

**RULE 3.9:
ADVOCATE IN NONADJUDICATIVE PROCEEDINGS**

Executive Summary

New York's disciplinary rules do not include a counterpart to ABA Model Rule 3.9, dealing with the responsibilities of an advocate in nonadjudicative proceedings before legislative bodies or administrative agencies. Proposed Rule 3.9 requires an advocate in a nonadjudicative proceeding to give notice to the tribunal when the lawyer is appearing in a representative rather than a personal capacity (the initial requirement of ABA Model Rule 3.9). COSAC did not adopt the second aspect of ABA Rule 3.9 which requires that lawyers representing parties in nonadjudicative proceedings adhere to the higher standards of candor and disclosure required of adjudicatory proceedings. Rather, COSAC felt the standards of honesty and fairness required of lawyers in dealing with third persons, as stated in Rules 4.1 through 4.4, and 8.4, should be extended to apply to nonadjudicative proceedings.

Text of Proposed Rule with COSAC Explanation

RULE 3.9: ADVOCATE IN NONADJUDICATIVE PROCEEDINGS	COSAC COMMENTARY
<p>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. Representation in such matters is governed by Rules 4.1 through 4.4, and 8.4.</p>	<p>Proposed Rule 3.9 follows ABA Rule 3.9 in requiring a lawyer representing a client in a nonadjudicative proceeding to disclose the lawyer's representative capacity. Unlike DR 7-106(B)(2), applicable to adjudicative proceedings, the lawyer need not disclose the identify of the client.</p>

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 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.

[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.

[2] Omitted.

[3] Omitted.

COSAC COMMENTARY

The first sentence of Comment [1] is identical to that of ABA Comment [1]. The remainder of the Comment has been rewritten to reflect the changed content of the text of the rule. For the same reason, Comments [2] and [3] of ABA Rule 3.9 have been omitted.

This new Comment reflects the requirement of DR 7-106(B)(2) and other law, which require a lawyer appearing in a representative capacity in an adjudicative proceeding to identify the lawyer's client.

Changes from Existing New York Code

New York's current Disciplinary Rules contain no counterpart to ABA Rule 3.9. The closest analog is EC 8-4, which states that a "lawyer should identify the capacity in which he or she appears [when seeking legislative or administrative changes]." DR 7-106(B)(2) requires a lawyer to disclose "[u]nless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer." But DR 7-106 is a rule governing "trial conduct" and applies "[i]n presenting a matter to a tribunal" and not to "nonadjudicative proceedings" before administrative agencies and legislative bodies.

Reporter's Notes

The second requirement of ABA Rule 3.9 (the candor and fairness required of a lawyer in dealing with governmental bodies in nonadjudicative proceedings) raises difficult issues

concerning its application and scope. As a consequence, some jurisdictions that have adopted the Model Rules have omitted the rule entirely (e.g., Illinois, North Carolina, and Virginia). The current New York Code currently has no direct analogue. However, COSAC concluded that a lawyer has an obligation to inform legislative bodies and administrative agencies that the lawyer is appearing in a representative capacity. Proposed Rule 3.9 is limited to that requirement and a statement that the lawyer's conduct in nonadjudicative proceedings before legislative bodies and administrative agencies is subject to the rules that govern relationships with third persons generally: "[r]epresentation in such matters is governed by Rules 4.1 through 4.4, and 8.4."

The Proposed Rule does not include the attempt of ABA Model Rule 3.9 to distinguish between nonadjudicative proceedings that should be governed by the higher standards of candor and disclosure required of adjudicatory proceedings (e.g., Rule 3.3(a)). COSAC felt that no adequate standard for distinguishing those proceedings from other governmental or administrative proceedings that are governed by the standards of honesty and fairness required of a lawyer in dealing with third persons (i.e., Rules 4.1 through 4.4, and 8.4) could be drafted. Consequently, the Proposed Rule applies the standards stated in Rules 4.1 through 4.4, and 8.4, to all nonadjudicative matters or proceedings of legislative bodies and governmental agencies.

Corresponding New York Disciplinary Rules

DR 7-106(B)(2)

B. In presenting a matter to a tribunal, a lawyer shall disclose:

2. Unless privileged or irrelevant, the identities of the clients the lawyer represents and of the persons who employed the lawyer.