



The State Bar of California

Rule 3.9 Advocate in Nonadjudicative Proceedings (Rule Approved by the Supreme Court, Effective November 1, 2018)

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

Comment

This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.

**NEW RULE OF PROFESSIONAL CONDUCT 3.9
(No Former Rule)
Advocate In Nonadjudicative Proceedings**

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) reviewed and evaluated ABA Model Rule 3.9 (Advocate In Nonadjudicative Proceedings) for which there is no California counterpart. The Commission also reviewed relevant California statutes, rules, and case law relating to the issues addressed by the proposed rule. The result of this evaluation is proposed rule 3.9 (Advocate in Nonadjudicative Proceedings).

Rule As Issued For 90-day Public Comment

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

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

National Background – Adoption of Model Rule 3.9

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

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

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf

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

Thirty-one states have adopted Model Rule 3.9 verbatim. Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9. Three states have adopted a version of the rule that substantially diverges from Model Rule 3.9.

Revisions Following 90-Day Public Comment Period

After consideration of comments received in response to the initial 90-day public comment period, the Commission has revised the black letter of the rule to clarify its scope of application.

With these changes, the Board authorized an additional 45-day public comment period on the revised proposed rule.

Final Commission Action on the Proposed Rule Following 45-Day Public Comment Period

After consideration of comments received in response to the additional 45-day public comment period, the Commission made no changes to the proposed rule and voted to recommend that the Board adopt the proposed rule.

The Board adopted proposed rule 3.9 at its March 9, 2017 meeting.

Supreme Court Action (May 10, 2018)

The Supreme Court approved the rule as submitted by the State Bar to be effective November 1, 2018.

**Rule 3.9 Advocate ~~In Non-adjudicative~~ in Nonadjudicative Proceedings
(Redline Comparison to the New York Rule)**

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

Comment

This rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. This rule also does not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.

~~[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 arguments regarding the matters under consideration. The legislative body or administrative agency is entitled to know that the lawyer is appearing in a representative capacity. Ordinarily the client will consent to being identified, but if not, such as when the lawyer is appearing on behalf of an undisclosed principal, the governmental body at least knows that the lawyer is acting in a representative capacity as opposed to advancing the lawyer's personal opinion as a citizen. Representation in such matters is governed by Rules 4.1 through 4.4, and 8.4.~~

~~[1A] Rule 3.9 does not apply to adjudicative proceedings before a tribunal. Court rules and other law require a lawyer, in making an appearance before a tribunal in a representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.~~

~~[2] [Reserved]~~

~~[3] [Reserved]~~

Rule 3.9 Advocate ~~In~~in Nonadjudicative Proceedings (Redline Comparison to the ABA Model Rule)

A lawyer representing a client before a legislative body or administrative agency in a connection with a pending nonadjudicative matter or proceeding shall disclose that the appearance is in a representative capacity ~~and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5,~~ except when the lawyer seeks information from an agency that is available to the public.

Comment

~~[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body must deal with it honestly and in conformity with applicable rules of procedure. See Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5.~~

~~[2] Lawyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.~~

~~[3] This Rule~~rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. ~~Not~~This rule also does ~~it~~not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by ~~Rules~~rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.