

**McCurdy, Lauren**

---

**From:** Harry Sondheim [hbsondheim@verizon.net]  
**Sent:** Tuesday, October 27, 2009 2:31 PM  
**To:** Difuntorum, Randall; slamport@coxcastle.com; Foy, Linda; avoogd@stanfordalumni.org  
**Cc:** mtuft@cwclaw.com; pwvapk@townsend.com; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; Ruvolo, Ignazio; McCurdy, Lauren; Lee, Mimi  
**Subject:** Re: RRC November Assignment for III.B. Rule 3.9 - Rule & Comment Comparison Document  
**Importance:** High

Thanks, Randy. You are correct in how we will proceed if no one steps to the plate, an event which I hope will be avoided.

----- Original Message -----

**From:** [Difuntorum, Randall](#)  
**To:** [slamport@coxcastle.com](mailto:slamport@coxcastle.com) ; [Foy, Linda](#) ; [avoogd@stanfordalumni.org](mailto:avoogd@stanfordalumni.org)  
**Cc:** [hbsondheim@verizon.net](mailto:hbsondheim@verizon.net) ; [mtuft@cwclaw.com](mailto:mtuft@cwclaw.com) ; [pwvapk@townsend.com](mailto:pwvapk@townsend.com) ; [kevin\\_e\\_mohr@csi.com](mailto:kevin_e_mohr@csi.com) ; [kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu) ; [kemohr@charter.net](mailto:kemohr@charter.net) ; [Ruvolo, Ignazio](#) ; [McCurdy, Lauren](#) ; [Lee, Mimi](#)  
**Sent:** Tuesday, October 27, 2009 10:49 AM  
**Subject:** RE: RRC November Assignment for III.B. Rule 3.9 - Rule & Comment Comparison Document

Rule 3.9 Codrafters:

In light of the lead drafter's unavailability to attend the November meeting, you are needed to take responsibility for this assignment. With limited provisos, the Chair has indicated that the Model Rule may be deemed adopted if there is no contrary submission or objection. Attached is a first draft rule comparison chart that simply states that the Model Rule is recommended for adoption with no modifications. Now is the opportunity to consider the Model Rule language and recommend changes, or to explain a recommendation against adoption of the rule. If a revised chart is not received, then the attached will be used for the agenda materials. Thanks. -Randy D.

\*\*\*\*\*

Randall Difuntorum  
Director, Professional Competence  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
(415) 538-2161  
[randall.difuntorum@calbar.ca.gov](mailto:randall.difuntorum@calbar.ca.gov)

This E-Mail message may contain confidential information and/or privileged material for the sole use of the intended recipient(s). Any review, use, distribution or disclosure by others is strictly prohibited. If you are not the intended recipient (or authorized to receive for the recipient), please contact the sender by reply E-Mail and delete all copies of this message.

---

**From:** Ruvolo, Ignazio [mailto:Ignazio.Ruvolo@jud.ca.gov]  
**Sent:** Tuesday, October 27, 2009 7:16 AM  
**To:** McCurdy, Lauren  
**Cc:** [slamport@coxcastle.com](mailto:slamport@coxcastle.com); Foy, Linda; [avoogd@stanfordalumni.org](mailto:avoogd@stanfordalumni.org); [hbsondheim@verizon.net](mailto:hbsondheim@verizon.net); [mtuft@cwclaw.com](mailto:mtuft@cwclaw.com); [pwvapk@townsend.com](mailto:pwvapk@townsend.com); [kevin\\_e\\_mohr@csi.com](mailto:kevin_e_mohr@csi.com); [kevinm@wsulaw.edu](mailto:kevinm@wsulaw.edu); [kemohr@charter.net](mailto:kemohr@charter.net); Difuntorum, Randall  
**Subject:** RE: RRC November Assignment for III.B. Rule 3.9 - Rule & Comment Comparison Document

Lauren:

I will be unable to attend the November meeting nor can I meet tomorrow's deadline for submission of the requested matters.

Nace Ruvolo

---

**From:** McCurdy, Lauren [mailto:Lauren.McCurdy@calbar.ca.gov]

**Sent:** Monday, October 26, 2009 5:03 PM

**To:** Ruvolo, Ignazio

**Cc:** slamport@coxcastle.com; Foy, Linda; avoogd@stanfordalumni.org; hbsondheim@verizon.net; mtuft@cwclaw.com; pwwapnek@townsend.com; kevin\_e\_mohr@csi.com; kevinm@wsulaw.edu; kemohr@charter.net; Difuntorum, Randall

**Subject:** RRC November Assignment for III.B. Rule 3.9 - Rule & Comment Comparison Document

Nace & Drafting Team:

The first draft of the rule & comment comparison table is attached. The Model Rule text has been dropped into the left column.

The assignments for the November meeting are due this Wednesday, October 28<sup>th</sup>.

sent by:

Lauren McCurdy

Office of Professional Competence

State Bar of California

180 Howard Street

San Francisco, CA 94105

phone 415-538-2107

fax 415-538-2171

[lauren.mccurdy@calbar.ca.gov](mailto:lauren.mccurdy@calbar.ca.gov)

# Proposed Rule 3.9 [N/A]

## “Non-adjudicative Proceedings”

(Draft #1, 10/26/09)

**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 other rules concerning candor and fairness.

### Comparison with ABA Counterpart

Rule	Comment
<input checked="" type="checkbox"/> ABA Model Rule substantially adopted	<input checked="" type="checkbox"/> ABA Model Rule substantially adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input 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)

---

## 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

# COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

## **Rule 3.9 Non-adjudicative Proceedings**

October 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 the lawyer to disclose that their appearance is in a representative capacity. In addition, similar to rules governing duties related to an appearance before a judicial tribunal, the rule requires compliance with standards of candor and fairness.



<p align="center"><u>ABA Model Rule</u></p> <p><b>Rule 3.9 Advocate in Nonadjudicative Proceedings</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p><b>Rule 3.9 Non-adjudicative Proceedings</b></p>	<p 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 3.5.</p>	<p>This language is identical to Model Rule 3.9.</p>

---

\* Proposed Rule 3.9, Draft 1 (XX/XX/09). Redline/strikeout showing changes to the ABA Model Rule

<p align="center"><b><u>ABA Model Rule</u></b></p> <p align="center"><b>Rule 3.9 Advocate in Nonadjudicative Proceedings</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Commission's Proposed Rule*</u></b></p> <p align="center"><b>Rule 3.9 Non-adjudicative Proceedings</b></p> <p align="center"><b>Comment</b></p>	<p align="center"><b><u>Explanation of Changes to the ABA Model Rule</u></b></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>Comment [1] adopts Model Rule 3.9, comment [1].</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>Comment [2] adopts Model Rule 3.9, comment [2].</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</p>		<p>Comment [3] adopts Model Rule 3.9, comment [3].</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"><b>Rule 3.9 Advocate in Nonadjudicative Proceedings Comment</b></p>	<p align="center"><u>Commission's Proposed Rule*</u></p> <p align="center"><b>Rule 3.9 Non-adjudicative Proceedings Comment</b></p>	<p align="center"><u>Explanation of Changes to the ABA Model Rule</u></p>
<p>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>		



**Table of Contents**

August 27, 2009 McCurdy E-mail to Ruvolo, cc Chair, Vapnek, Tuft & Staff: .....	1
October 26, 2009 McCurdy E-mail to Drafters (Ruvolo, Foy, Lamport, Voogd), cc Chair & Staff: .....	3
October 27, 2009 Ruvolo E-mail to McCurdy, cc Drafters, Chair & Staff: .....	3
October 27, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff: .....	3
October 27, 2009 Sondheim E-mail to Difuntorum, cc Drafters & Staff:.....	3
October 31, 2009 Kehr E-mail to RRC:.....	4
November 1, 2009 Sapiro E-mail to RRC List: .....	5
November 1, 2009 Sondheim E-mail to RRC: .....	6
November 2, 2009 Lamport E-mail to RRC: .....	6
November 2, 2009 Tuft E-mail to RRC: .....	8
November 2, 2009 Lamport E-mail to RRC: .....	8

**August 27, 2009 McCurdy E-mail to Ruvolo, cc Chair, Vapnek, Tuft & Staff:**

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A "rolling assignments agenda" is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered "rolling" because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

**ASSIGNMENTS FOR SEPTEMBER MEETING**

**September 11, 2009 Meeting**

**Assignments Due: Wed., 9/2/09**

**1. III.D. Rule 1.4 Communication [3-500, 3-510] (Comparison Chart Draft #2 – Post Public Comment Rule Draft #7 dated 8/5/09) Codrafters: Julien**

**Assignment:** (1) a chart comparing proposed Rule 1.4 to MR 1.4; (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

**2. III.G. Rule 1.8.10 Sexual Relations With Client [3-120] (Dec. 2008 Comparison Chart – Post Public Comment Rule Draft #6 dated 6/17/07) Codrafters: Foy, Julien**

**Assignment:** (1) a chart comparing proposed Rule 1.8.10 to MR 1.8(j); (2) a "dashboard" cover sheet; and (3) a chart summarizing the public comment received and the Commission's response.

3. **III.H. Rule 2.4 Lawyer as Third-Party Neutral [N/A] (Post Public Comment Rule Draft #6.1 dated 6/16/07) Codrafters: Melchior, Mohr**  
**Assignment:** (1) a chart comparing proposed Rule 2.4 to MR 2.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.I. Rule 2.4.1 Lawyer as Temporary Judge [1-710] (Post Public Comment Rule Draft #5 dated 6/23/07) Codrafters: Melchior, Mohr**  
**Assignment:** (1) a chart comparing proposed Rule 2.4.1 to RPC 1-710; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

5. **III.J Rule 2.4.2 Lawyer as Candidate for Judicial Office [1-700] (Post Public Comment Rule Draft #4 dated 6/23/07) Codrafters: Melchior, Mohr**  
**Assignment:** (1) a chart comparing proposed Rule 2.4.2 to RPC 1-700; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

**Assignments Due: Wed., 9/30/09**

1. **III.CC. Rule 1.8.3 Gifts from Client [4-400] (Post Public Comment Draft #4.1 dated 6/27/08) Codrafters: Julien, Vapnek**  
**Assignment:** (1) a chart comparing proposed Rule 1.8.3 to MR 1.8(c); (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

**Assignments Due: Wed., 11/28/09**

1. **IV.B. Rule 3.9 Non-adjudicative Proceedings [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Foy, Lamport, Voogd**

**Assignment:** (1) a chart comparing proposed Rule 3.9 to MR 3.9; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

2. **IV.H. Rule 8.2(a) Judicial and Legal Officials [N/A] (new matter assigning the preparation of a first draft rule in a MR comparison chart format) Codrafters: Sapiro, Vapnek**

**Assignment:** (1) a chart comparing proposed Rule 8.2(a) to MR 8.2(a); and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

(NOTE: This is in addition to any assigned rule not completed at the October meeting.)

**October 26, 2009 McCurdy E-mail to Drafters (Ruvolo, Foy, Lamport, Voogd), cc Chair & Staff:**

Nace & Drafting Team:

The first draft of the rule & comment comparison table is attached. The Model Rule text has been dropped into the left column.

The assignments for the November meeting are due this Wednesday, October 28th.

***Attached:***

RRC - [3-9] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc

**October 27, 2009 Ruvolo E-mail to McCurdy, cc Drafters, Chair & Staff:**

I will be unable to attend the November meeting nor can I meet tomorrow's deadline for submission of the requested matters.

**October 27, 2009 Difuntorum E-mail to Drafters, cc Chair & Staff:**

Rule 3.9 Codrafters:

In light of the lead drafter's unavailability to attend the November meeting, you are needed to take responsibility for this assignment. With limited provisos, the Chair has indicated that the Model Rule may be deemed adopted if there is no contrary submission or objection. Attached is a first draft rule comparison chart that simply states that the Model Rule is recommended for adoption with no modifications. Now is the opportunity to consider the Model Rule language and recommend changes, or to explain a recommendation against adoption of the rule. If a revised chart is not received, then the attached will be used for the agenda materials.

***Attached:***

RRC - [3-9] - Compare - Rule & Comment Explanation - DFT2 (10-26-09)RD.doc

**October 27, 2009 Sondheim E-mail to Difuntorum, cc Drafters & Staff:**

Thanks, Randy. You are correct in how we will proceed if no one steps to the plate, an event which I hope will be avoided.

**October 31, 2009 Kehr E-mail to RRC:**

Here are my comments on this draft (please note that these comments to a significant extent bear on the drafting of Rule 1.0.1, and it might be desirable to take up this Rule with Rule 1.0.1):

1. This rule obligates a lawyer representing a client before “a legislative body or administrative agency in a nonadjudicative proceeding” to comply with Rule 3.3(a), which prohibits a lawyer from making a false statement of fact or law to a tribunal. Compare this to Model Rule 4.1, which prohibits *material* false statements of fact and law to a third person. I would be comfortable with the omission of “material” from Rule 3.3 if 3.3 were limited to courts and their equivalent. Draft Rule 1.0.1, which is item IV.A on the November agenda, narrowly defines “tribunal” to mean: “(i) a court, an arbitrator, or an administrative law judge acting in an adjudicative capacity, and authorized to make a decision that can be binding on the parties involved; or (ii) a special master or other person to whom a court refers one or more issues and whose decision or recommendation can be binding on the parties if approved by the court.” This draft definition is based on my belief that the extremely high standards of Rule 3.3 should apply only when a lawyer is in a court or its equivalent. I do not believe this same high standard should apply when a lawyer is dealing with “a legislative body or administrative agency in a nonadjudicative proceeding”. I will suggest an alternative after sharing my other comments.
2. Model Rule 3.9 incorporates in its requirements for non-adjudicative proceedings compliance with Rule 3.3(b), a rule that by its terms applies only in adjudicative proceedings. This is a non-sequitor.
3. Model Rule 3.9 also incorporates Rule 3.4(c), which uses the word “tribunal” in its larger Model Rule sense of “a legislative body or administrative agency in a nonadjudicative proceeding”. 3.4 (c) generally prohibits a lawyer from violating “the rules of a tribunal”. I am not convinced that every violation of the rules of “a legislative body or administrative agency in a nonadjudicative proceeding” should be the basis for possible professional discipline. Conduct might be inappropriate in some sense without calling into question a lawyer’s fitness to practice.
4. This rule would obligate a lawyer in a non-adjudicative proceeding to comply with Rule 3.5. I understand that reference with respect to 3.5(b) (unauthorized ex parte communication) and 3.5(d) (conduct intended to disrupt), but I nevertheless am skeptical of both references. Are there any ex parte contact limitations in the context of “a legislative body or administrative agency in a nonadjudicative proceeding”? I also question subjecting a lawyer to professional discipline for disruptive behavior at a non-adjudicative legislative or administrative hearing. Should a lawyer be subject to professional discipline for disruptive behavior at a HUAC hearing? I am comfortable with the across-the-board judgment that lawyers should be subject to professional discipline for intentionally disrupting a court, but I am not comfortable with this in legislative and administrative hearings.
5. Although I’m skeptical of the 3.5(b) and (d) references as I’ve explained, I simply don’t understand the references to 3.5(a) (seeking to influence a judge, juror, or prospective juror) and 3.5(c) (communication with a juror or prospective juror). Neither paragraph

would seem to have anything to do with “a legislative body or administrative agency in a nonadjudicative proceeding”.

I suggest the following alternative for Rule 3.9: “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.”

**November 1, 2009 Sapiro E-mail to RRC List:**

1. I agree with the approach of this Rule. Requiring lawyers to deal honestly with legislative bodies or administrative agencies is long overdue.
2. Is the first sentence of proposed Comment [2] really correct? Individual clients can appear before a court *in propria persona*, so our right to appear before courts is not “exclusive.”
3. I agree with the concept of the last sentence of proposed Comment [2]. However, I think that sentence should not be limited to the “legislature.” I would change “legislatures” to “legislative bodies.” I am glad that people who appear before legislative bodies and administrative agencies will now be bound to comply with Rule 3.3. I am sure that we have all seen legislative advocates who do not quite speak with candor.
4. However, proposed Comment [3] detracts from Comments [1] and [2]. If I, as a lawyer, appear before the San Francisco Board of Supervisors in connection with a conditional use permit application, that board should have the right to expect candor from me. Proposed Comment [3] excludes from the scope of this rule my advocacy before a planning commission, the Building Inspection Department, the Board of Supervisors, or other agencies if my client is applying for a license, permit, or other privilege. And the next sentence says that, if a lawyer is preparing an income tax return, the lawyer need not be candid because this rule does not apply in that circumstance. Then the following sentence says that a lawyer is not required to be candid in connection with a government investigation, such as an inquiry by the Securities and Exchange Commission. These exclusions encourage dissimulation by lawyers when dealing with administrative agencies. The opposite – namely candor - should be required.
5. The exclusions from the rule under proposed Comment [3] are not salvaged by the last sentence of that comment. Although proposed Rule 4.1(a) is a step in the right direction, proposed Rule 4.1(b) does not go far enough. A lawyer would only be disciplined for making a material nondisclosure to a legislative body or administrative agency if the material nondisclosure would assist a client in performing a crime or fraud. If the client is not committing a crime or fraud, for example because the client’s conduct is not a violation of a penal statute, then proposed Rule 4.1(b) limits the duty of disclosure, so that a lawyer advocating before a legislative body or government agency in connection with a license, permit application, or similar application can mislead the government by making material omissions, as long as the client is not committing a fraud or a crime. That is not appropriate, and I think all of Rule 3.9, including proposed Comments [1] and [2] should apply to lawyers appearing before legislative bodies and administrative agencies, and that Comment [3] should be stricken or radically revised.
6. We should not recommend a rule or comment that encourages lawyers to be less than truthful.

**November 1, 2009 Sondheim E-mail to RRC:**

A nit regarding the introduction: In the second line the word "their" should be "her/his" because lawyer is singular.

**November 2, 2009 Lamport E-mail to RRC:**

In general, I do not think we should adopt this rule for the reasons set forth in number 5 below. I have a few specific comments that I will address first.

1. The title of this rule should be changed to "Advocate in Non Judicial Proceedings." In general, proceedings before a government agency are of three types (i) legislative - the enactment of a law or ordinance or establishment of a policy of general application, (ii) administrative or quasi-adjudicative - where an agency makes a decision based on evidence presented, and (iii) ministerial - where an agency has a mandatory, non-discretionary duty to act if certain criteria are met. The term "Nonadjudicative Proceedings" is going to suggest to those knowledgeable in this field that the rule does not apply to the second category.

2. The reference to Rule 3.5 should be deleted. Rule 3.5 as we have revised it does not work in the context of this Rule. Rule 3.5(a) is specifically directed to giving things of value to a judge, which does not directly translate to a political setting. A lawyer in that setting should comply with the lobbyist and contribution limitations, which, of course 3.5(a) does not address.

Rule 3.5(b) & (c) prohibits ex parte contacts with judges and their clerks and staff who participate in the decision making process that does not translate to the political setting. Ex parte contacts are permitted in a legislative proceeding. Indeed, a client has a constitutional right to communicate through a lawyer to decision maker regarding a legislative act. The same is true for ministerial acts. Ex parte contacts also can occur in an administrative proceeding, so long as they are disclosed. There are some bodies, such as the Coastal Commission, which conduct all meaningful business through ex parte contacts. A prohibition would prevent a lawyer from engaging in that activity for a client.

Rule 3.5(d) - (l) relates to venires that don't exist in the government proceeding context.

3. Comment [1] is fairly generic and speaks in terms that are somewhat foreign to California. I suggest it state:

[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. [Delete second sentence]. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rule 3.3(a) through (c) and 3.4(a) through (c)."

4. The second sentence of Comment [1] should be deleted because it is not a true statement in California. As a result of Civil Code Section 47 and the broad application of the California SLAPP statute anyone can lie and misrepresent facts in a governmental proceeding with impunity. Most of the elected official and planning commissioners I deal with will candidly acknowledge that the information they receive in public hearings is incorrect or untrue. Often information will show up in a hearing and there is no opportunity to correct it. Ironically, unless

**RRC – Rule 3.9 [MR 3.9]  
E-mails, etc., -- Revised (11/3/2009)**

the information is something so patently wrong that anyone would know its wrong, it will be viewed by the courts on review as substantial evidence that can be used to uphold the agency's decision. I am not an apologist for this system - I merely report the news. But for the Bar to issue a statement in a Comment that a decision making body should be able to reply on the integrity of the submissions made to it, likely would be viewed by experienced practitioners on both sides of the aisle in this field as a fallacy.

5. I would delete Comment [2]. Comment [2] for me is the reason not to have a rule. As I said in the Rule 4.2 discussion, inherently, a fundamental role lawyers serve is to be client's voice in communications with government, whether it be the courts (where this role is more commonly recognized) or government agencies. It is true that lawyers are not the only ones who can speak to government. In my world there are planners, expeditors, architects, engineers and others who may represent a client before a government body and each profession has its place. However, there is a definite role for a lawyer to appear as a client's advocate in such proceedings. I certainly have seen very unfortunate things happen to people who either represented themselves or who had someone who was not a lawyer represent them in these types of proceedings, which likely could have been avoided if an experienced lawyer had represented their position.

The problem with this rule is that the playing field is not level. Because of the Civil Code section 47 immunities and the extension of that protection through the SLAPP statute, no one communicates with government at their peril. This rule would make lawyers the only category of person who could be penalized for what they say in the process. The reason for the broad immunities afforded under the Civil Code privilege and the procedural protections of the SLAPP statute is to 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. This Rule would carve out lawyers who represent their clients before agencies from that protection, but would not touch others who speak for clients in the same proceeding, as well as individuals who speak for themselves. Why do we want to impose this chill on the legal profession, which exists, at least in part, to be a client's voice with respect to government?

My concern with Comment [2] is that it says that lawyers may be subject to restrictions and penalties for their speech that would not apply to any other participant in the process. It is a signal that people can go after lawyers in the process by reporting them to the State Bar and forcing them to defend their licenses. It would, in effect, be a carve out of the SLAPP protection afforded everyone else. I recall that Ann Ravel successfully asked us to remove a comment from Rule 4.2 about discussing settlement with an elected official, because it would encourage such communications and would suggest it was open season for such communications. This Comment creates the same concerns and encourages treating lawyers, who speak for a client in a non-judicial proceeding, differently than anyone else in the process. For that reason, at a minimum, it should be deleted. However, on a broader basis, this Rule should not be adopted for the reasons stated.

**November 2, 2009 Tuft E-mail to RRC:**

My comments track the numbers in Stan's email of today's date:

1. We should not depart from the Model Rule definition of "Tribunal." Otherwise, we will be creating unnecessary confusion between the application of rule 3.3 and other rules in the 3 series with rule 3.9. "Tribunal" under Model Rule 1.0(m) includes a legislative body, administrative agency or other body acting in an adjudicative capacity. To be consistent with the rules of other states we should retain the heading to this rule and maintain the dichotomy between an adjudicative and a non-adjudicative body or and agency.
2. I disagree with deleting rule 3.5 from the list. Comment [3] makes it clear that this rule applies only to a lawyer representing a client in connection with an official proceeding to which the lawyer or the lawyer's client is presenting evidence or argument. Rule 3.5 prohibits ex parte contact during the proceeding unless authorized by law. If the rules of the particular body permit ex parte contact, rule 3.5 would not apply. Stan's examples take us beyond the intended scope of rule 3.9.
3. See no. 1 above. I don't mind conforming the comment to flush out California's municipal councils such city councils and boards of supervisors.
4. I am not aware that Civil Code section 47(d) and the SLAPP statute are intended to immunize lawyers other than for civil liability for breaches professional duties owed to tribunals and non adjudicative bodies. In addition, Rule 3.9 does not apply in representing clients in negotiations or other bilateral transactions with a government agency or in regard to an application for a license or other privilege or compliance with the client's generally applicable reporting requirements.
5. I agree for the reason Jerry has expressed, that Comment [2] should be tightened up, but not eliminated. Here is a stab at it:

[2] Lawyers have no greater rights to appear before nonadjudicative bodies than they do before a court. Therefore, under this Rule, a lawyer may be subject to regulations of a legislative body or administrative agency that are 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.

**November 2, 2009 Lamport E-mail to RRC:**

My response to Mark's comments.

1. The proposed definition 1.0.1(n) excludes legislative bodies and administrative agencies from the definition of a tribunal for very good reasons explained in agenda materials. If we define "tribunal" as proposed in 1.0.1(n), there is no confusion. Furthermore, Rule 3.9(a) makes portions of 3.3, 3.4 and 3.5 applicable to proceedings before a legislative body and adjudicatory body. So again, there is no confusion. Its one stop shopping. No one has to figure whether they are in a proceeding where all of 3.3 and 3.4 apply or only the parts referenced in 3.9 apply. That's confusing.

**RRC – Rule 3.9 [MR 3.9]  
E-mails, etc., -- Revised (11/3/2009)**

Model Rule 3.9 in its current form is ambiguous. It reads like it is written by somebody who does not practice in the field. First, administrative proceedings before a city or county are referred to as quasi-adjudicatory in that the rules of evidence do not apply and there is no trial in the sense that we know it in the judicial process. Is a quasi-adjudicatory proceeding "adjudicatory" in the Model Rule sense or something else? In the context of the California practice, the rule is very confusing because administrative proceedings in the municipal context are not true adjudicatory proceedings. They aren't referred to as such and they don't function like the types of tribunals that Rules 3.3, 3.5 and 3.5 are talking about. Most people who are in that process would not understand that such proceedings are governed by those Rules and would have no idea how to apply the ex parte and venire contact rules in that context.

In addition, Rule 3.9 creates confusion with its very fuzzy language. Look at Comment [3]. It says the Rule only applies when a lawyer represents a client in connection with any official hearing or meeting of a governmental agency or legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. That encompasses both legislative and administrative proceedings. A planning commission or city council hears both, frequently at the same time in the land use context. If someone applies for a zone change (a legislative act) and a subdivision map (a quasi-adjudicatory proceeding) the agency will hear both at the same time. One proceeding is indistinguishable from the other. Combine that with the fact that the California Environmental Quality Act applies to both and is subject to a quasi-adjudicatory standard of review. Superimposing two sets of rules on these proceedings is incredibly confusing. Having served a national land use policy advisory committees over the years, I can tell you that achieving uniformity is not workable because there is no uniformity in the underlying processes in the states. The fact is that the process in California is very different than most states and the lines are not as bright as you might think.

If avoiding unnecessary confusion is the goal (and I support that), we avoid such confusion by treating all of these proceedings under one rule (if we have to have a rule at all).

2. Please read 3.5 again. Rule 3.5(a) says, "Except as permitted by the Code of Judicial Ethics, a lawyer shall not directly or indirectly give or lend anything of value to a judge, official, or employee of a tribunal..." How does the Code of Judicial Ethics apply to a municipal body? Rule 3.5(b) does allow ex parte contact authorized by law, but most agencies don't have rules authorizing contact. A client has a constitutional right to communicate with government. If that is what is meant by authorized by law, we ought to say so in the Comments rather than leave it to be tested when someone's license is at stake. Further, if that is authorized by law, then every ex parte contact would be authorized, so what are we really prohibiting in this rule?

How is my example beyond the scope of the Rule? The point is that ex parte contacts are part of the process. They aren't formal. They frequently have no specific authorization. There are certain bodies, the Coastal Commission is just one example, where there are hearings, but you are dreaming if you think the decision is made in the hearing. If you have a negative staff report and you have not met individually with the commissioners before the hearing, you have almost no chance of changing the recommendation at the hearing. Every coastal commission member I have ever worked with will tell you that. It is expected and you are committing malpractice if you don't engage in ex parte contacts in many cases. If you prohibit lawyers from having ex parte contacts unless authorized by law and there is no express authorization, you create a situation where lawyers are prevented from doing what everybody else is expected to do when dealing with certain governmental agencies. Why would we do that?

3. We are in agreement.

4. You are missing my point. I am not saying Civil Code section 47 and the SLAPP statute immunize lawyers from breaches of professional duties. My point is that this rule would single out lawyers for discipline for things others could do with impunity. The point of these protections is to not chill speech; but this rule would create a chill for lawyers and no one else. That is not a good result.

5. I don't think the second sentence of your revision to Comment [2] works. If this rule said "if you appear before a legislative or administrative body you must comply with its rules," I would be fine with it. That is the law now. But that is not what this Rule says. It superimposes restrictions that apply in judicial proceedings that have nothing to do with the rules of the legislative or administrative body. This Rule is not about duties owed to the municipal body. This Rule is about duties owed to the State Bar, because only the Bar would enforce them. Why do we need the Bar to inject itself into this process and create unique risks for lawyers who represent clients in the governmental context based on standards that are independent of the rules of the governmental body itself?