

Rule 3.9 Advocate in Non-adjudicative 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.

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A lawyer ~~communicating in a representative capacity with~~ 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 3.9 Advocate in Non-adjudicative Proceedings
Synopsis of Public Comments**

TOTAL = 9	A = 3
	D = 0
	M = 5
	NI = 1

No.	Commenter/Signatory	Comment on Behalf of Group?	A/D/M/NI ¹	Rule Section or Cmt.	Comment	RRC Response
X-2016-32q	Law Professors (Zitrin) (07-25-16)	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>

¹ A = AGREE with proposed Rule D = DISAGREE with proposed Rule M = AGREE ONLY IF MODIFIED NI = NOT INDICATED

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X-2016-43q	Committee on Professional Responsibility and Conduct (COPRAC) (Baldwin)	Yes	A	3.9	Supports adoption of proposed Rule 3.9.	No response required.
X-2016-32q	Law Professors (Zitrin) (07-25-16)	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>	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

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						proposed rule provides.
X-2016-52q	Law Professors (Zitrin) (08-24-2016)	Yes	M		See X-2016-32q Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories	See X-2016-32q for Commission's response to the Law Professors' comments
X-2016-68q	Law Professors (Zitrin) (09-21-2016)	Yes	M		See X-2016-32q Law Professors (Zitrin) dated July 25, 2016 for the comment synopsis. The comments are identical and the only difference is the signatories.	See X-2016-32q for Commission's response to the Law Professors' comments
X-2016-104aq	Office of Chief Trial Counsel (OCTC) (Dresser) (9-27-16)	Yes	A		1. Supports adoption of proposed Rule 3.9. 2. Supports adoption of the Comment to Rule.	1. No response required. 2. No response required.
X-2016-97e	Freedman, Daniel (9-27-16)	No	M		While we agree with the spirit of this rule, as drafted it is too vague to apply in connection with hearings in front of local administrative bodies and typical nonadjudicative proceedings. For example, if an attorney has a personal interest in a specific issue that may also impact a client's interest, there is an untenable vagueness concerning whether his/her participation in the hearing is in a "representative capacity." [A]s drafted, this rule will create unacceptable risk that an attorney's participation in the political process, for personal reasons, will be subject to	The Commission disagrees that proposed Rule 3.9 creates an unacceptable risk that a lawyer's personal participation in the political process would invoke the rule. The Rule clearly applies to lawyers representing clients in a pending non-adjudicative matter or proceeding. The Commission has revised the rule to clarify this further by substituting "representing a client before" for "communicating with"

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					heightened scrutiny that will likely result in politically motivated and/or unwarranted complaints to the state bar.	
X-2016-83a	Garrett, Christopher (9-26-16)	No	A		The proposed Rule 3.9 represents a workable balance between the policy of ensuring that public officials are adequately informed of a lawyer's representation and providing workable and enforceable rule. The rule is also consistent with the constitutional rights to free speech and to petition the government for redress of grievances.	No response required.
X-2016-86d	United States Department of Justice (US DOJ) (Ludwig) (9-27-16)	Yes	NI		We take no position regarding the adoption of a Rule that addresses a lawyer's obligations as an advocate in non-adjudicative proceedings before a legislative body or administrative agency. That said, we note that the proposed Rule, as modified from Model Rule 3.9, may create confusion. Specifically, the proposed Rule requires "[a] lawyer communicating in a representative capacity with a legislative body or administrative agency in connection with a pending nonadjudicative matter or proceeding [to] disclose that the appearance is in a representative capacity, except when the lawyer seeks	The Commission recognizes the confusion that might be generated by the language used and has revised the rule to clarify its scope of application by substituting "representing a client before" for "communicating with"

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					information from an agency that is available to the public.” Obviously, however, a lawyer need not <i>appear</i> before a legislative body or administrative body in order to <i>communicate</i> with such body; lawyers can draft written submissions for consideration “in connection with an official hearing or meeting.” It is unclear whether the Commission intended for the proposed Rule to extend to such communications.	

