



**THE STATE BAR
OF CALIFORNIA**

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**RE: Rule 3.9
12/11&12/09 Commission Meeting
Open Session Agenda Item IV.F.**

PLANNING, AND DEVELOPMENT

DATE: November 19, 2009
TO: Members of the Commission for the Revision of the Rules of Professional Conduct
FROM: Randall Difuntorum, Commission Staff Counsel
SUBJECT: 10-day Ballot Circulation of Proposed Rule 3.9

Proposed Rule 3.9 is being distributed for your consideration. The revisions adopted at the Commission's November 6 & 7, 2009 meeting have been implemented and approval is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be distributed for public comment as part of the Commission's Batch 6 proposed rules.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 3.9, Draft 2.1 (11/13/09), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. A separate Minority Statement is provided as Enclosure 4. Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, November 30, 2009, proposed Rule 3.9 will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 3.9

(Comparison Chart Showing Changes to Model Rule 3.9)

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 maybe 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, municipal<u>city</u> 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. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. 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.</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</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</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</p>

* Proposed Rule 3.9, Draft 1 (XX/XX/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>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>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>from the standards imposed on nonlawyers.</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>

Enclosure 2

Proposed Rule 3.9

Clean Version of Draft 2.1 (11/13/09)

Rule 3.9 Advocate in Nonadjudicative Proceedings

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.

Enclosure 3

Proposed Rule 3.9
Draft "Dashboard"

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

Primary Factors Considered

- Existing California Law
 - Rules
 - Statute
 - Case law

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

- Other Primary Factor(s)

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority/Position Included on Model Rule Comparison Chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

Enclosure 4

Proposed Rule 3.9
(Minority Statement)

Rule 3.9 Non-adjudicative Proceedings Rules Revision Commission — 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 lead 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: 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.