

**Rule 3.9 Advocate in Nonadjudicative Proceedings
(Proposed Rule Adopted by the Board on March 9, 2017)**

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.

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

EXECUTIVE SUMMARY

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) 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.

Post Public Comment Revisions

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 Modifications to the Proposed Rule

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.

COMMISSION REPORT AND RECOMMENDATION: RULE 3.9

Commission Drafting Team Information

Lead Drafter: Mark Tuft

Co-Drafters: Nanci Clinch, Robert Kehr

I. CURRENT ABA MODEL RULE

[There is no California Rule that corresponds to Model Rule 3.9, from which proposed Rule 3.9 is derived.]

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 Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Comment

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

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

[3] This Rule only applies when a lawyer represents a client in connection with an official hearing or meeting of a governmental agency or a legislative body to which the lawyer or the lawyer's client is presenting evidence or argument. It does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency or in connection with an application for a license or other privilege or the client's compliance with generally applicable reporting requirements, such as the filing of income-tax returns. 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.

I.A. CURRENT NEW YORK RULE

Rule 3.9 Advocate In Non-Adjudicative Matters

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending non-adjudicative 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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: January 20, 2017

Action: Recommend Board Adoption of Proposed Rule 3.9

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: March 9, 2017

Action: Board Adoption of Proposed Rule 3.9

Vote: 11 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE (CLEAN)

Rule 3.9 Advocate in Nonadjudicative Proceedings

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.

IV. COMMISSION'S PROPOSED RULE (REDLINE TO ABA MODEL RULE 3.9)

Rule 3.9 Advocate ~~In~~in Nonadjudicative Proceedings

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 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. ~~No~~This rule also does ~~it~~not apply to the representation of a client in connection with an investigation or examination of the client's affairs conducted by government investigators or examiners. Representation in such matters is governed by rules 4.1 through 4.4. This rule does not require a lawyer to disclose a client's identity.~~

IV.A. COMMISSION'S PROPOSED RULE (REDLINE TO NEW YORK RULE 3.9)

Rule 3.9 ~~New York~~-Rule 3.9 Advocate ~~In Non-Adjudicative Matters~~in Nonadjudicative Proceedings

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-~~adjudicativenonadjudicative 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.

V. RULE HISTORY

Although the origin and history of Model Rule 3.9 was not the primary factor in the Commission's consideration of proposed Rule 3.9, that information is published in "A Legislative History, The Development of the ABA Model Rules of Professional Conduct, 1982 – 2013," Art Garwin, Editor, 2013 American Bar Association, at pages 541 - 544, ISBN: 978-1-62722-385-0. (A copy of this excerpt is on file with the State Bar.)

Information on the adoption of New York Rule 3.9 is published online at the New York Legal Ethics Reporter website: <http://www.newyorklegalethics.com/simon-on-new-rules-rule-3-7a-through-rule-3-9/> [last checked February 10, 2017]. This article "Simon on New Rules: Rule 2.1 Through 3.3(a)(1)," by Professor Roy Simon was originally published in NYPRR September 2009 issue.

An excerpt is provided below:

Now (as Monty Python used to say) for something completely different. Rule 3.9, which consists of only one sentence, governs one narrow but important aspect of representing clients in matters involving legislatures or government agencies: the obligation to disclose whether the lawyer is appearing on behalf of a client, rather than on his own behalf or as a public-spirited citizen. The Rule had no counterpart whatsoever in the old Disciplinary Rules, but the first sentence of old EC 8-4 said: "Whenever a lawyer seeks legislative or administrative changes, the lawyer should identify the capacity in which he or she appears, whether on behalf of the lawyer, a client, or the public." Rule 3.9 narrows the focus to situations in which a lawyer is appearing on behalf of a client. It says:

A lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending *non-adjudicative* 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. [Emphasis added.]

Comment [1] to Rule 3.9 explains the rule and its policies succinctly. It says:

[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.

Thus, a lawyer appearing before a Senate committee or a rule-making agency on behalf of a client must say, "I am here as a representative of a client" or "I am appearing in a representative capacity." The lawyer cannot pretend to be merely an interested public citizen with no axe to grind. Rule 3.9 does not require the lawyer to identify the client — it merely requires a lawyer in a non-adjudicative proceeding before a legislative body or administrative agency to say, "I have a client."

Rule 3.9 is, however, limited to "non-adjudicative" proceedings. Does this take a lawyer off the hook when a legislative body or administrative agency is acting in an adjudicative capacity? No. As Comment [1A] to Rule 3.9 explains:

[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.

One of the laws and court rules governing appearances before a tribunal is Rule 3.3(e), which provides as follows:

In presenting a matter to a tribunal, a lawyer shall disclose, unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.

Thus, if a legislative body or administrative agency is functioning as a "tribunal," the lawyer must nearly always disclose the client's identity. But when is a legislative body or administrative agency functioning as a "tribunal"? A good question — and one answered (at least in the abstract) by Rule 1.0(w), which defines "tribunal" as follows:

"Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an *adjudicative capacity*. A legislative body, administrative agency or other body acts in an *adjudicative capacity* when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter. [Emphasis added.]

The Comment to Rule 1.0, unfortunately, does not elaborate on this language. But most lawyers will recognize the situation when they see it. And when in doubt as to whether a proceeding before a legislative body or administrative agency is “adjudicative” (making the legislative body or administrative agency a “tribunal” and triggering Rule 3.3(e)) or “non-adjudicative” (making Rule 3.9 the applicable rule), the best policy will be to ask the client for consent to disclose the client’s identity. If the client refuses, the lawyer may ask for a ruling as to whether the legislative body or administrative agency is acting in an adjudicative capacity, and the lawyer will then know which rule to follow.

How broad is the exception for situations when a lawyer is acting on behalf of a client but “seeks information from an agency that is available to the public”? It is as broad as the law requiring a government agency to furnish the information that any member of the public is entitled to receive either anonymously or solely by giving his name. In those situations, the lawyer is not required to disclose whether the appearance is in a representative capacity because the lawyer is not expressing views, answering questions, or otherwise supplying information to the agency. (The exception covers only an “agency,” but it should also apply to requests for information from legislative bodies, like the rest of Rule 3.9.) Thus, if a lawyer asks the Federal Communications Commission to supply reports on punitive actions taken against license holders within the last five years, and if that information is “available to the public” in the sense that any member of the public has a right to obtain that information upon request (including filling out any necessary forms and paying any standard charges), then the lawyer need not disclose whether the lawyer is representing a client.

VI. OFFICE OF CHIEF TRIAL COUNSEL / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016
(In response to 90-day public comment circulation):**

1. OCTC supports this rule.

Commission Response: No response required.

2. OCTC supports the Comment to this rule.

Commission Response: No response required.

- **Gregory Dresser, Office of Chief Trial Counsel, 1/9/2017
(In response to 45-day public comment circulation):**

For the 45-day public comment version of the rule, OCTC re-submitted substantially the same comments as on the 90-day public comment version of the rule and the Commission's responses to OCTC remained the same.

- **State Bar Court:** No comments were received from State Bar Court.

VII. SUMMARY OF PUBLIC COMMENTS (INCLUDING COMMENTS SUBMITTED BY THE OFFICE OF CHIEF TRIAL COUNSEL AND STATE BAR COURT) & PUBLIC HEARING TESTIMONY

During the 90-day public comment period, nine public comments were received. Three comments agreed with the proposed rule, five comments agreed only if modified, and one comment did not indicate a position. During the 45-day public comment period, one public comment was received. That one comment agreed with the proposed rule. A public comment synopsis table, with the Commission's responses to each public comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. Related California Law

Regarding the issue of action taken in an adjudicative capacity vs. a legislative or non-adjudicative matter, the Commission considered the following cases or authorities:

- *Strumsky v. San Diego Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35
- *American Fed. of Labor and Congress of Indus. Orgs. v. Unemployment Ins. Appeals Bd.* (2002) 13 Cal.4th 1017, 1028
- *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372
- *People v. Sims* (1982) 32 Cal. 468, 479, fn. 8, superseded on other grounds by statute
- Code of Civil Procedure section 1094.5
- *Horn v. County of Ventura* (1979) 24 Cal.3d 609, 612
- *Governing Bd. of the Alum Rock Union Elem. School Dist. v. Superior Court* (1985) 167 Cal.App.3d 1158, 1162
- *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 10

B. ABA Model Rule Adoptions

Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.¹ The ABA State Adoption Chart for ABA Model Rule 3.9, revised September 15, 2016, is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf (Last accessed on 2/10/17)
- Thirty-one jurisdictions have adopted Model Rule 3.9 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.³ Three

¹ The two jurisdictions are: North Carolina and Virginia.

² The thirty-one jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota,

states have adopted a version of the rule that substantially diverges from Model Rule 3.9.⁴

**IX. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES;
NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED**

A. Concepts Accepted (Pros and Cons):

1. Recommend adoption of New York Rule 3.9, which the first Commission similarly recommended as its proposed Rule 3.9.

- Pros: The Model Rule’s requirement that a lawyer comply with certain rule provisions (i.e., Rules 3.3, 3.4 and 3.5) that are applicable to conduct *before a tribunal* should not be adopted. This 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 concept of “evidence,” but these same concepts are confusing or incorrect for setting clear disciplinary standards in a non-adjudicative proceeding. It is appropriate, however, that lawyers be held to the requirements set forth in Rules 4.1 through 4.4.
- Cons: The proposed rule substantively diverges from the Model Rule language which has been adopted verbatim or nearly verbatim in a substantial majority of jurisdictions. There is no good reason to depart from the standard in those jurisdictions; lawyers should be held to a higher standard in their dealings with legislatures or administrative agencies in their rule-making capacity. The rules referenced in the Model Rules (i.e., Rules 3.3, 3.4 and 3.5) do not merely address “trial” concepts such as evidence. In fact, the specific provisions in Rule 3.3 [paragraphs (a) through (c)] concern the lawyer’s duty of *candor* to the tribunal. It is not evident that the same standards should not apply when a lawyer appears in a representative capacity before a non-adjudicative body such as a legislature or an administrative agency acting in a rule-making or policy-making capacity.

2. Recommend deletion of Model Rule Comments [1] and [2].

- Pros: Model Rule 3.9, Comment [1], restates the Model Rule which is not being recommended, and explains the policy underlying the Model Rule, which is not appropriate in a disciplinary Rule. Model Rule 3.9, Comments [1]

Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

³ The fourteen jurisdictions are: Alaska, District of Columbia, Florida, Georgia, Hawaii, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, New York, Tennessee, Texas, and Washington.

⁴ The three jurisdictions are: Colorado, Maine, and North Dakota.

and [2], similarly address the policy that justifies the application of Rules 3.3, 3.4 and 3.5 in non-adjudicative proceedings.

- Cons: See “Cons” to paragraph 1, above.

3. Recommend adoption of Model Rule 3.9, Comment [3], as revised.⁵

- Pros: The proposed Comment provides specific guidance as to how the rule should be applied. The Comment has also been revised to explain the rule does not require disclosure of the client’s identity.
- Cons: None identified.

B. Concepts Rejected (Pros and Cons):

1. Recommend adoption of the first Commission’s proposed Rule 1.9, Comment [1A].⁶

- Pros: The Comment informs the reader that the lawyer’s conduct will be governed by the specific rules of a tribunal when appearing before such body.
- Cons: The Comment merely states the policy underlying the rule and does not elucidate upon, or provide helpful explanation of, the proposed rule. It is derived from the New York rule and has no counterpart in the Model Rule.

2. Recommend adoption of a sentence at the end of the Comment stating: “A client’s identity may be disclosed when that disclosure is authorized by the lawyer’s client.”

- Pros: The Comment currently states the rule does not require disclosure of the client’s identity. A reader could infer disclosure of the client’s identity is optional at the lawyer’s discretion, or required when asked by a member of a legislative body or administrative agency.
- Cons: The sentence is too limiting. A client’s identity may or may not be confidential depending on the circumstances and a lawyer may or may not be required to obtain consent to disclose the client’s identity. Nevertheless, the sentence is unnecessary as it does not require any explanation that a client may authorize the disclosure of its name.

⁵ Note: the cross-reference to Rules 4.1 through 4.4 is bracketed pending the Commission’s decision regarding those rules.

⁶ The first Commission’s proposed Rule 3.9, Comment [1A], provided:

[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.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

C. Changes in Duties/Substantive Changes to the Current Rules:

1. This would be new rule of professional conduct in California and is a substantive change in that violation of the rule would subject a lawyer to discipline.

D. Non-substantive Changes to the Model Rule:

None.

E. Alternatives Considered:

See Section IX.A.1 above. The main alternatives considered was whether to add this concept to the rules and, if so, whether to include the Model Rule's references to 3.3, 3.4, and 3.5.

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

The Commission recommends adoption of proposed Rule 3.9 in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopts proposed Rule 3.9 in the form attached to this Report and Recommendation.