

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3.9

Lead Drafter: Tuft
Co-Drafters: Clinch, Kehr
Meeting Date: June 2nd & 3rd, 2016

I. CURRENT CALIFORNIA RULE

There is no California counterpart to ABA Model Rule 3.9.¹

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was a consensus among the drafting team members to recommend the proposed rule as set forth below in Section III. The vote was unanimous in favor of making the recommendation.

III. PROPOSED RULE 3.9 (CLEAN)

Rule 3.9 Advocate in Nonadjudicative Proceedings

A lawyer communicating in a representative capacity with 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.

¹ The blackletter of Model Rule 3.9 provides:

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.

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IV. PROPOSED RULE (REDLINE TO MODEL RULE 3.9)

Rule 3.9 Advocate In Nonadjudicative Proceedings

A lawyer ~~representing a client before~~ communicating in a representative capacity with 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. ~~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 4.1 through 4.4.] This Rule does not require a lawyer to disclose a client's identity.~~

V. PUBLIC COMMENTS SUMMARY

None.

VI. OCTC / STATE BAR COURT COMMENTS

- GREG DRESSER, OCTC, Date:
[Insert OCTC Comments]
- RUSSELL WEINER, OCTC, 6/15/2010:

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OCTC is concerned with the Commission's departing from the language in ABA rule 3.9, which requires the attorney to comply with rules 3.3(a) through (c), 3.4(a) through (c) and 3.5. The Commission states that they are deviating from the ABA's language because the rules referred to in the ABA rule involve adjudicative matters, but OCTC does not see the reasons for the difference. If a lawyer is representing a client it should not make a difference that it is in litigation or before a non-adjudicative proceeding. The rules eliminated by the Commission, like the rule added by the Commission, address truthfulness and fairness. There is no reason to depart from the ABA's rule.

If the rule is changed to be like Model Rules 3.9, then the Comments will have to be changed or deleted. Comments 1-2 are too general and cover subjects and discussions best left to treatises, law review articles, and ethics opinions. OCTC would also request a comment that other rules may apply depending on the facts and circumstances.

- **MIKE NISPEROS, OCTC, 9/27/2001:**

OCTC did not comment on ABA Model Rule 3.9 in 2001.

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

VII. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

Other than California, all jurisdictions but two have adopted some version of ABA Model Rule 3.9.²

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
- Thirty-one jurisdictions have adopted Model Rule 3.9 verbatim.³ Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.⁴ Three jurisdictions have adopted a version of the rule that substantially diverges from Model Rule 3.9.⁵

² The two jurisdictions are: North Carolina and Virginia.

³ The thirty-one jurisdictions are: Alabama, Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

⁴ 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.

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VIII. 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 RRC1 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, cmt. [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, cmts. [1] 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.⁶

⁵ The three jurisdictions are: Colorado, Maine, and North Dakota.

⁶ Note: the cross-reference to Rules 4.1 through 4.4 is bracketed pending the Commission's decision regarding those rules.

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- 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 RRC1 proposed Rule 1.9, Comment [1A].⁷
 - 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.

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:

1. None.

E. Alternatives Considered:

1. None.

⁷ RRC1's proposed Rule 3.9, cmt. [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.

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IX. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues.

X. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Tuft

- [Date]: Email Comment
- [Date]: Email Comment

Clinch

- [Date]: Email Comment
- [Date]: Email Comment

Kehr

- [Date]: Email Comment
- [Date]: Email Comment

XI. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the commission recommend that the Board of Trustees of the State Bar of California adopt proposed rule 4.1 in the form attached to this report and recommendation.

Proposed Resolution:

RESOLVED: That the Commission adopts proposed rule 3.9 in the form attached to this Report and Recommendation.

XII. DISSENTING POSITION(S)

None.

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XIII. FINAL COMMISSION VOTE/ACTION

[Date of Vote]

[Action: Proposed amended rule adopted or not adopted]

[Record of Roll Call Vote]