

**Rule 3.9 Advocate in Nonadjudicative Proceedings**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

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.



**Proposed Rule 3.9 Advocate in Non-adjudicative Proceedings**  
**Synopsis of Public Comments**

**TOTAL = XX**      **A = X**  
**D = X**  
**M = X**  
**NI = X**

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI <sup>1</sup>	Rule Section or Cmt.	Comment	RRC Response
2016-32q	Law Professors (Zitrin)	Yes	M	3.9	<p>While the commission has adopted Rule 3.9 “inexplicably” [this] version of the rule does not require compliance with other rules relating to candor and honesty, 3.3, 3.4 and 3.5... Such compliance is required by ABA MR 3.9.</p> <p>We cannot understand the commission’s reluctance to remind practitioners of common requirements of attorney honesty.</p> <p>[W]e believe that it is better for rules of conduct to make it abundantly clear that lawyers must act honestly and honorably. There is no excuse for not requiring compliance with other rules in situations not involving adjudicative proceedings.</p>	<p>The Commission disagrees with the commenters’ assessment. The proposed rule does not suggest that a lawyer may engage in dishonest conduct. Rather, the Commission determined that 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 <i>before a tribunal</i> should not be included in this rule, which governs non-adjudicative settings. 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 <i>adjudicative</i> 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, as the proposed rule provides.</p>

<sup>1</sup> A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED