

LEGAL ETHICS OPINION 1819

CONFLICT OF INTEREST – LAWYER
WORKING AS LOBBYIST RATHER
THAN IN AN ATTORNEY CLIENT
RELATIONSHIP

You have presented a hypothetical situation in which a lawyer works for a lobbying firm of which he is a co-owner with several non-attorneys. The lawyer does not have a private law practice. The lobbying firm provides lobbying services at the Virginia General Assembly as well as public relations services. The firm has a contract with customer A to provide lobbying services, with the purpose to oppose the legislative goals of B. Customer A believes that B's legislative goals would allow B to compete unfairly against A.

The engagement letter from the firm to customer A states that the firm will provide governmental services. The letter is silent regarding legal services. The letter does not state that no legal services will be provided and does not state that no confidential attorney/client relationship will be formed. The firm's website states that the lawyer "is an attorney with many years of experience in both business and government" who has "dealt successfully with many legal, governmental and other crises." The website describes that the firm provides "creative solutions when drafting legislation, monitoring and testifying before committees and lobbying legislators and other governmental officials."

The firm and the lawyer actively provided services to customer A, including numerous meetings with A and with other lobbyists, consultants and attorneys for A. In those meetings, the lawyer and his firm were privy to A's long term goals and short and long term business plans.

Customer A knew that the lawyer was an attorney. The lawyer would frequently preface remarks to A with comments like, "As a lawyer, I think you should emphasize these issues." Customer A believed that the lawyer's skills were one of the elements of governmental services to be provided by the firm, with the lawyer applying his legal knowledge and training to the facts of the situation.

Customer A's engagement with the firm ended with the end of the 2005 General Assembly session. The firm has informed A that B has now engaged the firm to provide it with governmental and public relations services, including lobbying on the exact same issue as the work done for A. The firm has told A that Rule 1.9 ("Conflict of Interest: Former Client") does not apply to the lawyer or the firm. Customer A has expressed concern about the lawyer's use of information acquired from A.

In the context of this hypothetical scenario, you have inquired as follows:

1) Is lobbying or providing governmental relations services at the Virginia General Assembly a non-legal ancillary business such as mediation?

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2) Is the lawyer subject to the Rules of Professional Conduct, in circumstances where he and the firm did not make it clear that there was no attorney/client relationship to which the protections of the rules would apply?

3) If the lawyer is subject to the Rules of Professional Conduct, is the firm also subject to the Rules?

4) Can the firm or the lawyer now represent Customer B on the same or a substantially related matter in which B's interests are materially adverse to A's without A's consent?

Your initial question is whether the lobbying services provided by the firm are a non-legal ancillary business such as mediation. The phrase "non-legal ancillary business" is not a term of art from the Rules of Professional Conduct. However, this committee has discussed lawyers working in businesses ancillary to the practice of law in a number of opinions. Discussion of those opinions and the application of the ethics rules to lawyers with such businesses is discussed below in response to your other questions.

Your second question is whether the lawyer is subject to the Rules of Professional Conduct, where he did not make clear to his customer that no attorney/client relationship had been formed to which ethical protections would apply. In line with case law on the subject¹, the Committee has consistently opined that lawyers remain subject to the authority of the Rules of Professional Conduct, even while working in other fields. *See* 1764 (attorney fee sharing with finance company); 1754 (attorney selling life insurance products); 1658 (employment law firm/human resources consulting firm); 1647 (employee-owned title agency); 1634 (accounting firm); 1579 (serving as fiduciary such as guardian or executor); 1584 (partnership with non-lawyer); 1368 (mediation/arbitration services); 1442 (lender's agent); 1345 (court reporting); 1318 (consulting firm); 1311 (insurance products); 1254 (bail bonds); 1198 (court reporting); 1163 (accountant; tax preparation); 1131 (realty corporation); 1083 (non-legal services subsidiary); 1016 (billing services firm); 187 (title insurance). Accordingly, the Committee opines that the scope of the Rules of Professional Conduct similarly extends to a lawyer working as a lobbyist for a lobbying firm.²

¹*See, e.g., In re Galahasini*, 786 P.2d 971 (Ariz. 1990) (suspending lawyer who failed to supervise lay employees working on contract for debt collections agency that used his law letterhead and name on door, answered business phone as if it were his law office, and improperly solicited client's using his name); *In re Unnamed Attorney*, 645 A.2d 69 (N.H. 1994) (lawyer disciplinary agency had authority to conduct random audits of financial records of lawyer's title insurance company or which lawyer was a majority shareholder); *In re Leaf*, 476 N.W.2d 13 (Wis. 1991) (suspending lawyer for referring clients to "life-style management" business in which lawyer had an interest without disclosing that interest to clients, for misrepresenting employment status of non-lawyer employee of business and for assisting non-lawyer in unauthorized practice of law).

² Other states have also extended ethical responsibilities to lobbying work. *See, e.g.,* Maine Ethics Op. 158 (1997) ; Maryland Ethics Op. 95-25; Maryland Ethics Op. 93-19.

The Committee sees a need for clarification of this general proposition regarding the scope of the rules. While the rules do apply to this attorney's lobbying activities, the precise application will not necessarily be identical to that for the provision of legal services to a client. For example, the restriction on contact with a represented person created in Rule 4.2 applies only where "representing a client." In contrast, Rule 8.4's prohibition regarding certain criminal or deliberately wrongful acts could be violated without any client involved whatsoever. Thus, while an attorney's conduct is always subject to the authority of the Rules, the precise application will always depend on which rules are pertinent to the specific context in question.

The facts of the hypothetical scenario, for instance, give rise to a particular ethical issue: whether an attorney/client relationship was actually formed. This Committee has previously relied upon the following definition from the Unauthorized Practice Rules³:

Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply this possession and use of legal knowledge or skill.

Did this lawyer create an attorney/client relationship with Customer A? The facts suggest that the lawyer and A disagree on that point. The facts include a contract for lobbying services but also a website offering the expertise of a lawyer and customer advice expressly prefaced on that legal expertise. While neither the lawyer, nor the firm, may have intended to establish an attorney/client relationship, the Committee is sympathetic to A's impression to the contrary. When a lawyer establishes a relationship to provide other than legal services and the customer knows he is a lawyer, the lawyer must be cognizant of this opportunity for confusion. Unless the services clearly have no connection to legal training and expertise (e.g., a lawyer-owned restaurant), the lawyer should accept an affirmative duty to clarify the boundaries of the business relationship. The Committee suggests that such a duty is present in many nonlegal endeavors: for example, mediation, financial planning, and, as in the present hypothetical, lobbying services. This affirmative duty belongs on the part of the lawyer, rather than the customer, in that the lawyer is in the more informed position regarding the nature of his services and the details of the ethical rules.

Where a lawyer has failed to act on this duty and allowed for confusion regarding whether or not he and the customer are in an attorney/client relationship, the attorney may not be able to avoid the application of certain rules creating obligations and conflicts usually associated with attorney/client relationships. Specifically, a lawyer may find that for purposes of the protection of confidentiality under Rule 1.6 and for conflicts under Rules 1.7 and 1.9, a business customer may be deemed a legal client if the customer had a reasonable understanding in the situation that he was working with "his lawyer."

³ See Rules of Supreme Court of Virginia, Pt. 6, §I, Preamble.

Whether or not Customer A has that sort of reasonable understanding, despite the lawyer's assertion to the contrary, could only be determined based on more detailed facts than provided in the hypothetical. Nevertheless, the Committee reads those facts provided as definitely giving rise to the possibility. Critical factors for that determination would include whether the lawyer held himself out as an attorney, whether he offered attorney/client confidentiality, and whether he provided any legal advice.

Your third question asks: if the lawyer is subject to the Rules of Professional Conduct, do the rules apply to the lobbying the firm as well? In the discussion of Question Two, above, the Committee responded that the lawyer *is* subject to the Rules while working as a lobbyist. However, this does not mean that the lobbying firm is also governed by the Rules. The scope of the Rules of Professional Conduct is conduct of members of the Virginia State Bar. The Rules do *not* extend to entities, including this lobbying firm. However, the Unauthorized Practice Rules *do* apply to the lobbying firm; while outside the purview of this Committee, the Committee notes that a non-legal entity cannot properly provide legal services to the public, even through an attorney employee. *See* UPL Op. ## 177, 57. The Committee also cautions the lawyer that Rule 5.4 (“Professional Independence of a Lawyer”) precludes him from owning or working for an entity with non-lawyer owners if such entity provides legal services to the public. Under the limited facts provided in the hypothetical, the Committee has not concluded that legal services are being provided by the lobbying firm. Therefore, the Committee does not opine whether the lawyer, and this firm, crossed this impermissible line regarding the unauthorized practice of law. The Committee simply cautions that this attorney, in working for this lobbying firm, must be vigilant that he not assist his employer in improperly providing legal services to the customers. Were he to do so, he would not only be in violation of Rule 5.4 but also would be assisting the lobbying company in the unauthorized practice of law, a Class 1 misdemeanor pursuant to Virginia Code §54.1-3904.

Your final question is whether either the firm or the lawyer can now represent Customer B in the same or a substantially related matter to the work done for A, absent A's consent. As the hypothetical includes the statement that the lawyer has no private practice of law, the Committee assumes that your question regarding representing Customer B is intended for the lobbying services of the firm and not legal representation.⁴ As discussed with regard to Question 3, above, the Rules of Professional Conduct do not apply to the firm; therefore, this specific question regarding the firm's work for Customer B is outside the purview of this Committee.

⁴ If this attorney *did* have a private practice in addition to his lobbying employment, he would need to be cognizant of Rule 1.7 (a)(1), which creates a concurrent conflict of interest where “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to ... a third person.” If he has any contractual duties of loyalty or confidentiality to Customer A from the lobbying contract, that contractual duty could constitute “responsibilities to ... a third person” and trigger a potential conflict of interest were he to represent Customer B as a client of his law practice. The Committee notes that any such conflict under Rule 1.7 would be imputed, via Rule 1.10, to all members of the lawyers law firm.

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With respect to the lawyer, Rule 1.9, regarding conflicts involving former clients, does not prohibit the lawyer from providing lobbying services to Customer B so long as Customers A and B were solely lobbying customers and not legal clients, as discussed earlier in this opinion. The conflict that arises when a lawyer represents a client adverse to a former client in a substantially related matter is triggered when the lawyer provides *legal representation* to a new client in that matter. If the lawyer is not creating attorney/client relationships with these customers, Rule 1.9(a) is not triggered. However, if the lawyer has through representations made to these customers created a reasonable understanding that they are his legal clients, then he can only perform this new work for B if not in conflict with his former work for A, pursuant to Rule 1.9(a). Nevertheless, even if the lawyer's conduct in dealing with Customer A supported a reasonable belief held by Customer A that that an attorney-client relationship existed, a conflict under Rule 1.9 would not be imputed to the other employees of the lobbying firm since they are not lawyers and the lobbying firm is not a law firm. *See* Rule 1.10.

In sum, the ethical responsibilities flowing from this lawyer's work with the lobbying firm do derive from the Rules of Professional Conduct. The precise application of those provisions depends on the nature of the relationship between the lawyer and his customers and how it was presented to the customers. For a lawyer to avoid the confidentiality and conflict-avoidance duties of Rules 1.6, 1.7 and 1.9 with a business customer, he must ensure that the customer understands that he is not legally represented by the lawyer.

This opinion is advisory only, based on the facts you presented and not binding on any court or tribunal.