior to taking action on Proposed Rule 3.9.	
8	Office of the Chief Trial Counsel	M			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. Comments [1] – [2] are too general. OCTC also requests a Comment that other rules may apply depending on the facts and circumstances.	
9	Louise H. Renne	D			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	

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					carries the unintended consequences of reducing representation of citizens at public meetings, and of chilling speech.	
10	David Ivester	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 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>	



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February 12, 2010

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Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)**

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

~~CONCLUSION: We approve the new rule with modifications.* delete paragraph (d)(2)~~

LEC Rule Volunteer Name(s): Jack Leer

Old Rule No./Title: N/A

Proposed New Rule No./ Title: 3.9 – “Non-adjudicative Proceedings”

(5) Rule 3.9, as proposed, would provide that attorneys appearing before legislative and other non-adjudicative bodies (1) disclose the attorney is acting in a representative capacity for the client and (2) comply with Rule 4.1 (i.e. refrain from making false statements or failing to disclose facts if necessary to avoid assisting in a fraud or crime). It differs from the ABA Rule by not including other duties set forth in Rules 3.3, 3.4 and 3.5, thus creating a less onerous burden on an attorney appearing before a non-adjudicative body than the ABA Rule would require, based on the Revision Committee’s determination that the legislative/administrative bodies serve materially different interests than the courts. A minority suggests the Rule should be omitted entirely (as it is in several states) because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same type of non-adjudicative bodies. 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, I believe the Rule should be adopted as proposed.

CONCLUSION: We approve the new rule in its entirety.

~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

~~**Old Rule No./Title:** N/A (Existing CA statute: Bus & Prof. Code section 60608(e))~~

~~**Proposed New Rule No./ Title:** 4.1 “Truthfulness In Statements to Others”~~

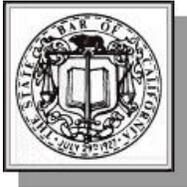
~~(5) Proposed Rule 4.1 largely tracks Model Rule 4.1 which apparently every jurisdiction has some version of except North Carolina and California. In my view, proposed Rule 4.1 should be adopted because it provides some helpful guidance in this complex area and brings California into conformity with the rest of the country on this subject. Although it is extremely difficult to enforce, it might beneficially influence lawyers’ conduct and beliefs.~~

~~Proposed Rule 4.1 (a) states a lawyer’s duty of honesty that is owed to third persons in the course of representing a client as follows:~~

~~“(a) In the course of representing a client a lawyer shall not knowingly:~~

~~(1) make a false statement of material fact or law to a third person; or~~

~~(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

- | | | | |
|------------------------------------|-----------------------------------|--------------------------------|--|
| Rule 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [n/a] | Discussion Draft [all rules] |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
- DISAGREE with this proposed Rule
- AGREE ONLY IF MODIFIED

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File :

F-2010-382h SCCBA [3.9]

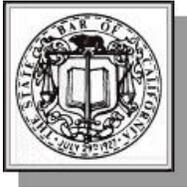
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THE STATE BAR OF CALIFORNIA

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- Yes
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(You will receive a copy of your comment submission.)

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| Rule 1.0.1 [1-100] | Rule 1.11 [n/a] | Rule 4.1 [n/a] | Rule 6.5 [1-650] |
| Rule 1.4.1 [3-410] | Rule 1.17 [2-300] | Rule 4.4 [n/a] | Rule 7.6 |
| Rule 1.8.4 [n/a] | Rule 1.18 [n/a] | Rule 6.1 [n/a] | Rule 8.2 [1-700] |
| Rule 1.8.9 [n/a] | Rule 3.9 [n/a] | Rule 6.2 [n/a] | Discussion Draft [all rules] |

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

- AGREE with this proposed Rule
 DISAGREE with this proposed Rule
 AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

March 3, 2010

Jill H. Smith
805.882.1438 tel
805.965.4333 fax
Jsmith@bhfs.com

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Comments on Proposed Rule 3.9 Advocate in Nonadjudicative Proceedings

Dear Ms. Hollins:

Brownstein Hyatt Farber Schreck, LLP has reviewed the proposed Rule 3.9 Advocate in Nonadjudicative Proceedings. The purpose of this letter is to offer comments on the proposed rule to the Commission for its consideration.

Comment 3 to the proposed Rule 3.9 states that the rule 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. However, Comment 3 fails to specify whether the rule would apply when a lawyer represents a client in a "quasi-legislative" or "quasi-judicial proceeding."¹ 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 nonadjudicatory proceeding.

Brownstein Hyatt Farber Schreck, LLP respectfully requests 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 we concur with commentators who have noted that holding lawyers to the strict standard proposed can place attorneys at a distinct disadvantage because,

¹ Section 11440.60 of the Government Code defines "quasi-judicial proceeding" as any of the following:

- (A) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies.
- (B) A proceeding involving the issuance, amendment, or revocation of a permit or license.
- (C) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.
- (D) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency.
- (E) A proceeding at which an action is taken awarding a grant or a contract.

Variations and conditional use permits are quasi-judicial, requiring an administrative decision maker to ascertain facts in a specific case, to exercise discretion in applying the law to those facts, and to draw conclusions and adopt findings to support those conclusions. (CEB Cal. Land Use Practices §7.4 C. Procedures Required for Consideration of Variance.)

Ms. Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

March 3, 2010
Page 2

in these kinds of proceedings, different witnesses have differing versions of what is and is not a falsehood.

Thank you for considering these comments.

Sincerely,

A handwritten signature in black ink that reads "Jill H. Smith". The signature is written in a cursive, flowing style.

Jill H. Smith

SB 536119 v1:000009.0001

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* Date

03/08/2010 

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File :

F-2010-384 Jill Smith BHFS [3.9]

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March 9, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

MEMORANDUM

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 3.9 – Non-Adjudicative Proceedings**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

Proposed Rule 3.9 would regulate a lawyer's conduct when representing a client before a legislative body or administrative agency in a non-adjudicative matter. The proposed Rule would require the lawyer to disclose that his or her appearance is in a representative capacity and, further, would require compliance with proposed Rule 4.1 (which imposes a duty to avoid making any representation of a material fact which the lawyer knows to be false).

The OCBA opposes the adoption of the proposed Rule and agrees with the position of the Commission's minority. 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 or administrative bodies and could have the effect of chilling communications with the government.

First, the OCBA believes 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.

Second, the OCBA opposes 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 governmental body that regulate conduct of persons appearing before it. However, the OCBA believes that a lawyer should not be considered 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.



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March 9, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.9 Advocate in Nonadjudicative
Proceedings

Dear Ms. Hollins:

The California Building Industry Association (CBIA) is a non-profit trade association representing approximately 3,700 member companies who are responsible for all aspects of the planning, design, financing, construction, sales and maintenance of approximately 70% of all homes built in California annually. CBIA includes more than 200 lawyers who specialize in representing this industry in nonadjudicative proceedings throughout the state. Regrettably, we write to inform you of our opposition to Proposed Rule 3.9.

Proposed Rule 3.9 would prohibit attorney-advocates from making false statements in proceedings conducted by legislative and executive branches of government.

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 nonadjudicative proceedings without any resulting improvement to the integrity, honesty or candor in such proceedings.

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 frequently was without merit, but was used to chill speech. As matters now stand, everyone who participates in the public process before a legislative or executive branch of government can communicate without having to be concerned about being prosecuted for what they say.

Rule 3.9 would single out lawyers for potential prosecution for their statements before a 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.

By exposing lawyers to unique risks that do not apply to any other participant in the process, will limit lawyers' ability to be effective advocates for their clients in such proceedings. We expect that proponents and opponents of homebuilding projects across the state will use other consultants who are not subject to the risk this Rule would create. Unlike proceedings in the judicial branch, parties addressing a legislative or executive branch are not required to be represented by lawyers. They are free to hire other representatives not subject to the prohibitions of Proposed Rule 3.9. Non-lawyers are not restrained by an obligation to tell the truth. In fact they are protected by Civil Code section 47 from civil liability in exercising their First Amendment rights.

If the purpose of the Proposed Rule is to enhance integrity in nonadjudicatory proceedings, it will fail to achieve its goal. At the same time, it will create an unlevel playing field, where lawyers are the only category of professional before an agency who would be exposed to claims based on what they say before the agency. Lawyers often are in the best position to protect a client's position before the agency. If a lawyer is being a particularly effective advocate for a client in a contentious proceeding, we expect that opponents will attempt to take the lawyer out of the process either by reporting the lawyer to the State Bar for discipline or by bringing suit against the lawyer using the Proposed Rule 3.9 as the basis for the claim. 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.

The end result will not benefit clients. The entitlement process before executive and legislative bodies is a highly technical process. Many cases involve complicated legal issues. The risk adverse lawyer can be expected to limit his or her participation in the client's matter in the face of a claim, leaving the client to

use less effective advocates, who do not have the skill or training to address the legal issues.

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?

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.

Because Proposed Rule 3.9 lacks clarity, lawyers will not know what statements are permitted and what are prohibited. Therefore, we believe that it will have a chilling effect on lawyers' ability to represent clients in nonadjudicatory proceedings. Additionally, the Proposed Rule puts lawyers who practice in nonadjudicative proceedings at a distinct disadvantage. For these reasons, we oppose Proposed Rule 3.9.

Thank you for considering our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Nick Cammarota". The signature is fluid and cursive, with a large initial "N" and "C".

Nick Cammarota

General Counsel

LATHAM & WATKINS LLP

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March 12, 2010

VIA EMAIL AND FACSIMILE

State Bar of California
Harry B. Sondheim, Esq., Chair
Commissioners
Commission for the Revision of the Rules
Of Professional Conduct
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule 3.9 – Nonadjudicative Proceedings

Dear Chairman Sondheim and Commissioners:

On behalf of Latham & Watkins LLP, I am writing with respect to Proposed Rule 3.9 (Nonadjudicative Proceedings), which the Commission for the Revision of the Rules of Professional Conduct has circulated for public comment.

Our firm only recently has become aware of Proposed Rule 3.9 and is concerned that other members of the State Bar may likewise not be aware of the proposed rule. Our firm holds itself to the highest standards of truthfulness in all of our practice areas, including in nonadjudicative proceedings. However, we are concerned that Proposed Rule 3.9, and the minority dissent to the proposed rule, raise significant and complicated issues, the implications of which may not be fully understood by members of the State Bar who practice before legislative and administrative bodies.

We therefore respectfully request that the Commission provide additional time for public comment prior to taking action on Proposed Rule 3.9.

We appreciate your consideration of this request.

Sincerely,


John J. Clair
Los Angeles Office Managing Partner
of LATHAM & WATKINS LLP

cc: Randall Difuntorum

HERUM \ CRABTREE
ATTORNEYS

Brett S. Jolley
bjolley@herumcrabtree.com

March 12, 2010

VIA FACSIMILE AND U.S. Mail

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105
Fax (415) 538-2171

Re: Opposition to Proposed Rule 3.9 of the Rules of Professional Conduct

Dear Ms. Hollins:

I write in opposition to Proposed Rule 3.9 of the Rules of Professional Conduct 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. While the intent of the rule is no doubt honorable, adopting this rule would chill public participation, and could deprive citizens of access to justice during non-adjudicative proceedings.

Although I currently serve as the President of the State Bar's California Young Lawyers Association, I do not submit these comments in that capacity or on behalf of CYLA (which has not considered the proposed rule), but rather on behalf of the Land Use practice group of Herum Crabtree and as member in good standing of the State Bar since 2000. As land use attorney, I and other attorneys in my office regularly appear before city councils, county boards of supervisors, planning commissions, LAFCOs, and other administrative bodies on behalf of project proponents, opponents, and public agencies. Though based in Stockton, our geographic territory for administrative hearings is expansive – from as far north as Chico to as far south as Riverside County.

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 not adopt the Rule.

The proposed rule would create an unnecessary, unfair, and unreasonable double standard for participants in administrative hearings. Stated slightly differently, attorneys would be subject to potential discipline – *and threat of discipline* – not apt to any other

Ms. Audrey Hollins
Comment on Proposed Rule 3.9
March 12, 2010
Page 2

participant in administrative proceedings. 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 – burdening both the financially-strapped regulators and the regulated attorneys with unnecessary hardship.

While we do not dispute that an attorney should conform duties of honesty and professional responsibility in both judicial and non-adjudicative proceedings, this Rule goes far beyond the issue of truthfulness and clearly eliminates the level playing field currently enjoyed by all who participate in administrative proceedings. As a practical matter, unlike court proceedings, parties to land use proceedings are often represented during the proceedings by lawyers, as well as political and environmental consultants, architects, engineers, and even themselves. Formal rules of evidence and procedure do not apply to these proceedings. To the extent attorneys are subject to disciplinary standards to which other speakers and classes of professionals are not, attorney participation will be discouraged. Stated slightly differently, while such rule may properly apply in court where only attorneys represent clients – the same cannot be said of administrative hearings.

To this end, and also unlike judicial proceedings, the decision makers in land use proceedings – whether quasi-legislative or quasi-judicial – are not judicial officers and instead are often laypeople in the eyes of the law. The decision makers also frequently engage in ex parte communications with interested parties. It is not uncommon for a decision maker who is adverse to a particular party or side of an issue to use his or her position on the dais as a vehicle to conduct an ad hoc deposition of a speaker who is not under oath. I have personally observed decision makers in this situation read prepared, pointed, and sometimes hostile questions at a speaker – and often times the questions reflect the direct influence of an interested party who has shared this information with the decision maker. To the extent an attorney is held to a higher standard in responding to these questions than his client or his client's architect, engineer, or planning consultant this places an unfair burden on the attorney and may actually *discourage* clients from using attorneys in heated situations for fear that the attorney will have to disclose information about the client or face a threat of violating Rule 3.9.

And rather than facilitate open communication with local government, the Rule will deter the public from exercising its First Amendment right to free speech. California's Anti-SLAPP Law was enacted to eliminate threats discouraging individuals from exercising their rights of petition and free speech in connection with public issues. As the Legislative History on CCP §425.16 reveals, "The purpose of this bill is to protect a person's exercise of First Amendment free speech and petition rights from being chilled by meritless lawsuits." See, Senate Committee on Judiciary analysis of SB 10 (1991, Lockyer), enclosed herewith. That report continues:

Ms. Audrey Hollins
Comment on Proposed Rule 3.9
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Page 3

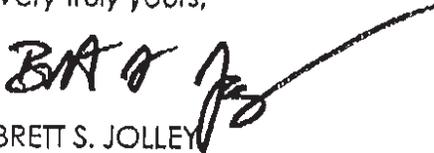
[SLAPP] suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits...are filed for the sole purpose of intimidation...Proponents assert that although the great percentage of SLAPP suits are legally unsuccessful, they nonetheless exact a high toll from targeted defendants who are forced to invest significant financial resources, time, and emotions in defending the suits.

Rule 3.9 has the potential to counteract this purpose; subjecting attorneys to standards and discipline during public hearings to which no other participants are held, will discourage lawyers from engaging in open discussion with government officials regarding public policy matters on behalf of their clients. By way of example, assume a community group engages an attorney to represent its interests in opposing a land use permit for a landfill in proceedings before a city planning commission. The planning commission denies the landfill permit and the project proponent appeals to the City Council. Between the planning commission and city council hearings the landfill proponent files a complaint with the State Bar that a statement made by the attorney is untruthful and violates Rule 3.9. Even if entirely meritless, what impact does this filing have on the attorney and his client as they prepare for the city council appeal? What psychological impact does this action have on the city council members who will hear and decide the appeal? What if the landfill proponent uses this complaint as "leverage" to prevent counsel from representing his client at the appeal hearing?

We share the minority's concern that Rule 3.9 will result in a new breed of retaliatory measures designed to chill an adverse party's advocacy before a government agency. 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. And depriving citizens of representation by counsel contradicts principles of promoting access to justice.

We appreciate the opportunity to comment on Proposed Rule 3.9 and urge the Board of Governors to reject Rule 3.9.

Very truly yours,



BRETT S. JOLLEY
Attorney at Law

Enclosure: Senate Committee on Judicial analysis, SB 10 (1991)

cc: Steven A. Herum, Herum Crabtree
Natalie M. Weber, Herum Crabtree
Kerri K. Foote, Herum Crabtree

SENATE COMMITTEE ON JUDICIARY
Bill Lockyer, Chairman
1991-92 Regular Session

SB 10 (Lockyer)
As introduced
Hearing date: March 12, 1991
Code of Civil Procedure
GWW/ps

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CIVIL LAWSUITS
PLEADING HURDLE FOR "SLAPP" SUITS

HISTORY

Source: Author

Prior Legislation: SB 2313 (1991) - Vetoed

Support: Planning and Conservation League; First Amendment Coalition; ACLU; Numerous individuals

Opposition: California Building Industry Association

KEY ISSUE

SHOULD A PLAINTIFF BE REQUIRED TO SHOW A COURT THAT THE ACTION HAS A SUBSTANTIAL PROBABILITY OF SUCCESS BEFORE HE MAY PROCEED WITH A LAWSUIT AGAINST A PERSON FOR ACTS OF THE PERSON IN FURTHERANCE OF THAT PERSON'S FIRST AMENDMENT RIGHT OF PETITION OR FREE SPEECH IN CONNECTION WITH A PUBLIC ISSUE?

SHOULD A PREVAILING DEFENDANT IN SUCH AN ACTION BE ENTITLED TO RECOVER HIS OR HER ATTORNEY'S FEES?

PURPOSE

Existing law prohibits certain causes of actions from being included in a complaint or other pleading unless the court enters an order allowing the pleading upon establishment by the plaintiff that there is a substantial probability of success or sufficient evidence to support the claim, depending on the particular case. "Pleading hurdles" are in place for tort actions against volunteer

(More)

SB 10 (Lockyer)
Page 2

directors and officers of non-profit corporations, and for punitive damage claims against health care professionals and religious organizations.

This bill would enact a "pleading hurdle" for "causes of action against a person arising from any act of that person in furtherance of his or her first amendment right of petition or free speech in connection with a public issue." For a law suit to proceed, the plaintiff must establish a substantial probability of success.

The bill would also allow a prevailing defendant in any action described above to recover his or attorney's fees and costs.

The purpose of this bill is to protect a person's exercise of First Amendment free speech and petition rights from being chilled by meritless lawsuits.

COMMENT

1. Need to deter SLAPP suits

According to the author's office and research by two professors at the University of Denver, "Strategic Lawsuits Against Public Participation (SLAPP)" suits are being brought in large numbers in order to chill the exercise of first amendment rights. Most SLAPP suits are filed under a variety of causes of actions, such as defamation, interference with economic opportunity, or conspiracy, and are filed for the sole purpose of intimidation.

According to the University of Denver study by Professors George Pring and Penelope Canan, 83 of 100 studied cases were ultimately dismissed or found to be without merit. Updated statistics, not yet finalized, on 250 cases indicate that more than 90% of the SLAPP suits are legally unsuccessful. According to Professor Pring, there are perhaps thousands of such lawsuits being filed annually.

Proponents assert that although the great percentage of SLAPP suits are legally unsuccessful, they nonetheless exact a high toll from targeted defendants who are forced to invest significant financial resources, time, and emotions in defending the suits.

The author also states: "These are lawsuits designed to silence ordinary citizens from trying to influence their government. In a democratic society with the right to petition government being one of the fundamental liberties, we want to encourage participation."

In Sierra Club v. Butz 349 F. Supp 974 (1972), the district court held:

(More)

"[A]ll persons, regardless of motive, are guaranteed by the First Amendment to the right to seek to influence the government or its officials to adopt a new policy, and they cannot be required to compensate another for loss occasioned by a change in policy should they be successful."

2. Examples of SLAPP suits

Proponents offer several examples of SLAPP suits which SB 10 is intended to screen:

- Alan La Pointe was sued for \$42 million after he publicly complained to stop construction of a local sanitary district's garbage burning plant. The case was ultimately dismissed and the expenses to defend the action would have exceeded \$20,000 had not the attorney provided the services pro bono.
- Two Hudson Falls, N.Y. citizen groups who went to court in 1989 to stop construction of a \$74 million trash incinerator were countersued by local agencies for \$1.5 million. Officials contended that the opposition drove off prospective buyers of bonds to finance the project. The government attorney added a further intimidating touch by announcing that defendants risked losing their homes. The countersuit was dismissed by a state appellate court in January, 1990.
- Dr. John Bolton and the American Academy of Pediatrics were sued by Alta Dena Dairy for \$220 million after he gave testimony before Congress about the dangers of raw "certified" milk. The case was eventually dismissed, but the defendants incurred \$75,000 in defense costs.
- Members of the Land Utilization Alliance (in San Joaquin County) have been recently sued for protesting a sewer plant expansion and a local development.
- Rick Sylvester and others were sued in 1987 for \$75 million by a land development corporation which claimed that he and others broke an agreement to not publicly oppose a development project. Mr. Sylvester has already incurred \$350,000 in defending the suit.

Proponents assert that the pleading hurdle proposed in SB 10 is intended to screen out meritless cases at an early stage in order to save defendants the tremendous burden of unnecessary litigation. Proponents also note that legitimate suits would not be affected because the plaintiff in that case would be able to make the requisite showing to the trial judge.

(More)

3. Examples of pleading hurdle in existing law

Other uses of the pleading hurdle in existing law include:

- punitive damages claims for medical malpractice (Sec. 425.13) or against religious organizations (CCP Sec. 425.14);
- liability suits against volunteer directors and officers of specified non-profit organizations (CCP S. 425.15); and
- liability suits against attorneys for civil conspiracy with client to deny plaintiff's rights. (Civil Code Sec. 714.10)

4. Attorney's fees to prevailing defendant

Statutes which provide for attorney's fees usually provide it to a prevailing party. SB 10, in contrast, provides attorney's fees only to a prevailing defendant.

The exception to the general rule is both necessary and justifiable, assert proponents. It is necessary to "make whole" the defendant of a SLAPP suit, and it is justifiable in order to deter actions to chill the exercise of first amendment rights.

5. Building industry opposition

The CBIA opposes SB 10, asserting that SB 10 involves "the misconception that a new breed of litigation has surfaced in which builders or land developers file meritless lawsuits against individuals who exercise their right to speak out against a project."

6. Prior veto

In his veto of SB 2313, former Governor Deukmejian stated: "[T]here are currently protections against frivolous causes of action, and judges should be encouraged to impose liberal sanctions against parties who file such lawsuits. I do not believe this bill is necessary to protect citizen involvement in public issues."

Proponents respond that mandatory sanctions are necessary to deter the filing of frivolous actions which chill the exercise of important constitutional rights; the mere filing of a SLAPP suit on a given issue has been known to operate to chill other speech on that issue. Further, proponents point out that SLAPP suits are expensive to defend and it is still very difficult and expensive to obtain an early dismissal of a meritless action. They assert that it is better to provide a pro-active and front-end protection for the exercise of First Amendment rights.

(More)

7. Possible overbreath

The California District Attorneys' Association, while not opposing the bill, expresses concern that the bill may have the unintended consequence of hindering enforcement of certain consumer protection laws by state and local agencies, e.g., enforcement of law prohibiting false, misleading or deceptive advertising.

The author's staff suggests that possible language could be drafted later to address concerns of possible overbreadth.



THE STATE BAR OF
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March 12, 2010

Randall Difuntorum, Director
Office of Professional Competence & Planning
State Bar of California
180 Howard Street
San Francisco, California 94105

re: Comments of the Office of the Chief Trial Counsel to Proposed
Amendments to the Rules of Professional Conduct

Dear Mr. Difuntorum:

Preliminarily, the Office of the Chief Trial Counsel (OCTC) would like to thank Harry B. Sondheim, Chair, Mark L. Tuft and Paul W. Vapnek, Co-Chairs, and the members of the Commission for the Revision of the Rules of Professional Conduct, for the opportunity to submit comments to the proposed amendments to the Rules of Professional Conduct, as released for public comment by the Board of Governors in January 2010. We appreciate the Commission's considerable efforts in crafting rules of conduct for California attorneys relevant to our contemporary legal environment. While we concur with most of the Commission's recommendations, we raise some points of disagreement. Our disagreement is offered in the spirit of aiding in the adoption of rules which can be practically and fairly applied in a uniform fashion by the prosecutor. We hope you find our thoughts helpful.

~~**Rule 1.0.1 Terminology/Definitions.**~~

- ~~1. Many definitions appear later in the rules rather than being consolidated here. It is unclear why certain definitions are included here while others are not. Further, many of the definitions are repeated elsewhere, which is unnecessary.~~
- ~~2. Rule 1.0.1(b) states that "confidential information relating to representation" is defined in rule 1.6, Comments [3] [6]. This is not a precise definition. Moreover, the Comments are not intended to be binding and, therefore, it is inappropriate to reference them as part of the actual (binding) definition.~~
- ~~3. Rule 1.0.1(m) significantly deviates from the ABA rule defining "tribunal" by excluding legislative bodies acting in adjudicative capacities. OCTC agrees with the ABA drafters that legislative bodies acting in adjudicative capacities should be included within the definition of tribunal. Attorneys representing clients before legislative bodies acting in adjudicative capacities should be held to the same standards as those appearing before any other adjudicative body.~~

Rule 1.17 Purchase and Sale of Law Practice.

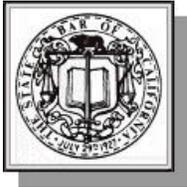
- ~~1. Although the rule states that if substitution is required by the rules of a tribunal all steps necessary to substitute a lawyer shall be taken, this appears incomplete. OCTC's believes that the rule should more clearly state that cessation of work by the current attorney requires compliance with the termination rules in all situations. Thus, there should be a provision that if the client does not specifically consent to the transfer of his or her file, the current attorney may not withdraw without complying with the rules governing withdrawal. (There are some comments regarding this, but OCTC believes that it should be stated in the rule itself.)~~
- ~~2. Comment 2 says "see Rule 1.16," when it should state that the seller is permitted to withdraw only if in compliance with rule 1.16. Comment 1A defines "selling lawyer;" this definition should be in the rule, not a comment. Comment 4 is completely repetitive of the rule itself and thus unnecessary. Comments 5-6 and 13 also serve no purpose. Comment 12, which provides information regarding the withdrawal requirement, should be in the rule, not a comment. Comments 15A (that lawyers must comply with rules 1.5.1 and 1.5.4) and 15B (requiring compliance with Bus & Prof. Code section 6180) also belong in the rule, not a comment.~~

Rule 1.18 Duties to Prospective Clients.

- ~~1. The drafters state that this is a new rule to California, although OCTC believes it is already part of existing ethical standards in our state.~~
- ~~2. OCTC is concerned that paragraphs (c) and (d) are essentially repetitions of the conflict rules and the concept of waivers and screens in those rules. Further, these sections are not complete as there are non-waivable conflicts. OCTC believes this is not the place for the conflict rules and that any conflict rules should be in a separate rule which clearly deals with all related issues.~~
- ~~3. Like the rule itself, comments 6-8 are discussions of conflict situations and could create confusion with the conflict rules. It would be better to simply refer the lawyers to the conflict rules, as is done in comment 9 to the competence rules and the client's property rules.~~

Rule 3.9 Non-adjudicative Proceedings.

- 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.
- Comments 1-2 are too general. OCTC also requests a comment that other rules may apply depending on the facts and circumstances.



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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 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 my interfere with their representation of clients. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. 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.

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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 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. Current law takes pains to assure that people can freely communicate with their government without fear of consequence. It would be unwise essentially to carve exceptions in such law to uniquely expose lawyers to risks for what they say on behalf of people communicating with their government, as Rule 3.9 would. 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.

I note that several states that have adopted rules modeled after the ABA Model Rules have opted not to adopt Rule 3.9 or 4.1. For the reasons noted above and expressed more fully in the Minority Dissent reports to Rules 3.9 and 4.1, I recommend that California do likewise.

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March 12, 2010

VIA FACSIMILE: 415-538-2171

Audrey Hollins
Office of Professional Competence, Planning & Development
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed Rule of Professional Conduct 3.9

Dear Ms. Hollins:

I write to urge that the Special Commission for the Revision of State Bar Rules of Professional Conduct not adopt proposed Rule 3.9. As the former San Francisco City Attorney, former General Counsel to the San Francisco Unified School District, and as outside counsel to numerous California cities, counties, school districts, and other public entities, I believe that proposed Rule 3.9 represents a step in the wrong direction.

Proposed Rule 3.9 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.

The concerns raised by the dissent are valid. The level of discourse in the public arena has been increasingly hostile for some time. Unfortunately, most public meetings today seem to be marked by an overall lack of civility. 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.

The Legislature has long recognized the importance of open and unfettered discussion in public meetings. Since 1872, Civil Code section 47 has privileged statements made in legislative or other official proceedings from prosecution. (See Cal. Civ. Code § 47(a).) And nearly two decades ago, the Legislature established a special motion to strike to prevent lawsuits aimed at chilling public participation. (See Code Civ. Proc. § 425.15.) 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; board- and councilmembers are sufficiently experienced to winnow the false from the true. Proposed Rule 3.9 is antithetical to the goals advanced by the Legislature in these statutes, unfairly restricts only attorney-advocates, and should be rejected.

Very truly yours,

Louise H. Renne



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

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March 12, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 3.9

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 3.9 and offers the following comments.

COPRAC generally supports the adoption of the rule. COPRAC recommends a slight change to the wording of the last sentence of Comment [1]. The use of the word "all" (as in, "Although a lawyer does not have *all* of the obligations owed by a court under Rules 3.3(a) through (c) . . .") 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, we recommend changing "all" to "any" (so as to clarify that the lawyer does not have "any" such obligations).

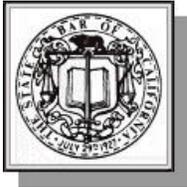
COPRAC also recommends the deletion of Comment [3]. This comment, which tracks Comment [3] of the Model Rule, is no longer applicable as a result of the modification to the rule itself. In particular, the rule as proposed deletes the references contained in the Model Rule to the rules applicable to adjudicative proceedings (namely, Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5), and replaces those references with a reference to Rule 4.1. The comment attempts to clarify when those rules are applicable and when they are not in non-adjudicative proceedings; however, since such rules are no longer referenced, and Rule 3.9 should be applicable in all instances, the comment is inapplicable and could be confusing.

Thank you for your consideration of our comments.

Very truly yours,

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

OFFICE USE ONLY.

* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

* Required

Proposed Rule 3.9 [N/A] “Non-adjudicative Proceedings”

(Draft 2.1(11/13/09))

Summary: This rule addresses a lawyer’s role as a client’s advocate before a legislative body or administrative agency in a nonadjudicative proceeding and it requires (1) disclosure that the appearance is in a representative capacity and (2) compliance with Rule 4.1 that imposes a duty of truthfulness.

Comparison with ABA Counterpart

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

Primary Factors Considered

- Existing California Law
 - Rules
 - Statute
 - Case law

- State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

- 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 _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

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:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Rule 3.9 Non-adjudicative Proceedings*

November 2009

(Draft rule to be considered for 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 requires a lawyer to disclose that his or her appearance is in a representative capacity. The rule also requires compliance with Rule 4.1 which imposes a duty of truthfulness. Model Rule 3.9 does not incorporate Rule 4.1 and instead imposes compliance with rules applicable to representations before an adjudicative tribunal. 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. 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. Also, a lawyer's representative work with legislative and administrative bodies involves an element of contractual and other negotiations that are not present in courts, and that role is more akin to a lawyer serving as an advocate in non-governmental negotiations. For these reasons, proposed Rule 3.9 incorporates by reference the duty of honesty under Rule 4.1 rather than the duties that lawyers have in court under Rule 3.3.

* Proposed Rule 3.9, Draft 2.1(11/13/09).

INTRODUCTION (Continued):

Minority. A minority of the Commission believes that Rule 3.9 should not be adopted in any form because it would expose lawyers to unique risks of prosecution for statements made before a legislative body or administrative agency that is contrary to the broad immunity enjoyed by all others who appear before such bodies and agencies. A detailed statement of the minority's position, with citation to authority, is provided in these materials after the Comment Comparison Chart, below. See Minority Dissent.

<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 Non-adjudicative 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 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 3.5Rule 4.1.</p>	<p>This language tracks the general prohibition in Model Rule 3.9 but incorporates a reference to Rule 4.1 as a substitute for the Model Rule’s reference to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5. The provisions referenced in the Model Rule include standards related to practices and policies arising in representations before adjudicative proceedings that may be confusing or incorrect in a non-adjudicative proceeding. For example, Rule 3.4(a) and (b) refers to “evidence,” a concept which has a specific meaning in judicial proceedings but does not have any similar discernable meaning in the great variety of non-adjudicative proceedings. The Commission determined that a reference to Rule 4.1 is preferable to the Model Rule approach because Rule 4.1 sets a basic and indisputable standard of truthfulness by prohibiting false statements of material facts. A lawyer should be required to conform to this duty of honesty in both judicial and non-adjudicative proceedings.</p>

* Proposed Rule 3.9, Draft 2.1(11/13/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center">ABA Model Rule</p> <p align="center">Rule 3.9 Advocate in Nonadjudicative Proceedings</p> <p align="center">Comment</p>	<p align="center">Commission's Proposed Rule*</p> <p align="center">Rule 3.9 Non-adjudicative Proceedings</p> <p align="center">Comment</p>	<p align="center">Explanation of Changes to the ABA Model Rule</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> city councils, <u>boards of supervisors, commissions,</u> and executive and administrative agencies acting in a rule-making <u>legislative, administrative</u> or policy-making <u>ministerial</u> 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. <u>Although a lawyer does not have all of the obligations owed a court under .-See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5-</u> when appearing before such a body, such as correcting misrepresentations made by third parties, the lawyer nevertheless is prohibited from <u>making a false statement of fact or law to the body.</u></p>	<p>See above explanation of the rule. The comparable Model Rule Comment [1] language has been revised to track the Commission's proposed rule that substitutes a reference to Rule 4.1 for the Model Rule's reference to Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.</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, <u>as well as nonlawyers,</u> have no <u>exclusive</u> a 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>Comment [2] has been slightly revised to be a more direct and succinct statement of the foundational point that while both lawyers and nonlawyers make appearances in nonadjudicative proceedings, lawyers are held to standards that may be different from the standards imposed on nonlawyers.</p>

* Proposed Rule 3.9, Draft 2.1 (11/13/09). 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 Non-adjudicative Proceedings</p> <p align="center">Comment</p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></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 conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.</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 conducted by government investigators or examiners. Representation in such matters is governed by Rules 4.1 through 4.4.</p>	<p>Comment [3] adopts Model Rule 3.9, comment [3].</p>

Proposed Rule 3.9 Advocate in Nonadjudicative Proceedings – Minority Dissent

A minority of the Commission dissents to the adoption of Rule 3.9, because it would expose lawyers to unique risks of prosecution for statements made before a legislative body or administrative agency that is contrary to the broad immunity enjoyed by all others who appear before such bodies and agencies. The Civil Code section 47 immunities and the extension of that protection through the SLAPP statute were established to assure that no one communicates with government at his or her peril. The Civil Code privilege and the procedural protections of the SLAPP statute remove the chilling effect that allegations of impropriety may have on a person's right to petition government. "It is well settled the First Amendment creates a privilege from civil liability for actions constituting the exercise of the right to petition the government for redress of grievances." (*Wilcox v. Superior Court (Peters)* (1994) 27 Cal.App.4th 809, 825; see also *Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 142-144.) This zone of protection exists so that people can communicate freely with government without fear of consequence.

The minority maintain that Rule 3.9 would make lawyers the only category of person who could be penalized for what they say in the process. The Rule would not touch others who speak for clients in the same proceeding, as well as individuals who speak for themselves. The history of litigation that led to enactment of the SLAPP statute demonstrates that the potential for retaliatory

claims to chill an adverse party's advocacy before a government agency is real. The issue is not whether anyone, lawyer or non-lawyer, should make a false statement of material fact in a government proceeding. The issue is whether there should be a level playing field when it comes to immunities that facilitate open and uninhibited communication with government. In the view of the minority, Rule 3.9 would expose lawyers to claims that would chill communications with government. The result is unwarranted in light of the fact that the legal profession exists, at least in part, to be a client's voice with respect to government.

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

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 Rule 4.1.

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, 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. Although a lawyer does not have all of the obligations owed a court under Rules 3.3(a) through (c) when appearing before such a body, such as correcting misrepresentations made by third parties, the lawyer nevertheless is prohibited from making a false statement of fact or law to the body.
- [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.
- [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: Non-adjudicative Proceedings

STATE VARIATIONS

(The following is an excerpt from *Regulation of Lawyers: Statutes and Standards* (2009 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.

Illinois omits Rule 3.9.

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: ABA Model Rule 3.9 has no counterpart in New York’s Disciplinary Rules.

North Carolina omits Rule 3.9.

North Dakota replaces the reference to Rule 3.5 with the following new sentence: “A lawyer shall also conform to the provisions of Rule 3.5, except the lawyer may participate in ex parte communications with members of a legislative body regarding legislative matters but not adjudicative matters.”

Virginia omits Rule 3.9.

**RRC – Rule 3.9 [MR 3.9]
E-mails, etc., -- Revised (3/24/2010)**

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March 10, 2010 McCurdy E-mail to Drafters (Ruvolo, Foy, Lamport), cc Chair, Vice-Chairs & Staff:

Rule 3.9 Drafting Team (RUVOLO, Foy, Lamport):

This message provides the assignment background materials for Rule 3.9 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

- RRC - [3-9] - Dashboard - ADOPT - DFT2 (03-10-10).doc
- RRC - [3-9] - Compare - Introduction - DFT2.2 (11-19-09) RD-SWL-LM.doc
- RRC - [3-9] - Compare - Rule & Comment Explanation - DFT 3.1 (12-14-09)RD-LM.doc
- RRC - [3-9] - Rule - DFT2.1 (11-14-09)-CLEAN-LAND-RD.doc
- RRC - [3-9] - Minority Statement - DFT1 (11-13-09)SWL-RD-LM.doc
- RRC - [3-9] - Public Comment Complete - REV (03-10-10).pdf
- RRC - [3-9] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
- RRC - [3-9] - State Variations (2009).pdf

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 11/27/09.
2. Full E-mail compilation, revised 1/5/10.

Please let me know if you have any questions.

March 15, 2010 Ruvolo E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

Attached is the comment comparison addressing two commentators. I do not propose to make any other changes. Maybe change not controversial to moderately controversial in light of the minority position and the Orange County opposition.

Attached:

RRC - [3-9] - Public Comment Chart - By Commenter – DFT2 (03-15-10)NR.doc

March 15, 2010 Lamport E-mail to Ruvolo, cc Drafters, Chair, Vice-Chairs & Staff:

Randy has informed me that we have received a number of additional comments on this rule. I understand that a package will go out to you with the additional comments later today. I will, therefore, hold off commenting on your effort until you have had a chance to look at the other comments.

I would observe, however, that we should be saying more in response to comments than just "The RRC does not agree." We should be addressing the merits of the position stated by the commenter. Just saying the RRC does not agree sounds like we are blowing off the comment. If someone was willing to go to the effort to write about their concerns, we should make the effort to respond fully to those concerns. I also think the Supreme Court expects us to be specific in providing reasons for not accepting a commenter's recommendation.

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart. Please note that not all of the comments received over the past several days have been synopsisized and added to this chart. Please go ahead and add the entries yourself in the extra row at the bottom of the table. If you run out of rows, simply press the TAB key in the last cell of the last row and a new row will appear.

NOTE: Nace, I've added your earlier entries to the attached updated commenter chart, so please use the attached draft for purposes of continuing your work on those additional comments received. Also, will you be attending the March meeting? If not, please arrange to have one of the other members of the drafting team present this rule at the meeting.

Since the last transmission, comments from the following commenters were received:

California Building Industry Association
Latham & Watkins
OCTC
Brett Jolley
David Ivester
Louise Renne
COPRAC

Any additional comments received will be sent to you as soon as they are received.

March 18, 2010 McCurdy E-mail to Lamport, cc Drafters, Chair & Staff:

Can you please pick-up the responsibility for this assignment for Nace? For purposes of today's mailing we'll simply put the partially completed commenter chart submitted by Nace, along with the other public comment materials for this rule. We'll circulate your completed commenter chart prior to the meeting once you submit it. Please work from the attached version of the chart, which includes Nace's last work.

Please confirm that you are able to follow-through on this.

March 18, 2010 Lamport E-mail to McCurdy, cc Drafters, Chair & Staff:

I am in an all day meeting today in San Francisco and will be flying back this evening. I can work on it tomorrow. I wonder if I am the right choice, however, since I wrote the dissent and agree with the comments that say that the rule should not be adopted

March 19, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. Public comment #4, at agenda p. 307, refers to quasi-judicial and quasi-legislative proceedings and asks whether they are included in Rule 3.9. They draft response, rather abruptly in my view, dismisses this.

Govt. Code section 11440.60 defines "quasi-judicial proceeding" to mean any of the following: "(A) A proceeding to determine the rights or duties of a person under existing laws, regulations, or policies. (B) A proceeding involving the issuance, amendment, or revocation of a permit or license. (C) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law. (D) A proceeding at which action is taken involving the purchase or sale of property, goods, or services by an agency. (E) A proceeding at which an action is taken awarding a grant or a contract."

Govt Code section 82002 adds three more definitions: " (a) "Administrative action" means the proposal, drafting, development, consideration, amendment, enactment, or defeat by any state agency of any rule, regulation, or other action in any ratemaking

**RRC – Rule 3.9 [MR 3.9]
E-mails, etc., -- Revised (3/24/2010)**

proceeding or any quasi-legislative proceeding, which shall include any proceeding governed by Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2. **(b)** "Ratemaking proceeding" means, for the purposes of a proceeding before the Public Utilities Commission, any proceeding in which it is reasonably foreseeable that a rate will be established, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms. **(c)** 'Quasi-legislative proceeding' means, for purposes of a proceeding before the Public Utilities Commission, any proceeding that involves consideration of the establishment of a policy that will apply generally to a group or class of persons including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry."

I suggest that we add after the first sentence of Comment [1]: "These include, without limitation, the proceedings defined in Government Code sections 11440.60 and 82002." If this change is made, I would merge the two paragraphs of the public comment so that a single response covers all.

2. In the last sentence of Comment [1], I wonder why we need to refer to individual paragraphs of Rule 3.3. Why not just refer to Rule 3.3? This would be simpler and would avoid the omission of Rule 3.3(d).
3. Turning back to the commenter chart, I think we should provide an explanation of the Commission's position rather than merely rejecting the O.C. comment. Its comment has three paragraphs, and I suggest the following:
 - a. I would keep the response to the first O.C. comment but add: "Because of the special role and responsibilities of lawyers, the Commission believes it appropriate to impose on lawyers through this proposed rule standards of conduct not required of non-lawyers."
 - b. I suggest: "The commenter does not explain when a client's legitimate interest might be injured by the requirements of this Rule. It is possible that the commenter misreads the proposed Rule as requiring the lawyer to disclose the identity of the client. It does not, requiring only that the lawyer disclose that the lawyer acts in a representative, and this is something the legislature already has strongly encouraged through Govt. Code section 11440.60(c)." For the Commission's information, that section states: "A state agency may refuse or ignore a written communication submitted by an attorney or any other authorized representative on behalf of a client in a quasi-judicial proceeding, unless the written communication clearly indicates the client on whose behalf the communication is submitted to the state agency."
 - c. I suggest: "This Comment, at least in part, repeats the commenter's first comment, but we will not repeat the response to it. It also appears to be internally inconsistent. It acknowledges that lawyers should observe all applicable Rules and State Bar Act provisions but objects to the reference to one of those Rules, Rule 4.1. Because, unlike the Model Rule, the Commission does not recommend applying in the context of this rule the extremely broad and we think inapposite requirements of Rules 3.3 and 3.4, the Commission considers it essential to refer to Rule 4.1."
4. No response is given to comment #6. I suggest we refer to the response to the O.C. comment.

5. In response to comment #7, I suggest: “The Commission notes that this Rule will be exposed to public comment again as part of the entire set of proposed rules.”
6. In response to comment #8, I suggest borrowing the 2nd through 4th sentences of the comparison chart explanation of the proposed departure from the Model Rule. P.S. I just noticed that there is a somewhat fuller explanation in the Introduction – either one would work here. OCTC says that Comments [2] and [3] are too general. I don’t see how to improve Comment [2], but do we need [3] at all?
7. Comment #9 is daunting, but it does not cite to any statutory privilege or protection that is inconsistent with the proposed rule. Unless one of you knows of one, I would say so in response to this comment.
8. In response to comment #10, we could refer back to the O.C. comment. Also, I think we should respond to the last paragraph with an accurate count of how many jurisdictions do and do not have Rule 3.9.
9. I think the dashboard (agenda p. 347) should identify this rule as very controversial. There have been a number of forceful comments against it.
10. In the Introduction (agenda p. 348), in the fourth line, after the reference to Rule 4.1, I would use “but” rather than “and”. That sentence then goes on to explain the MR incorporation in its Rule 3.9 of rules applicable to representations before an adjudicative tribunal. That is only partly correct. Model Rule 3.9 also incorporates part of Rule 3.4. This should be included here. As I recall it, we decided not to incorporate Rule 3.4(a) and (b) b/c they refer to “evidence”, and Rule 3.4(c) b/c it refers to testimony by witnesses, all of which is pertinent to trial courts but not predictably so in other contexts.

March 21, 2010 Lampton E-mail to RRC:

I was informed on Thursday that Nace is not available to finish the response to the public comment to this Rule and make a final recommendation regarding its adoption. As a result, that responsibility has fallen on me. In light of the public comment, I am recommending that the Commission not adopt this Rule.

We received eleven comments on the Rule, including three comments from the San Diego, Orange and Santa Clara County Bar Associations and six comments from law firms, lawyers and a trade organization involved in the land use and municipal law fields, including Louise Renne, the Brownstein/Hyatt firm (a well regarded land use practice in Santa Barbara and Los Angeles), the California Building Industry Association, Latham & Watkins, David Ivester (a well regarded land use lawyer in San Francisco), and Herum/Crabtree (a well regarded land use firm in the Central Valley). The author of the Herum/Crabtree comment is currently president of CYLA, although he is not writing in that capacity. We also received comments from OCTC and COPRAC.

Seven of the eleven comments either oppose the Rule or express concerns about the Rule (in the case of Latham). They include the Orange County Bar Association and all six of the comments from the law firms, lawyers and trade association involved in the land use and

municipal law fields. Brownstein/Hyatt is identified in the table as supporting the Rule if modified, but their position is that Comment [3] should exclude quasi-judicial proceedings and that the Rule should not be adopted without such a modification. I view their position as an opposition to the Rule since they are asking that the Rule not apply in circumstances in which it appears to be intended to apply.

The San Diego and Santa Clara County Bar Associations support the Rule, although the San Diego Bar Association letter notes that a minority oppose the Rule for the reasons stated in the dissent.

OCTC and COPRAC support the Rule if modified.

The Comments in opposition to the Rule concur with the dissent and present additional reasons why the Rule should not be adopted, which I believe are compelling. There are a number of important common themes in these letters that are worth noting:

- **The threat that the Rule would be misused to chill speech is real.** Louise Renee states, "The concerns raised by the dissent are valid. The level of discourse in the public area 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." The Herum/Crabtree letter includes legislative history for California's SLAPP statute, which states, "The purpose of this bill is to protect a person's exercise of First Amendment free speech and petition rights from being chilled by meritless lawsuits...[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." The California Building Industry Association letter states that "Before the Legislature enacted California's SLAPP statutes, California had a history of litigation arising out of advocacy for or against a pending project....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."
- **The Rule would create an unlevel playing field by subjecting lawyers to unique risks that do not apply to anyone else who participates in the process.** Brownstein/Hyatt states, "we concur with commentators who have noted that holding lawyers to the strict standard proposed can place attorneys at a distinct disadvantage..." The Orange County Bar Association states that the Rule "exposes lawyers to unique risks and disciplinary measures that are not faced by others who appear before the same legislative or administrative bodies and could have the effect of chilling communications with the government." The California Building Industry Association states that the Rule, "will create an unlevel playing field, where lawyers are the only category of professional before an agency who would be exposed to claims based on what they say before the agency." Herum/Crabtree states that the Rule "subjecting attorneys to standards and discipline during public hearings to which no other participants are held, will discourage lawyers from engaging in open discussion with government officials regarding public policy matters on behalf of their clients." David Ivester states that the Rule would unnecessarily and unwisely adopt disciplinary 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." Louise Renne states that the 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."

- **The Rule will chill lawyer speech on behalf of clients without any resulting improvement to the integrity or honesty in such proceedings.** All of the comments opposing the Rule note that it will chill lawyer speech on behalf of clients. Some of those comments are summarized in the preceding bullet. The California Building Industry Association makes the further point that "The end result will not benefit clients. The entitlement process before executive and legislative bodies is a highly technical process. Many cases involve complicated legal issues. The risk adverse lawyer can be expected to limit his or her participation in the client's matter in the face of a claim, leaving the client to use less effective advocates, who do not have the skill and training to address the legal issues." The Herum/Crabtree letter notes that the Rule may actually discourage clients from using lawyers in particular situations that would be handled by others who have no constraints on what they can say before a government agency. Louise Renne states, "I believe that the proposed Rule carries the unintended consequences of reducing representation of citizens at public hearings and chilling speech." Ms. Renne also notes 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."

The comments in favor of the Rule do not address the foregoing concerns or respond to the dissent. I am not suggesting that they were required to, but there is nothing in the public comment favoring the Rule that refutes the concerns raised in opposition to the Rule.

The Santa Clara County Bar Association expressed support for the Rule without further comment. The San Diego position notes a minority opposes the Rule "because it would take lawyers out of the protections of Civil Code section 47, which provides immunity for others appearing before the same types of non-adjudicative bodies." It concludes, 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, I believe the Rule should be adopted as proposed." In my view, the opponents of the Rule raise concerns that outweigh having an ABA Rule. Furthermore, this Rule has not been embraced as a national standard. This Rule has not been adopted in New York, Florida, Illinois, North Carolina and Virginia, a list that includes the third, fourth, fifth, tenth and twelfth most populous states.

Neither OCTC nor COPRAC offer any comment on the practical effect of the Rule. OCTC does not see why the rules that apply in adjudicative proceedings should not also apply to nonadjudicative proceedings. The OCTC comment states, "If a lawyer is representing a client it should make no difference whether it is in litigation or a non-adjudicative proceeding." OCTC also states that Comments [1] and [2] are too general and that a Comment should be added that other Rules may apply depending on the circumstances. There are two responses to the OCTC position:

- **Nonadjudicative proceedings are not the same as adjudicative proceedings.** 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 nonadjudicatory proceeding in California. The Herum/Crabtree comment notes that "Formal rules of evidence and procedure do not apply to these proceedings...[T]he decision makers in land use proceedings - whether quasi-legislative or quasi-judicial - are not judicial officers and instead are often lay

people in the eyes of the law." I would add that 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. Nonadjudicatory 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. These differences justify treating nonadjudicative proceedings differently from adjudicative proceedings.

- **The issues and concerns raised by those opposing the Rule justify treating nonadjudicative proceedings differently.** The positions of the comments opposing the Rule, summarized above, also justify treating nonadjudicative proceedings differently. The OCTC comment does not present a rationale that would justify treating nonadjudicative proceedings the same as adjudicatory proceedings.

In light of my recommendation that we not adopt the Rule, I do not recommend taking any action on OCTC's recommendations regarding the Comments. With respect to OCTC's request that the Comments include reference to other Rules that may apply to nonadjudicative proceedings, 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.

The COPRAC comment states that COPRAC generally supports the Rule. It recommends a change to the last sentence of Comment [1] and the deletion of Comment [3]. The COPRAC comment does not discuss any rationale for adopting the Rule and does not address the merits of the dissent or the concerns that were raised in the comments opposing the Rule. Again, I am not saying COPRAC was required to address such concerns; but the COPRAC comment does not present a rationale for adopting the Rule that outweighs the reasons the opponents have provided for not adopting the Rule.

In light of my recommendation that we not adopt the Rule, I do not recommend taking any action on COPRAC's proposed changes to the Comments. If the Commission were to adopt the Rule, I would agree with COPRAC's proposed change to Comment [1] for the reasons COPRAC has stated. I do not agree with COPRAC's proposal to delete Comment [3]. COPRAC's rationale is that the Rule should no longer be limited to nonadjudicative proceedings since the references to Rules 3.3, 3.4 and 3.5 have been removed. The problem with COPRAC's comment is that the Rule as titled and written is limited to nonadjudicative proceedings. As a result, there is a need to address in the Comment what the term "nonadjudicative proceeding" includes and what it does not include. The Comment is derived from the Model Rule. Deleting the Comment would create confusion over what the Rule encompasses. Since we would be deleting an ABA Comment, there would be questions whether we intended something other than what that Comment states. We can avoid such speculation by keeping the Comment. In addition, COPRAC is not suggesting that the Comment does not clearly or properly explain what a nonadjudicative proceeding encompasses. (The COPRAC comment is that the distinction is no longer necessary.) Since the Comment still has a purpose, given the specific limitation of the

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Rule to nonadjudicative proceedings, and there is no suggestion that the Comment is not sufficient for its purpose, it should be retained if the Rule is adopted.

Overall, we have received thoughtful and carefully considered comments from highly regarded government and private lawyers and an industry organization who are experienced in the field in which this Rule would apply. These comments demonstrate that there are real concerns that would adversely affect the representation of clients. They make the case that the potential harm that could result from the Rule outweighs the limited benefit one could hope for under the Rule. There is nothing in the comments in support of this Rule or in our rationale for considering this Rule that refutes the information we received in the comments opposing the Rule. For these reasons, I recommend that the Commission not adopt Rule 3.9.

I will be incorporating this information into the Public Comment table shortly, but I wanted to get this summary of my recommendation to you as soon as possible. There are issues with the latest table I was sent (not all of the comments are in the table), so it will take a little time to finish it. I hope to have it out later today.

March 21, 2010 Lamport E-mail to RRC:

Attached is an updated and revised Public Comment chart. I have redlined the changes to the portions Nace had drafted previously. I have not only responded to the additional comments, but have expanded the description of the comments in a number of instances. In addition, neither version of the chart I received included either the Herum/Crabtree comment or the COPRAC comment. The Herum/Crabtree and COPRAC comment descriptions and the responses are both new.

Attached:

RRC - [3-9] - Public Comment Chart - By Commenter – DFT2.1 (03-19-10)NR-SWL.doc

March 22, 2010 Kehr E-mail to RRC:

On the chance that Stan's individual recommendation will be treated as one from the drafting team, so that a minimum number of votes is needed to bring Rule 3.9 before the Commission, I vote to do so.

March 22, 2010 Sapiro E-mail to RRC List:

1. I do not recall how I voted before, but I now disagree with this rule.
2. If this rule were limited to disclosure that the appearance is in a representative capacity, I probably would support it. That is the way New York limited this rule. [Contrary to agenda page 356, New York's website shows that it adopted its version of 3.9 in 2009.] New York thereby avoided the problems pointed out by the commenters who disagree with this proposed rule.
3. As proposed, this rule requires a lawyer who appears before a legislative body or administrative agency to comply with [it uses the flowery phrase "conform to" instead of saying

what is really intended; shouldn't a disciplinary rule be explicit?] Rule 4.1. This creates the opportunity for OCTC to charge violations of both Rule 3.9 and Rule 4.1 for the same act. We should not be drafting disciplinary rules that permit stacking of charges.

4. In addition to the comments by those who have submitted disagreements with the proposed rule, I think proposed Comment [3] makes uncertain when the rule applies. If a lawyer appears on behalf of a client before a meeting of a planning commission in connection with a client's application for a use permit, is that an "official hearing or meeting of a governmental agency," or is it "an application for a license or other privilege"? If a state senate committee is investigating a client's activities, is that an "official hearing or meeting of . . . a legislative body," or is it "an investigation or examination of the client's affairs conducted by government investigators or examiners"? If this is to be a disciplinary rule, it should be lucid.

March 23, 2010 Sondheim E-mail to RRC:

1. We will briefly discuss whether to recommend this rule.
2. As of now I have not seen a Commenter Table from Stan, although it is possible I have overlooked it in light of the volume of e-mails which have been going back and forth.
3. If no table is submitted, we can supplement the existing table with Bob's comments.

March 23, 2010 Sondheim E-mail to RRC:

I've attached the Public Comment chart Stan sent on March 21, 2010, in letter-scaled PDF.

Attached:

RRC - [3-9] - Public Comment Chart - By Commenter – DFT2.1 (03-19-10)NR-SWL.pdf

March 24, 2010 Tuft E-mail to RRC List:

I offer the following comments on Stan's recommendation not to adopt rule 3.9 and the proposed response to the public comments received.

1. The principal objection to the rule as proposed by the Commission seems to be that lawyers representing clients in an official nonadjudicative proceeding before a legislative body or administrative agency will face risks that are not faced by any other class of participants and that such risks will chill lawyer speech in acting as lawyer-advocates. A rule that requires a lawyer representing a client in an official hearing or meeting of a government agency or legislative body to disclose that the appearance is in a representative capacity would not seem to chill lawyer speech or implicate the SLAPP statute or the First Amendment. This aspect of the rule is consistent with the rule in most jurisdictions and with Restatement section 104, which states that a lawyer representing a client before a legislative or administrative agency "(1) must disclose that the appearance is in a representative capacity and not misrepresent the capacity in which the lawyer appears." Aside from OCBA, no one seems to have an objection to this aspect of the rule.

2. The issue then becomes what rules should apply to lawyer advocacy in this context. The Model Rule cross references to rules affecting lawyer advocacy that in the ABA's view are adaptable to official nonadjudicative proceedings in which the lawyer or the lawyer's client is presenting evidence or argument. Rule 3.9 does not apply to other interactions between lawyers and government agencies, including applications for a permit or license, a client's reporting requirements and filings, or to government investigations. The Commission's proposed rule, unlike the Model Rule, excludes rules dealing with the duty of candor, fairness to opposing party and counsel and impartiality and decorum of the tribunal. The proposed rule cross references only rule 4.1 that prohibits lying to a third party about a material fact or law and requiring disclosure of a material fact when necessary to avoid assisting a client's criminal or fraudulent act. How would this aspect of the rule chill legitimate lawyer speech or undermine the purpose of the SLAPP statute?

3. If the Commission concludes that despite the limited scope of the proposed rule, it should not be adopted because the rule could be misused to chill legitimate lawyer speech, there should at least be some empirical evidence that supports that position. I am not aware of reported instances where rule 3.9 has been misused to limit protected speech or curtail lawyer advocacy in official nonadjudicative proceedings. Restatement section 104(3) takes a much broader approach by distinguishing between the obligations of a lawyer functioning as an advocate in adjudicative vs. other types of proceedings. The reporter's notes do not mention that the rule has had the risk of chilling lawyer speech. I was not able to find references in the annotations to the Model Rules or the ABA/BNA Reporter that Rule 3.9 has had the effect of chilling lawyer speech. I found, instead, several articles arguing that Model Rule 3.9 is not adequate to prevent fraud and other abuse before administrative agencies.

4. The response to the comment by Brownstein, Hyatt Farber Schreck LLP about "quasi-legislative and quasi-judicial proceedings" depends in large part on the definition of "tribunal" in rule 1.0.1(m). I have said that the Model Rule provides a better definition that would help resolve this question. Gov't Code section 11440.60 deals with the payment for written communications submitted by parties in agency hearings under the Administrative Procedures Act. Rule 3.9 would not apply to a number of proceedings defined in section 11440.60(a).