

Rule 3.9: Advocate in Nonadjudicative Proceedings

1. Current Kentucky Rule with Official Comments:

SCR 3.130(3.9) Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative or administrative tribunal 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.

Supreme Court Commentary

[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 should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[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 does not apply to representation of a client in a negotiation or other bilateral transaction with a governmental agency; representation in such a transaction is governed by Rules 4.1 through 4.4.

2. Proposed Kentucky Rule with Official Comments:

SCR 3.130(3.9) Advocate in nonadjudicative proceedings

A lawyer representing a client before a legislative body or administrative ~~tribunal~~ 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.

Supreme Court Commentary 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 ~~should~~ must deal with ~~the tribunal~~ 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, representation 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 a transaction matters is governed by Rules 4.1 through 4.4.

3. Discussion and Explanation of Recommendation:

a. Comparison of proposed Kentucky Rule with its counterpart ABA Model Rule.

The proposed KRPC 3.9 adopts all MR 3.9 changes. The ABA Reporter's Explanation of Changes expresses the Committee's view. It is adopted by the Committee for purposes of explaining recommended changes and is quoted below.

- ABA Reporter's Explanation of Changes -- Model Rule 3.9

TEXT:

The only change in the Rule text is the replacement of the reference to "legislative or administrative tribunal" with "legislative body or administrative agency." The term "tribunal" is defined in Rule 1.0(m) as denoting courts and other agencies when those agencies are acting in an adjudicative capacity. This change is necessary to make clear that Rule 3.9 applies only when the lawyer is representing a client in a nonadjudicative proceeding of a legislative body or administrative agency. No change in substance is intended.

COMMENT:

[1] The third sentence has been modified to clarify that the lawyer must, rather than merely should, act honestly and comply with procedural Rules. A cross reference to Rules 3.3(a) through (c), 3.4(a) through (c) and 3.5 was also added.

[3] The addition of the new references to official hearings or meetings at which the lawyer or the lawyer's client is presenting evidence or argument, applications for licenses, generally applicable reporting requirements and investigations or examinations is intended to clarify the limited situations in which Rule 3.9 is applicable. The Comment is consistent with the holding of ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 93-375 that Rule 3.9 is inapplicable in connection with a bank examination.

b. Detailed discussion of reason for variance from ABA Model Rule (if any).

There is no variance in proposed KRPC 3.9 from MR 3.9.

Committee proposal adopted without change. Order 2009-05, eff 7-15-09.