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Ethics Opinion 344

Conflicts of Interest for Lawyers Engaged in Lobbying Activities that Are Not Deemed to Involve the Practice of Law

The District of Columbia Rules of Professional Conduct regulate “lobbying activity” by lawyers who practice law in the District of Columbia. The conflicts rules for lobbying matters are as follows:

- Rule 1.7(a) prohibits one lawyer or law firm from advancing opposing positions, in the same lobbying matter. This conflict cannot be waived.
- Lobbying representations are ***not*** subject to Rule 1.7(b)(1) because such representations are not “matters involving a specific party or parties,” a phrase which excludes lobbying, rulemaking and other matters of general government policy.
- Rules 1.7(b)(2), (b)(3) and (b)(4) prohibit lobbying representations if:
  - The proposed representation is likely to be adversely affected by another representation;
  - Another representation is likely to be adversely affected by the proposed representation; or
  - The lawyer-lobbyist’s professional judgment reasonably may be adversely affected by the lawyer’s responsibilities to or interests in a third party, or the lawyer’s own financial, business, property, or personal interests.

  Typically apparent in “punch-pulling” situations where the lawyer’s zealousness in one representation may arguably be compromised by representations of other clients or by other interests of the lawyer, these conflicts can be waived in some circumstances through informed consent from the affected clients. *See* Rule 1.7(c).

Because nonlawyers may engage in lobbying activity, lawyers and their associates may remove such activities from the conflicts provisions of the Rules of Professional Conduct through strict compliance with the regulations of D.C. Rule 5.7 for “law-related services.” To do so, however, the lobbying client must receive clear notice that the services are not legal services and that the usual protections accompanying a client-lawyer relationship do not apply.

Applicable Rules

- Rule 1.0(h) (Terminology: Definition of “Matter”)
- Rule 1.6 (Confidentiality of Information)
- Rule 1.7 (Conflicts of Interest: General)
- Rule 1.10 (Imputed Disqualification General Rule)
- Rule 1.11 (Successive Government and Private or Other Employment)
- Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)
- Rule 5.4 (Professional Independence of a Lawyer)
- Rule 5.7 (Responsibilities Regarding Law-Related Services)

Inquiry

The Committee on Unauthorized Practice of Law of the District of Columbia Court of Appeals (the “UPL Committee”) recently issued an opinion concluding that “U.S. legislative lobbying does not constitute the practice of law under Rule 49, and Rule 49 does not require individuals engaged in such lobbying to be members of the D.C. Bar.” Unauthorized Practice of Law Opinion 19-07, *Applicability of Rule 49 to U.S. Legislative Lobbying* (Dec. 17, 2007) [hereinafter the “UPL Opinion”]. In the wake of that opinion, the Legal Ethics Committee has received an inquiry about the obligations of a lawyer-lobbyist who is a member of the D.C. Bar. The inquirer asked whether a lawyer has a conflict of interest under Rule 1.7 when she lobbies Congress in favor of a special tax

break for her Client X even though she knows the break will directly disadvantage the lawyer's other client, Client Y.

The specific holding of the UPL Opinion was that "U.S. legislative lobbying does not constitute the practice of law within the meaning of Rule 49(b)." For purposes of its opinion, the UPL Committee defined the phrase "U.S. legislative lobbying" in a way that "does not necessarily include all activities" related to congressional matters.[1] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn1) The UPL Opinion is narrowly drawn – activities outside the scope of this definition may constitute the practice of law.[2] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn2)

Having defined an area that does not involve the practice of law, the UPL Opinion confirms that nonlawyers may establish offices in the District of Columbia for the purpose of "U.S. legislative lobbying." Similarly, lawyers licensed in other jurisdictions, but not in the District of Columbia, may act as "U.S. legislative lobbyists" from offices in the District of Columbia. UPL Opinion, at 3-4.

Non-D.C. lawyers lobbying from the offices of law firms in the District of Columbia "must make clear that they are not engaged in the general practice of law in the District of Columbia." *Id.* at 4. This is so because Rule 49 prohibits persons not licensed in D.C. to "hold [themselves] out" as being authorized to practice law in D.C.[3] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn3) As the UPL Opinion notes, "[i]dentifying an individual as a lawyer in a D.C. law firm generally implies that the individual is authorized to practice law in the District of Columbia." UPL Opinion at 4. Consistent with the approach used for several other limited practice exceptions to Rule 49, the UPL Opinion suggests certain disclaimers and notices on business cards, websites and correspondence that will avoid any impermissible holding out. *Id.* at 4-5.

The UPL Committee specifically declined to address "whether or to what extent (a)legislative lobbyists may be subject to the professional obligations of lawyers or (b)communications between lobbyists and clients may be protected by the attorney-client privilege." UPL Opinion at 6. Like the UPL Committee, we also decline to address the applicability of the attorney-client privilege to communications between clients and lawyer-lobbyists.[4] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn4)

The immediate question before us is how Rule 1.7 on conflicts of interest applies to cases in which a lawyer undertakes a lobbying activity as a legal representation. The principles stated in this Opinion regarding conflicts of interest apply to lobbying activities related to both legislative matters and executive branch rule-making matters. Implicit in the immediate question is the applicability of Rule 1.7 to lobbying services that do not themselves involve the practice of law but are provided by lawyers or nonlawyers affiliated with law firms.

Although the inquiry before us involves only lobbying before Congress, the established understanding of the phrase "involving a particular party or parties" means that the principles discussed in this opinion also apply to conflict-of-interest questions faced by lawyers who lobby other legislative bodies, or who lobby administrative agencies or executive branch officials on legislation, rulemaking or other matters of general policy. The Rules of Professional Conduct do not distinguish between lobbying at the federal level and lobbying at the state or local level.

Discussion

At one level, the inquiry asks whether lawyer conduct rules apply when non-legal lobbying services are performed. As discussed in Part I below, the D.C. Rules of Professional Conduct regulate "lobbying activity" when undertaken by lawyers. Specific conflict-of-interest rules apply to such activities. Part II discusses the ability of lawyers and law firms to take certain steps to avoid the application of those conflict rules to lobbying and other "law-related services" under the District of

Columbia's new Rule 5.7. Absent strict compliance with the requirements of Rule 5.7, the conflicts rules will apply to lobbying activities by D.C. lawyers, law firms, and their lobbying associates, partners and affiliates.

I. Prohibited Conflicts of Interest in Lobbying Activities Governed by the Rules of Professional Conduct

The Rules of Professional Conduct regulate a lawyer's "lobbying activity." Rule 1.0(h) defines "matter" to

> mean[ ] any litigation, administrative proceeding, *lobbying activity*, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation*, except as expressly limited in a particular rule.*

(emphasis added).[5] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn5) The last clause of this definition is critical because, as discussed below, lobbying matters are effectively excluded from the operation of one of the prohibitions of Rule 1.7, specifically subsection (b)(1). But lobbying matters remain subject to the rest of the prohibitions, specifically subsections (a), (b)(2), (b)(3) and (b)(4) of Rule 1.7.

Rule 1.7 governs conflicts among current clients of the lawyer or law firm. It divides such conflicts into two broad categories, those that may be waived and those that cannot be waived. Rule 1.7(a) defines a situation in which a proposed representation is absolutely prohibited, even if all potentially affected clients are willing to consent. Rule 1.7(b) defines four situations in which a representation is only conditionally prohibited. Representations governed by Rule 1.7(b) may be undertaken if each potentially affected client provides informed consent and the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each client. *See* Rule 1.7(c).

A. Rule 1.7(a) – Representation Absolutely Prohibited.

Rule 1.7(a) provides that "a lawyer shall not advance two or more adverse positions in the same matter." This prohibition cannot be waived by the affected clients. It applies to lobbying activities by virtue of the underlying definition of "matter." Indeed, the Peters Committee, which recommended the current formulation of the rules on these issues, specifically concluded that lobbying opposite sides of the same issue should be prohibited:

> [T]he Committee rejected the concept that lobbying should be totally excluded from the reach of Rule 1.7 and expressly included lobbying in the definition of "matter" proposed in the Terminology section of the Rules. As a result, Rule 1.7(a) applies to lobbying activities and prevents a lawyer from lobbying for one position for one client in the same matter in which the lawyer (or the lawyer's firm, *see*Rule 1.10(a)) is lobbying for a conflicting position on behalf of a second client.

Peters Report at 18. Although ABA Model Rule 1.7 and D.C. Rule 1.7 "state the position differently, both rules prohibit the lawyer from advancing two adverse positions in the same matter or proceeding, even with the client's consent. [D.C.] Rule 1.7(a) states the position succinctly: 'A lawyer shall not advance two or more adverse positions in the same matter.'"[6] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn6)

The pending inquiry before the Committee does not involve Rule 1.7(a) because the lawyer-lobbyist has not been asked to advocate opposite sides of the same lobbying issue. Instead, she has been asked to pursue a tax break for Client X even though she knows that the tax break will

directly disadvantage another client (Client Y) whom the lawyer (or the firm) is not representing in that particular lobbying matter.

B. Rule 1.7(b) – Representation Conditionally Prohibited.

Rule 1.7(b) defines four conflicts situations in which a representation is prohibited unless each potentially affected client gives informed consent and the other requirements of Rule 1.7(c) are satisfied. As discussed below, the first of the four does not apply to lobbying matters. The remaining three do.

1. Rule 1.7(b)(1) – Adversity to Another Client in a Matter Involving A Specific Party or Parties.

Rule 1.7(b)(1) provides:

> [A] lawyer shall not represent a client with respect to a matter if... *that matter involves a specific party or parties* and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter even though that client is unrepresented or represented by a different lawyer.

Rule 1.7(b)(1) (emphasis added).

The inquirer did not say whether the lawyer expects the other client to lobby against the tax break she will be seeking for the first client. If the other client's active participation were expected in the lobbying matter, the representation of the first client would involve the lawyer taking a position known to be adverse to another client's position in the same matter.

However, that alone is not enough to create a conflict under Rule 1.7(b)(1) because of the limitation of that rule to "matter[s] involv[ing] a specific party or parties." That phrase is a term of art, which, for the reasons discussed below, has the effect of removing lobbying representations from the operation of Rule 1.7(b)(1).

Part (a) explains why the limitation of Rule 1.7(b)(1) to "matter[s] involv[ing] a specific party or parties" effectively excludes lobbying representations. Part (b) summarizes the history of revisions that led to the current rule, a history which confirms the conclusion in Part (a).

a. Meaning of Phrase"Matter Involving A Specific Party or Parties."

The key to the analysis is the meaning of the phrase "matter involv[ing] a specific party or parties." The phrase appears in only two places in the Rules of Professional Conduct: Rule1.7(b)(1) and Rule 1.11, which deals with the ability of a lawyer to represent clients after leaving government service for private practice. As discussed in Part (i) below, the phrase has a black-letter law meaning for purposes of Rule 1.11, a meaning that preceded incorporation of the phrase into Rule 1.7(b)(1) and that excludes lobbying matters from the conflicts rule. Under established principles of statutory and regulatory construction, the phrase must have the same meaning in each rule where it appears, as discussed in Part (ii). While there is some arguably inconsistent language in one of the comments to Rule 1.7, the text of the rules controls over the comments, as discussed in Part (iii).

i. Meaning of the Phrase "Matter Involving a Specific Party or Parties" in Rule 1.11.

Rule 1.11(g) confines the operation of the rule to a "matter involving a specific party or parties." "'Matter' is defined in paragraph (g) so as to encompass only matters that are particular to a specific party or parties. *The making of rules of general applicability and the establishment of*

general policy will ordinarily not be a 'matter' within the meaning of Rule 1.11." Rule 1.11, Comment [3] (emphasis added).

This interpretation comes from the well-established understanding of the meaning of an analogous phrase in 18 U.S.C. §207, which imposes certain restrictions on the work that may be performed by former government employees and officials after they leave government service. Some of those restrictions apply only to a "matter... involv[ing] a specific party or specific parties." 18 U.S.C. §207 (a)(1)(C) & (a)(2)(C). "Legislation or rulemaking of general applicability and the formulation of general policies, standards or objectives, or other matters of general applicability are not particular matters involving specific parties." *Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. 36,168, at 36,193 (June 25, 2008) (to be codified at 5C.F.R. §2641.201(h)(2)) [hereinafter "*Federal Post-Employment Conflict of Interest Restrictions"*].[7] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn7)

In Opinion 297, we considered whether a former government lawyer's participation in a negotiated rulemaking precluded him from subsequent representations involving those rules. We concluded that, because the former government lawyer's work on a negotiated rulemaking did not involve a particular party or parties, "successive representation is not per se prohibited by Rule 1.11(a) and (g) where the initial representation is in connection with a rulemaking of general applicability." D.C. Ethics Op. 297 (2000).

ii. The Phrase "Matter Involving a Specific Party or Parties" Must Have the Same Meaning in Rule 1.7(b)(1) As It Has in Rule 1.11

The phrase "matter involving a specific party or parties" cannot have one meaning in Rule 1.11 and a different meaning in Rule 1.7(b)(1). As a general principle of construction, "a particular term should be assumed to have a consistent definition throughout a statute." *Dupont Circle Citizens Ass'n v. District of Columbia Board of Zoning Adjustment*, 749 A.2d 1248, 1263 n.12 (D.C. 2000) (citing *Carey v. Crane Serv. Co., Inc.,* 457 A.2d 1102, 1108 (D.C.1983)). Application of that principle compels the conclusion that Rule 1.7(b)(1) excludes legislative lobbying matters.

Moreover, the phrase had a clear meaning in the context of former government lawyers long before it was ever added to Rule 1.7. Where the lawmaker "borrows terms of art in which are accumulated the legal tradition and meanings of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *1618 Twenty-First Street Tenants' Ass'n v. Phillips Collection*, 829 A.2d 201, 202 (D.C. 2003) (quoting *Bates v. District of Columbia Bd. Of Elections & Ethics*, 625 A.2d 891, 894 (D.C. 1993)) (additional citations omitted).

Applying those principles here, the phrase "matter involv[ing] a specific party or parties" must be given the same meaning for purposes of Rule 1.7(b)(1) as it has for Rule 1.11 and the progenitor of Rule 1.11, 18 U.S.C. §207. Given the well-established meaning of that phrase for purposes of Rule 1.11 and 18 U.S.C. §207, Rule 1.7(b)(1) does not apply to lobbying representations involving legislation, rulemaking or other matters of general policy.

iii. The Text of Rule 1.7(b)(1) Controls Over Any Inconsistent Language in the Comments to Rule 1.7.

The analysis thus far has focused only on the text of Rule 1.7(b)(1), Rule 1.11, and the established meaning of the phrase "matter involving a specific party or parties" as used in Rule1.11 and its predecessors. Rule 1.7 has a comment which, if read in isolation, could suggest a greater duty under Rule 1.7(b)(1) when the lawyer knows or has some way of discovering that another client is likely to oppose or disagree with the result being sought through the lawyer's lobbying efforts.[8] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn8) Such a reading cannot be reconciled with the limitation of Rule 1.7(b)(1) to a "matter involv[ing] a specific party or parties" because that

phrase takes lobbying matters and other matters of general policy out of the rule. The use of the word "party" was intended to limit the scope of Rule 1.7(b)(1) to those situations that involve particular clients participating in a pending or threatened adjudicative proceeding, a negotiation of a contract, or other discrete and isolatable transactions between identifiable and specific persons. [9] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn9) To the extent that the comment suggests otherwise, the language of the rule must control. As explained in Paragraph[6] of the Scope section of the Rules, "[t]he Comments are intended as guides to interpretation, but the text of each Rule is controlling."

Thus, whether the lawyer knows or has a way of knowing that other clients may have different views of the lobbying issue is irrelevant for purpose of Rule 1.7(b)(1) because Rule 1.7(b)(1) does not regulate lobbying matters or other matters of general policy.

b. The Legislative History of Rule 1.7(b)(1) Confirms That the Court of Appeals Adopted a Bright Line Test to Eliminate Substantial Uncertainties that Lawyer-Lobbyists Would Otherwise Face.

When the District of Columbia Bar recommended the initial adoption of Rule 1.7, it rejected the ABA's Model Rule 1.7. As explained by the Bar Committee's report:

> [T]he ABA draft... is so confusingly organized and ambiguously worded that it gives little guidance to lawyers trying to understand it or conform to it. Although the ABA drafters state in their notes that their draft is intended to codify standards that have evolved in application of the preexisting disciplinary rule and the "appearance of impropriety" test, those standards are not self-evident from a reading of the proposed language. Instead, members of the Bar would be forced to parse ambiguous phraseology and even perform research concerning case law and D.C. Bar Legal Ethics Committee interpretations before they could get a clear idea of what this basic rule means.

Proposed Rules of Professional Conduct and Related Comments, Showing the Language Proposed by the American Bar Association, Changes Recommended by the District of Columbia Bar Model Rules of Professional Conduct Committee, and Changes Recommended by the Board of Governors of the District of Columbia Bar at 67 (Nov. 19, 1986) [hereinafter the "*Jordan Report*"].

Both the Jordan Committee and its successor, the Peters Committee, devoted extensive resources to consideration of what the rules should be in the context of lobbying, where the potentially affected or interested players are not readily apparent at the outset, and where the active players and positions shift and change over time. It was at the Peters Committee's recommendation that, in November of 1996, the District of Columbia Court of Appeals adopted the current general definition of "matter," which includes "lobbying activity... except as expressly limited in a particular rule," and the current formulation of Rule 1.7(b)(1), whichapplies only to a "matter involv[ing] a specific party or parties."

The Peters Committee explained that it had "attempted to fashion in amended Rule 1.7 detailed, 'black letter' guidance to the Bar regarding conflicts of interest." *Peters Report* at 11. The Committee limited Rule 1.7(b)(1) to matters involving specific parties because "it is not practical – and may well harm the interests of a new client – for a lawyer asked to represent that client in lobbying activities to take affirmative steps to obtain disclosure from other clients asto whether they have (or will have) an adverse position in the matter." *Peters Report* at 18.

> Accordingly, the Committee has limited the obligations set out in Rule 1.7(b)(1) to situations involving "a specific party or parties." Because situations that may arise under Rule 1.7(b)(1) are numerous, the Committee has not attempted to define those

> matters that involve "a specific party or parties," but has left that definition to case-by-case development.

Id.

This bright line rule eliminates the need for lawyer-lobbyists to look to Rule 1.7(b)(1) for guidance on conflicts in lobbying matters. However, they must still consider potential conflicts under subsections (b)(2), (b)(3) and (b)(4). Such conflicts may exist when they know that another client strenuously objects to or will be seriously harmed by a lobbying result they are hired to pursue.

2. Rule 1.7(b)(2), (b)(3) and (b)(4) – Waivable Conflicts Rules that Do Apply to Lobbying Matters.

Rules 1.7(b)(2), (b)(3) and (b)(4) do apply to lobbying activities because, unlike Rule 1.7(b)(1), they contain no language that clearly limits their scope to adjudications and other discrete and isolatable transactions between identifiable persons. Rules 1.7(b)(2) and (b)(3) are mirror images of each other. Under the former, a lawyer may not represent a client with respect to a matter (including "lobbying activity" under Rule 1.0(h)) if "such representation will be or is likely to be adversely affected by representation of another client." Under the latter, the lawyer may not undertake the representation if "representation of another client will be or is likely to be adversely affected by such representation."

Rule 1.7(b)(4) looks beyond the potential effects of one client representation on another client representation. It asks if "the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interest."

Collectively, these three rules all apply to circumstances in which an objective observer would doubt the lawyer's incentive to be a zealous advocate. For that reason, they are often referred to as the "punch-pulling" conflicts rules because the lawyer might be tempted to "pull her punches" on behalf of one client so as not to harm the interests of another. D.C. Ethics Op.309 (2001). *Accord* D.C. Ethics Op. 317 n.6 (2002).[10] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn10)

The *Peters Report* specifically identified "punch-pulling" as a potential obstacle to a lobbying representation:

> [W]hile the Committee believed it appropriate to narrow Rule 1.7(b)(1), the Committee recommends no change to Rules 1.7(b)(2) through 1.7(b)(4). Rule 1.7(b)(1) implements a general duty of loyalty and, where it applies, prohibits representation whether or not that representation would in fact have any adverse impact on another client. The remainder of Rule 1.7(b), however, defines situations where the representation of a client would likely be compromised by representation of another client. If, for example, a lawyer knows that there is a riskthat he or she would "pull punches" for client Ain a lobbying matter to avoid angering large client B represented solely in a litigation matter, then representation of client A is not proper whether or not client B will appear in the lobbying matter.

Peters Report at 18.

The inquiry before the Committee does not supply enough information to determine whether a "punch-pulling" issue exists here. Certainly, the lawyer should consider discussing with her lobbying client (Client X) the fact that she knows her other client (Client Y) will be harmed by the tax credit to be sought in the lobbying. If the lawyer-lobbyist perceives a basis for a concern that her zealousness on Client X's behalf might be impaired by her knowledge of Client Y's position, Rule 1.7(c) requires her to satisfy herself that she can provide competent and diligent representation to X in these circumstances, and to obtain an informed consent from X, the client whose representation might be affected by Y's expected involvement. In some cases, Y's consent might also be required because of a potential adverse effect of the proposed lobbying

representation on the ongoing representation of Y.[11] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn11)

3. Imputation of Conflicts of Interest.

Under Rule 1.10, while lawyers are associated in a law firm, none of them may knowingly represent a client when any one of them practicing alone would be precluded from doing so by Rule 1.7. This rule imputing each lawyer's conflicts to all other lawyers in the firm applies to lobbying representations and lobbyists employed by a law firm. However, a conflict will not be imputed when "the prohibition of the individual lawyer's representation is based on an interest of the lawyer described in Rule 1.7(b)(4) and that interest does not present a significant risk of adversely affecting the representation of the client by the remaining lawyers in the firm." Rule 1.10 (a)(1).

II. Avoiding Application of the Conflict Provisions to Lobbying and Other "Law-Related Services"

Lawyers and law firms must take steps to assure that the nonlawyers associated with them abide by the Rules of Professional Conduct.[12] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn12) Moreover, lawyers themselves are governed by some of the Rules of Professional Conduct even when they act in a nonlawyer capacity.[13] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn13) Because clients who procure legal services are entitled to certain protections that do not typically apply to the provision of nonlegal services (such as confidentiality and avoidance of conflicts), the rules effectively require the lawyer to abide by all of the Rules of Professional Conduct, including the conflicts rules, when the client may reasonably believe that legal services are involved. Rule 5.7 addresses these issues for lawyer-lobbyists and their staff by setting forth a lawyer's "Responsibilities Regarding Law-Related Services."[14] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn14)

Despite the name, "law-related services" are not legal services. They are not legal services because they "are not prohibited as unauthorized practice of law when provided by a nonlawyer." Rule 5.7 (b). Such services are deemed to be "law-related" because they "might reasonably be performed in conjunction with and in substance are related to the provision of legal services." *Id*.

The comments to Rule 5.7 identify "legislative lobbying" as a "law-related service." Rule 5.7, Comment [9]. Indeed, the reference to "legislative lobbying" in the comments to Rule5.7 played a central role in the UPL Committee's conclusion that U.S. legislative lobbying does not involve the practice of law. *See* UPL Opinion at 3.[15] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn15)

When a lawyer or law firm provides both legal and nonlegal services, there is a risk that the client will be confused about the protections to which the client is entitled as part of the services. "The recipient of the law-related services may expect, for example, that the protection of client confidences, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provision of law-related services" when such is not the case. Rule 5.7, Comment [1].

To protect such expectations, Rule 5.7(a)(1) requires lawyers to abide by all of the Rules of Professional Conduct when the "law-related services" are provided "by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients." Rule 5.7(a)(2) requires application of all of the Rules of Professional Conduct if the services are provided "in other circumstances by an entity controlled by the lawyer individually or with others *if the lawyer fails to take reasonable measures to assure that [the recipient of the services] knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist*." (emphasis added).

"The burden is upon the lawyer to show that the lawyer has taken responsible measures under the circumstances to communicate the desired understanding." Rule 5.7, Comment [7]. "A sophisticated user of law-related services, such as a publicly held corporation, may require a lesser explanation than someone unaccustomed to making distinctions between legal services and law-related services, such as an individual...." *Id*.[16] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn16) When the lawyer has not severed the connection in the client's mind between the "legal" and "nonlegal" services, "*the lawyer must take special care to heed the proscriptions of the Rules addressing conflict of interest*...." *Id.*, Comment [10] (emphasis added).

One book describes Model Rule 5.7 (the text of which is identical to D.C. Rule 5.7) as a way of "opting out" of the Rules of Professional Conduct for lobbying matters.[17] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn17) It warns that, "[f]or the lawyer-lobbyist who practices in a traditional law firm setting and provides lobbying services to his clients in that setting, it seems clear that the Model Rules would apply to that lawyer's lobbying activities."[18] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn18) We agree that the burden falls on the lawyer-lobbyist to show that she has taken reasonable measures under the circumstances to communicate to the client that she is not acting as the client's lawyer.[19] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn19) "The lawyer must also take 'special care' to keep the provision of any legal services separate from the law-related services, in order to minimize the risk of confusing the client."[20] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftn20)

Conclusion

Most of the conflict rules apply to lawyer-lobbyists engaged in lobbying. Lawyer-lobbyists in the District of Columbia who hold themselves out as lawyers may not advance opposing positions in the same lobbying matter even with consents from all of their lobbying clients. Moreover, the lawyer-lobbyist must also ensure that she is not placing herself in a position where she might have to pull her punches on behalf of one client so as to protect the interests of another. Such conflicts can be waived with informed consent from the affected clients, provided that the lawyer reasonably believes that he or she can provide competent and diligent representation. Absent special circumstances, all of these restrictions also apply to other lobbyists in the same law firm, even if those other lobbyists are not themselves lawyers.

Lawyer-lobbyists are not, however, generally subject to Rule 1.7(b)(1) in the conduct of lobbying activities. This rule is confined to "matter[s] involv[ing] a specific party or parties," a phrase that excludes lobbying, rulemaking and other matters of general government policy. As a result, Rule 1.7(b)(1) does not prohibit a lawyer-lobbyist from advancing a position in a lobbying matter that may be opposed in that same lobbying matter by another client of the lawyer-lobbyist (or of the lawyer-lobbyist's law firm) where the other client is unrepresented in the lobbying matter or is represented by a different lobbyist who is not associated with the lawyer-lobbyist's firm.

Finally, Rule 5.7 provides guidance for lawyers and law firms who wish to establish a law-related lobbying practice that is not governed by the conflicts provisions of the Rules of Professional Conduct. To do so, however, the lobbying client must receive clear notice that the services are not legal services and that the usual protections accompanying a client-lawyer relationship do not apply.

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1. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref1) According to the UPL Committee,

[t]his Opinion uses the term "U.S. legislative lobbying" to refer to any activities to influence, through contacts with members of Congress and their staffs, the passage or defeat of any legislation by the

U.S. Congress, as well as other congressional actions such as ratification of treaties and confirmation of nominees. Such activities may include, but are not limited to: oral, written, and electronic communications with members of Congress, congressional committees, and congressional staff with regard to the formulation, modification, or adoption of federal legislation; preparation and planning activities, research, and other background work in support of such contacts; and development of legislative strategy and tactics. *The term does not necessarily include all activities that have a relationship with congressional actions. For example, advising a client about how legislative testimony might affect pending or prospective criminal or civil litigation before a court may constitute the practice of law*.

UPL Opinion at 1-2 (emphasis added). The UPL Opinion also "does not address lobbying of the executive branches of the U.S. or D.C. governments, including federal and D.C. departments and administrative agencies." *Id*. at 7 (noting that unauthorized practice of law questions respecting such representations are addressed in subsections (c)(2) and (c)(5) of Rule 49).

2. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref2) While the UPL Opinion does not address whether individuals "may use the District of Columbia as a base for lobbying legislative bodies other than the U.S. Congress," it notes that "some of the principles addressed in this Opinion may apply in that context." UPL Opinion at 8.

3. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref3) Holding out, for purposes of Rule 49, means:

to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia. Among the characterizations which give such an indication are "Esq.," "lawyer," "attorney at law," "counselor at law," "contract lawyer," "trial or legal advocate," legal representative," "legal advocate," and "judge."

Rule 49(b)(4).

4. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref4) The applicability of the attorney-client privilege is a question of law outside the scope of our jurisdiction. Lawyer-lobbyists should be aware, however, that there is case law to the effect that the attorney-client privilege does not apply to communications between a client and a lawyer who is acting solely or primarily as a lobbyist. *See, e.g., In re Grand Jury Subpoenas Dated March 9, 2001*, 179 F.Supp. 2d 270, 285 & 289-91 (S.D.N.Y. 2001) (noting, however, that "the inquiry is fact-specific"). The lawyer's ethical obligation to preserve client "confidences and secrets" is broader than the attorney-client privilege. Under Rule 1.6(b), lawyers must also protect unprivileged "secrets," which the rules define as "other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental to the client."

5. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref5) The D.C. Court of Appeals added this definition to the Rules in November 1996, after receiving and considering a number of recommendations from the Bar. *See Proposed Amendments to the District of Columbia Rules of Professional Conduct* (as adopted by the Board of Governors March 8, 1994) [hereinafter "*Peters Report*"]. As discussed in more detail below, one purpose of the recommended changes was to revise and clarify the rules on conflicts of interest in the lobbying context. *See id.* at 3-4 & 17-18.

6. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref6) William V. Luneburg & Thomas M. Susman, *The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers & Lobbyists* §27-3.6.2.1, at 501 (3d Ed. 2005) (providing the following example of a "nonconsentable" conflict in the lobbying context: "Handgun Control, Inc. calls to retain you to

lobby for an extension of the assault weapon ban; the NRA calls the next day to hire you to lobby against an extension.")

7. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref7) This final rule release replaces a similar rule which provided that a matter involving a specific party or specific parties "typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties. *Rulemaking, legislation, the formulation of general policy, standards or objectives, or other action of general application is not such a matter.* 5C.F.R. §2637.201(c)(1) (2007) (emphasis added). *See also Laker Airways Ltd. vs. Pan American WorldAirways*, 103 F.R.D. 22, 34 (D.D.C. 1984) ("In short, a government attorney may participate in legislative or other policy-making activity without precluding his subsequent representation of private parties affected by such rules or policies"). There is authority "that certain rulemakings, although rare, may be so focused on the rights of *specifically identified* parties as to fall within the ambit of section 207(a) even though most rulemaking proceedings are of general applicability beyond the scope of [that section]." *Federal Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. at 36,176 (citations omitted) (emphasis added). *But cf. id.* at 36,193 (to be codified at 5 C.F.R. §2641.201(h)(2), Example 5) (giving an example where even a rulemaking that has an immediate effect on only three or four companies nevertheless constitutes a rulemaking of general applicability). Private relief legislation may also involve specific parties. *See* Office of Government Ethics Advisory Opinions 83 x 7 and 06 x 9.

8. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref8) Comment [19] to Rule 1.7 provides as follows:

Lawyer's Duty to Make Inquiries to Determine Potential Conflicts

[19] The scope of and parties to a "matter" are typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the identity and the position of the parties exists. In Rule 1.7(b)(1), the phrase "matter involving a specific party or parties" refers to such situations. In other situations, however, it may not be clear to a lawyer whether the representation of one client is adverse to the interests of another client. For example, a lawyer may represent a client only with respect to one or a few of the client's areas of interest. Other lawyers, or non-lawyers (such as lobbyists), or employees of the client (such as government relations personnel) may be representing that client on many issues whose scope and content are unknown to the lawyer. Clients often have many representatives acting for them, including multiple law firms, nonlawyer lobbyists, and client employees. A lawyer retained for a limited purpose may not be aware of the full range of a client's other interests or positions on issues. Except in matters involving a specific party or parties, a lawyer is not required to inquire of a client concerning the full range of that client's interests in issues, unless it is clear to the lawyer that there is a potential for adversity between the interests of clients of the lawyer. Where lawyers are associated in a firm within the meaning of Rule 1.10(a), the rule stated in the preceding sentence must be applied to all lawyers and all clients in the firm. Unless a lawyer is aware that representing one client involves seeking a result to which another client is opposed, Rule 1.7 is not violated by a representation that eventuates in the lawyer's unwittingly taking a position for one client adverse to the interests of another client. The test to be applied here is one of reasonableness and may turn on whether the lawyer has an effective conflict checking system in place.

9. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref9) As expressed in the recent amendment of the federal regulations, "only those particular matters that involve a specific party or parties fall within the prohibition of section 207(a)(1). Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identified parties, such as a specific contract, grant, license, product approval application, enforcement action, administrative adjudication, or court case." *Federal Post-Employment Conflict of Interest Restrictions*, 73 Fed. Reg. at 36,193 (to be codified at 5 C.F.R. §2641.201(h)(1)).

10. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref10) Comment [7] to Rule 1.7 explains:

> The underlying premise is that disclosure and informed consent are required before assuming a representation if there is any reason to doubt the lawyer's ability to provide wholehearted and zealous representation of a client or if a client might reasonably consider the representation of its interests to be adversely affected by the lawyer's assumption of the other representation in question. Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests.

11. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref11) While the notion of "punch-pulling" captures most of the circumstances regulated by Rules 1.7(b)(2) through (4), there may be others as well. One of these is a situation involving an "issue" or "positional conflict," such that the lawyer's effectiveness in a matter being handled for one client would be adversely affected by the result being sought on behalf of another client as, "for example, when a decision favoring one client will create a precedent likely to seriously weaken the position being taken on behalf of the other client." Rule 1.7, Comment [13]; D.C. Ethics Op. 265 (1996). Nothing in the pending inquiry suggests that the proposed lobbying representation seeking a tax credit implicates any positional conflict issues.

12. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref12) *See* Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants); Rule 5.4(b) (requiring – as part of the District of Columbia's unique rule allowing nonlawyer partners in law firms – that the nonlawyers abide by the Rules of Professional Conduct).

13. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref13) For example, Rule 8.4(c) makes it professional misconduct to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Under that rule, "[a] lawyer is held to a high standard of honesty, no matter what role the lawyer is filling, acting as lawyer, testifying as a witness in a proceeding, handling fiduciary responsibilities, or conducting the private affairs of everyday life." *In re Jackson*, 650 A.2d 675, 677 (D.C. 1994).

14. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref14) Rule 5.7 was added to the District of Columbia's Rules of Professional Conduct in 2007.

15. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref15) We do not address whether and to what extent lobbying services other than "U.S. legislative lobbying"– as that phrase is used in the UPL Opinion – may qualify for treatment as a "law-related service" for purposes of Rule 5.7. Since the definition of "law-related service" requires a determination that the service is "not prohibited as the unauthorized practice of law when provided by a nonlawyer," an essential predicate issue is outside the scope of our jurisdiction. *See supra* notes 1 & 2.

16. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref16) *See also* Rule 5.7, Comment [8] ("Under some circumstances the legal and law-related services may be so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the rule cannot be met. In such a case a lawyer will be responsible for assuring that both the lawyer's conduct and, to the extent required by Rule 5.3, that of nonlawyer employees in the distinct entity that the lawyer controls complies in all respects with the Rules of Professional Conduct.").

17. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref17) Luneburg & Susman, *supra* note 6, §27-2.3.2, at 490. The cited edition of the book pre-dates the adoption in 2007 of Rule 5.7 by the District of Columbia, a later event that supersedes some of the analysis in the current edition of the book. *See id.* §27-2.3.3, at 491.

18. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref18) *Id.* at 490.

19. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref19) *Id*. at 491.

20. [Return to text] (/bar-resources/legal-ethics/opinions/opinion344.cfm#ftnref20) *Id*.

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