Speaking of Ethics

When Lawyers Lobby

In D.C. Bar Legal Ethics Opinion 344, the Legal Ethics Committee examines the specific question of whether D.C. Rule 1.7, which governs conflicts of interests between current clients of a lawyer or law firm, applies to lobbying matters. More generally, in light of the UPL Committee’s opinion and pursuant to D.C. Rule 5.7 (Responsibilities Regarding Law-Related Services), Opinion 344 provides guidance on when lawyers and their associates may appropriately remove lobbying activities from the conflicts provisions of the D.C. Rules.

As an initial matter, Opinion 344 underscores that the D.C. Rules regulate “lobbying activity” when undertaken by lawyers. Rule 1.0(h) defines matter to include “any … lobbying activity … except as expressly limited in a particular rule.” The opinion finds that when lawyers engage in lobbying activities, the absolute Rule 1.7(a) prohibition applies such that a lawyer or law firm cannot advance two conflicting positions of the same lobbying matter, even with the informed consent of all clients. However, the specific question before the Legal Ethics Committee was not whether the lawyer could advance opposite sides of the same lobbying matter, but, rather, whether a lawyer could advance a lobbying position of one client that might adversely affect the lawyer’s other client, whom the lawyer represents in a wholly separate matter.

The Legal Ethics Committee concludes that lobbying representations are not subject to Rule 1.7(b)(1) because such representations are not “matters involving a specific party or parties,”4 but they are subject to Rules 1.7(b)(2)–(4).5 Thus, in those lobbying representations where 1) the proposed representation is likely to be adversely affected by another representation; 2) another representation is likely to be adversely affected by the proposed representation; or 3) 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, the lawyer may not take on the lobbying representation unless A) the lawyer believes that the lawyer will be able to provide competent and diligent representation to each client; and B) the lawyer obtains the informed consent of all affected parties. See D.C. Rule 1.7(c)(1)–(2).

Finding that most rules governing conflicts of interest between current clients apply to lawyers when they take on lobbying representations, Opinion 344 then turns to the question of if, and when, a lawyer-lobbyist may properly remove a lobbying activity from these conflict provisions.

D.C. Rule 5.7(b) recognizes that not all services provided by lawyers are legal services, even if those services are often performed in conjunction with, or are in substance related to, the provision of legal services. Among those activities listed in Comment [9] to Rule 5.7 as an example of a “law-related service” is “legislative lobbying.” The rule provides that a lawyer is subject to the D.C. Rules of Professional Conduct with respect to the provision of law-related services if the lawyer provides those services “in circumstances that are not distinct” from the lawyer’s legal services. Thus, for the most part, a lawyer providing lobbying services among his or her other legal services would be subject to the D.C. Rules, including those governing conflicts of interests.

However, the lawyer can remove lobbying services from the conflicts rules provided that 1) the services are distinct from the lawyer’s provision of legal services; and 2) when the law-related services are provided by an entity controlled by the lawyer individually or with others, if the lawyer “takes reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client–lawyer relationship do not exist.”7

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