

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 3.9

Commission Drafting Team Information

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I. CURRENT CALIFORNIA 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.

II. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 3.9

Vote: 14 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 3. 9

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION'S PROPOSED RULE 3.9 (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 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. ~~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. 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.)

VI. OCTC / STATE BAR COURT COMMENTS

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

OCTC offers no comment on whether Model Rule 3.9, or a similar rule, should be adopted by California.

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

1. OCTC supports this rule.

2. OCTC supports the Comment to this rule.

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

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

One comment was received, from OCTC, which agreed. A public comment synopsis table, with the Commission's responses to each comment, is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND 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 is posted at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_9.authcheckdam.pdf
- Thirty-one states have adopted Model Rule 3.9 verbatim.² Fourteen jurisdictions have adopted a slightly modified version of Model Rule 3.9.³ Three 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 ~~RRC1~~ 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,

¹ The two jurisdictions are: North Carolina and Virginia.

² The thirty-one states 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.

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 states are: Colorado, Maine, and North Dakota.

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.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 RRC1 proposed Rule 1.9, Comment [1A].⁶

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

⁶ 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

- 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.

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 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. None.

representative capacity, to identify the client or clients and provide other information required for communication with the tribunal or other parties.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That 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 adopt proposed Rule 3.9 in the form attached to this Report and Recommendation.

