NEW YORK STATE BAR ASSOCIATION

One Elk Street, Albany, New York 12207 • PH 518.463.3200 • www.nysba.org

COMMITTEE ON PROFESSIONAL ETHICS

Opinion 838 (3/10/10)

TOPIC: Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered as being before a "tribunal" for purposes of the Rules; and whether ex parte communications in such a proceeding are prohibited.

DIGEST: Whether a rule-making or rate-making proceeding before an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the Rules is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact such as an administrative law judge. Even if the proceeding is before a "tribunal," Rule 3.5 does not apply unless the proceeding is an "adversary proceeding" and the agency does not have its own rules or regulations authorizing ex parte communications in connection with such proceedings.

RULES: 1.0(l), 1.0(w), 1.7, 1.16, 3.3, 3.4, 3.5, 3.7, 3.9, 4.1-4.4, 8.3, 8.4

QUESTION

1. When would a proceeding before a New York State administrative agency, such as the Public Service Commission, be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct? Is the relevant criterion what the Agency is doing (i.e. adjudication versus rulemaking) or how it is acting (i.e. using an adjudicative process)?

2. If an Agency rule-making or rate-making proceeding qualifies as being before a "tribunal," does Rule 3.5 always prohibit a lawyer from communicating ex parte as to the merits of the matter with a judge or other official of the tribunal?

DISCUSSION

What is a tribunal?

3. Many of the rules in the New York Rules of Professional Conduct (the "Rules"), as effective April 1, 2009, prescribe lawyer conduct when acting before a tribunal. *See, e.g.* Rule 1.7(b)(3) (conflicts in proceedings before a tribunal), Rule 1.16(c)(13) & (d) (withdrawal in matters pending before a tribunal), Rule 3.3 (candor to a tribunal), Rule 3.4 (fairness to opposing parties and counsel in appearances before a tribunal), Rule 3.5 (impartiality of tribunals), Rule 3.7 (lawyer as witness in matter before a tribunal), and Rule 8.3 (reporting misconduct to a tribunal).

4. The New York Code of Professional Responsibility, which was effective prior to the adoption of the Rules, defined "Tribunal" as including "all courts, arbitrators and other adjudicatory bodies." See Definition 6. The ABA Model Rules of Professional Conduct did not define the term "tribunal" until 2001, when the ABA adopted a definition of "tribunal" that included not only courts but also binding arbitration, legislative bodies, administrative agencies or other bodies "acting in an adjudicative capacity." The definition of "tribunal" in the New York Rules adopts the definition in the ABA Model Rules. Specifically, New York's definition of "tribunal, which appears in Rule 1.0(w), reads as follows:

> "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a legal judgment directly affecting a party's interests in a particular matter.

5. Under this definition, acting in an adjudicative manner is not enough to bring agency proceedings within the definition of a tribunal. An administrative agency qualifies as a "tribunal" only when a neutral official, after presentation of evidence or legal argument by a "party or parties," will render a judgment that directly affects the party's interests in a particular matter. The definition of "matter," which is found in Rule 1.0(l), includes an "administrative proceeding … involving a specific party or parties."[1]

6. In many administrative agencies, a rule-making proceeding is not a matter before a "tribunal" within the meaning of the Rules because rule-making does not involve a specific party or parties. Rather, rule-making applies generally to all covered persons. In some cases, the agency's procedures may include elements that are also found in an adjudicative proceeding.

---

[1] Because the definition of "matter" in the Rules requires a specific party or parties, we do not give dispositive weight to the decision of the New York Court of Appeals in *Allied Chemical v. Niagara Mohawk*, 72 N.Y.2d 271 (1988). In that case, the Appellate Division found that certain Public Service Commission rulemaking proceedings that involved notice and comment and other "adjudicative-type procedural safeguards," were "quasi-judicial." Since the PSC's rulemaking proceeding had given Allied Chemical a full and fair opportunity to contest the same issue that would be determined in the second proceeding, the Court of Appeals held that the doctrine of collateral estoppel would prevent Allied from litigating the issue before a court. The finding that the PSC proceeding was "quasi-judicial" for purposes of collateral estoppel, however, is not dispositive of whether that type of PSC proceeding satisfies the definition of "tribunal" under the Rules.

For example, the proceeding might involve the taking of testimony in formal hearings. However, we believe it is not the taking of testimony or a formal hearing that characterizes a tribunal, but rather the rendering of a legal judgment on the law and the evidence that directly affects the interests of one or more parties to the matter.

7. There is evidence in Rule 3.9, entitled "Advocate in Non-Adjudicative Matters," that the drafters of the Rules did not consider rule-making to be an "adjudicative" procedure.[2] Comments [1] and [1A] to that rule state (with emphasis added):

> [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 regarding 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 Rule 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.

8. Comment [1] to Rule 3.9 indicates that, when a lawyer is representing a client before an administrative agency acting in a rule-making capacity, the representation is governed by Rules 4.1 through 4.4 and 8.4.

9. Comment [1A] makes clear that, when a lawyer is acting before a tribunal, disclosure of the client's name is imperative. However, when a lawyer is representing a client in a rule-making proceeding, the lawyer need disclose only that he or she is acting in a representative capacity – the lawyer need not disclose the name of the client. The clear implication of this difference – a lawyer must disclose a client's name when representing a client before a tribunal but not when representing a client in a rule-making proceeding – is that the drafters of the Rules did not consider rule-making to be a proceeding before a "tribunal."

10. Rate-making proceedings may be difficult to classify. They may sometimes be adjudicatory in nature and sometimes not. Rate-making proceedings often affect individual parties, and often involve an administrative law judge who will take evidence and make a recommendation to the agency. However, the determination of rates is often a political or quasi-

---

[2] We also note that the State Administrative Procedure Act ("SAPA") provides certain rules with respect to rule-making (SAPA Article 2) and adjudicatory proceedings (SAPA Article 3). In that regard, SAPA § 102(2)(ii) defines a "rule" as including "prescription for the future of rates," although certain rules regarding subscriber rates contained in an application to the public service commission are not included. Similarly, SAPA § 102(3) defines an "adjudicatory proceeding" as an activity "which is not a rule making proceeding . . . in which a determination of the legal rights, duties or privileges of named parties thereto is required by law to be made only on a record and after an opportunity for a hearing."

legislative process, which is based on policy considerations as well as evidence of costs. Such quasi-legislative and policy considerations may implicate the rights of participants to petition the government within the meaning of the First Amendment. ("Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."). See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (same philosophy that underlies the Petition Clause governs the approach of citizens or groups of citizens to administrative agencies, and the right to petition extends to all departments of the government). Not surprisingly, therefore, Comment [1] to Rule 3.9 indicates that agencies acting in a policy-making capacity are acting in a non-adjudicative capacity.

11. In sum, a government agency may sometimes act in an adjudicative capacity, and thus qualify as a "tribunal," and at other times act in an non-adjudicative capacity, and thus not qualify as a "tribunal." Ultimately, whether the fact-finder in a rule-making or rate-making proceeding should be deemed to be a "tribunal" for purpose of the Rules is a question of fact that is beyond the jurisdiction of this Committee. The Agency's own characterization, or the characterization under the State Administrative Procedure Act, is not necessarily dispositive.

12. To generalize, we believe the determination of whether a particular proceeding is adjudicatory will involve one or more of the following factors:

(a) Whether specific parties will be affected by the decision;
(b) Whether the parties have the opportunity to present evidence and cross examine other providers or evidence; and
(c) Whether the ultimate determination will be made by a person in a policy-making role or by an independent trier of fact, such as an administrative law judge.

Application of Rule 3.5

13. Rule 3.5, entitled "Maintaining and Preserving the Impartiality of Tribunals and Jurors," is designed to preserve the impartiality of tribunals by prohibiting improper influence through (i) gifts, loans and political contributions, or (ii) ex parte communications. Impartiality is not defined in the Rules, but rather in the Code of Judicial Conduct, where its meaning is given as the "absence of bias or prejudice" for or against "particular parties," and "maintaining an open mind in considering issues." New York Code of Judicial Conduct §100.0(R).

14. Even if it is determined that a particular rule-making or rate-making proceeding is before a "tribunal" because the proceeding involves a neutral official who, after presentation of evidence or legal argument by a party or parties, will render a judgment, on the facts and the law that directly affects one or more parties' interests in a particular matter, Rule 3.5 would not necessarily apply.

15. New York Rule 3.5(a)(2), regarding communications on the merits of a matter, has no direct counterpart in the ABA Model Rules of Professional Conduct. Rather, Rule 3.5(a)(2) is derived from DR 7-110(B) of the former New York Code of Professional Responsibility. Both DR 7-110(B) and Rule 3.5(a)(2) apply only "in an adversary proceeding." Thus Rule 3.5 would only apply if the particular rule-making or rate-making proceeding were deemed to be an "adversarial proceeding."

16. Moreover, even if the rule-making or rate-making proceeding were deemed to be an "adversarial proceeding," an Agency could still determine on its own that Rule 3.5 should not apply. *See, e.g.*, Rule 3.5(a)(2)(iv), which states:

> A lawyer shall not . . . in an adversarial proceeding communicate or cause another person to do so on the lawyer's behalf, as to the merits of the matter with a judge or official of a tribunal or an employee thereof before whom the matter is pending, except . . . *as otherwise authorized by law* . . . ." [Emphasis added.]

CONCLUSION

17. Whether a rule-making or rate-making proceeding by an administrative agency or one of its officials should be considered a proceeding before a "tribunal" for purposes of the New York Rules of Professional Conduct is a question of fact. Principles that would apply to the determination include (a) whether individual parties will be affected by the decision; (b) whether the parties have the opportunity to present evidence and cross-examine other providers; and (c) whether the ultimate determination will be made by a person in a policy-making role or instead by an independent trier of fact, such as an administrative law judge.

Even if the proceeding is determined to be one before a "tribunal," Rule 3.5's restrictions on communicating with the tribunal would apply only if (i) the proceeding is determined to be an "adversary proceeding," and (ii) the agency has not adopted its own rules or regulations authorizing ex parte communications in connection with such proceedings.

(62-09)