



STATE BAR OF NEVADA
STANDING COMMITTEE ON
ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion No. 52
Issued on August 18, 2014

BACKGROUND

The Committee has received a request from a Nevada lawyer concerning the application of the Nevada Rules of Professional Conduct ("NRPC") to a Nevada lawyer who provides lobbying services directly or indirectly.

QUESTIONS PRESENTED AND SHORT ANSWERS

1. **"Do the Nevada Rules of Professional Conduct 1.7 and 1.9 apply to a Nevada attorney retained to provide lobbying, but not legal, services?"** A lawyer hired to act as a lobbyist is likely subject to the NRPC. The fact that a lay person can perform those same services free from the strictures of the NRPC does not matter.

2. **"Do the rules apply to a non-attorney employed by a law firm or a subsidiary of that law firm?"** To the extent that the NRPC applies to a lawyer or law firm as discussed in question 1, those same rules would apply to a non-lawyer employee or to a subsidiary.

3. **"How do the rules apply, if at all, where a law firm retains a non-lawyer with an existing client to assist the law firm's lawyers and non-lawyers in providing lobbying efforts on behalf [of] a law firm client with a legislative objective adverse to the non-lawyer lobbyist's client?"** If the non-lawyer lobbyist is truly an independent contractor not otherwise owned or controlled by the law firm, it does not appear that the NRPC would apply.

4. **"Similarly, how do the rules apply, if at all, where Alpha, Inc., retains a law firm's lobbyists--lawyers and non-lawyers--to promote defeat of the widget tax abatement bill, then retains as well non-lawyer lobbyist Smith who already represents Omega, Inc., to promote passage of the bill?"** Assuming that the NRPC applies as described in question 1, this fact pattern does not appear to create a conflict of interest on the part of the law firm. Alpha, Inc., would have a conflict of interest but, on these facts, that conflict would not be imputed to the law firm.

5. **"Do the rules apply to an attorney retained by a lobbying firm with no attorneys where the attorney's client is the lobbying firm but not the client retained by the lobbying firm, even though the lobbying firm's objective, with the lobbying assistance of the lawyer,**

is to promote or oppose specific legislation on behalf of the lobbying firm's client?" The NRPC applies to the attorney as discussed in question 1.

AUTHORITIES

1. NRCP 5.2
2. NRCP 5.3
3. ABA Model Rule 5.7.
4. In re Discipline of Singer, 109 Nev. 1117, 865 P.2d 315 (1993)
5. The Restatement of The Law Governing Lawyers, comment (g) to Section 10
6. R.D. Rotunda and J.S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* §5.7-2(a) (West 2012-2013)
7. Maine Ethics Opinion 158 (April 1997)
8. Illinois Opinion 90-32, May 1991)
9. Illinois Opinion 98-03 (Jan. 1999)
10. Virginia Opinion 1819 (09/19/05)

DISCUSSION

Question 1. **"Do the Nevada Rules of Professional Conduct 1.7 and 1.9 apply to a Nevada attorney retained to provide lobbying, but not legal, services?"** A lawyer hired to act as a lobbyist is likely subject to the Nevada Rules of Professional Conduct. The fact that a lay person can perform those same services free from the strictures of the NRPC does not matter. The lawyer will be held to the higher standard anyway.

If a Nevada lawyer were hired by a client to perform strictly non-legal services, the Nevada Rules of Professional Conduct ("NRPC") would not have any application. But, when these ancillary services become more law-related, the NRPC become more pertinent. A hypothetical multi-talented lawyer hired to write a symphony is clearly not practicing law, whereas that same lawyer hired to write a contract most certainly is practicing law. Being hired to write and espouse new statutes is much closer to the latter hypothetical than the former. Research, drafting and interpreting legislation takes advantage of a lawyer's education and experience. The same is true of the give-and-take negotiations within the legislative halls.

Obviously, if a lawyer is hired to lobby in the capacity of a lawyer, then NRPC would be applicable in all respects. The question remaining is the impact of characterizing these services as something other than the practice of law. That characterization is normally termed ancillary or law-related services.

The issue of ancillary services is one that held the attention of the ABA for a number of years.¹ After several years of study and hotly contested debate, in 1994 the ABA adopted Model Rule 5.7, which currently provides:

¹ In 1987, Nevada implicitly countenanced law firm ancillary businesses in Opinion No. 6 of the State Bar of Nevada Standing Committee on Ethics and Professional Responsibility.

Responsibilities regarding Law-Related Services

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services, as defined in paragraph (b), if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) 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 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.

(b) The term 'law-related services' denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

Comment 9 to that Rule makes clear that "law-related services" includes legislative lobbying.

Thirty-four states, together with the District of Columbia and the Virgin Islands, adopted Model Rule 5.7. Among the 16 states which did not do so was Nevada. The Nevada Bar Committee tasked with evaluating the E2K Rule changes in 2003 recommended against adopting Model Rule 5.7. Reporter's comments on the recommendation stated:

In June 2003, the Committee unanimously voted AGAINST adopting this rule. The Committee unanimously agreed there is little problem in Nevada on this issue, and if there were, other rules apply. Thus, there is no compelling reason to adopt at this time.

The Nevada Supreme Court accepted the Committee's recommendation and Model Rule 5.7 was not adopted in Nevada. Nonetheless, other states that did not adopt Model Rule 5.7 cite it as instructive guidance. Virginia Opinion 1819 (09/19/05); Illinois Opinion 98-03 (Jan. 1999).

"Whether or not a jurisdiction adopts Rule 5.7, the lawyer is still governed by Rule 1.8(a), which already regulates business transactions with a client. In fact, one can think of Rule 5.7 as an elaboration of the general principles found in Rule 1.8(a)." R. D. Rotunda and J. S. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* § 5.7-2(a) (West 2012-2013). This is not inconsistent with the comments of the Nevada Reporter.

Illinois has not adopted Model Rule 5.7. The Illinois Bar Association Ethics Committee has issued opinions on the provision of law-related services such as insurance and investments (Illinois Opinion 90-32, May 1991) and matching patent clients with potential investors (Illinois

Opinion 98-03, January 1999). That Committee concluded under rules paralleling the NRPC that:

[A]lthough the Rules permit 'dual profession' lawyers to do business relating to their non-legal professions with legal clients, such lawyers must conduct any business transactions with all legal clients in full compliance with the Rules.

Virginia is another state that has not adopted Model Rule 5.7 but has rules that parallel NRPC. The Virginia Ethics Committee was confronted with a hypothetical question of a lawyer-lobbyist working for a lobbying firm co-owned by the lawyer and several non-lawyers. The lawyer would not otherwise have a private law practice. Questions presented included whether the lawyer-lobbyist was governed by the Rules of Professional Conduct and, if so, whether the lobbying firm was governed by those same rules.

In line with case law on the subject, 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.

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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.

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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.

Legal Ethics Opinion 1819 (Va. 09/19/05).

The Maine Ethics Commission addressed some of these issues in Opinion 158 (April 1997). The fact pattern presented concerned a lawyer-lobbyist who wanted to form a lobbying firm with a lay person. The lawyer did not intend to otherwise practice law.

[T]he practice of law consists of the provision of services that lawyers typically provide, notwithstanding that lay persons may also lawfully provide the same services. This view has been generally accepted in the context of considering whether lay-lawyer partnerships violate the prohibition of codes of professional responsibility, *ABA Formal Opinion #297*.

In the field of legislative lobbying, and the somewhat broader category of governmental relations services, both lawyers and non-lawyers provide very similar services. These may include the drafting and interpretation of laws, and representation before government agencies. It is reasonable to assume that the person selecting as a lobbyist a lawyer rather than a lay person does so in anticipation of a higher degree of legal skill, in the expectation of adherence to more stringent standards of professional conduct, or under the assumption that the relationship between lawyer-lobbyist and client will give rise to a confidential relationship.

The Restatement of The Law Governing Lawyers does not squarely address Model Rule 5.7. Comment (g) to Section 10 of the Restatement addresses lawyer involvement in ancillary business activities and concludes that: "A lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions, including those of the law codes."

A lawyer's provision of services to a client through an ancillary business may in some circumstances constitute the rendition of legal services under an applicable lawyer code. As a consequence, the possibly more stringent requirements of the code may control the provision of the ancillary services, such as with respect to the reasonableness of fee charges (§ 34) or confidentiality obligations (§ 60 and following). When those services are distinct and the client understands the significance of the distinction, the ancillary service should not be considered as the rendition of legal services. When those conditions are not met, the lawyer is subject to the lawyer code with respect to all services provided. Whether the services are distinct depends on the client's reasonably apparent understanding concerning such considerations as the nature of the respective ancillary business and legal services,

This strongly suggests that a lawyer seeking to exempt ancillary services from the NRPC must have the informed, preferably written, consent of the client specifically acknowledging, among other things, that: the lawyer is not acting as a lawyer; the services rendered will not be measured against the standard of care expected of a lawyer; the NRPC, including its provisions

for confidentiality, conflicts, reasonableness of fees, etc., does not apply; there is no attorney-client privilege applicable; and, there is no legal malpractice insurance coverage for the services. All of this has to be done within the overlay of Rule 1.8. *See also, In re Discipline of Singer*, 109 Nev. 1117, 865 P.2d 315 (1993)

Question 2. **"Do the rules apply to a non-attorney employed by a law firm or a subsidiary of that law firm?"** To the extent that the NRPC applies to a lawyer or law firm as discussed in Section 1, those same rules would apply to a non-lawyer employee or to a subsidiary. *See* NRPC 5.2 and 5.3.

Question 3. **"How do the rules apply, if at all, where a law firm retains a non-lawyer with an existing client to assist the law firm's lawyers and non-lawyers in providing lobbying efforts on behalf [of] a law firm client with a legislative objective adverse to the non-lawyer lobbyist's client?"** If the non-lawyer lobbyist is truly an independent contractor not otherwise owned or controlled by the law firm, it does not appear that the NRPC would apply. However, a prudent practitioner would want the law firm client's informed consent to this arrangement.

Question 4. **"Similarly, how do the rules apply, if at all, where Alpha, Inc., retains a law firm's lobbyists--lawyers and non-lawyers--to promote defeat of the widget tax abatement bill, then retains as well non-lawyer lobbyist Smith who already represents Omega, Inc., to promote passage of the bill?"** Assuming that the NRPC applies as described in question 1, this fact pattern does not appear to create a conflict of interest on the part of the law firm. Alpha, Inc. would have a conflict of interest but, on these facts, that conflict would not be imputed to the law firm.

Question 5. **"Do the rules apply to an attorney retained by a lobbying firm with no attorneys where the attorney's client is the lobbying firm but not the client retained by the lobbying firm, even though the lobbying firm's objective, with the lobbying assistance of the lawyer, is to promote or oppose specific legislation on behalf of the lobbying firm's client?"** The NRPC applies to the attorney as discussed in Section 1. Whether the client is the lobbying firm or the entity which hired the lobbying firm does not alter the analysis of the application of NRPC as discussed in question 1.

CONCLUSION

Legislative lobbying is a sufficiently law-related service that the Rules of Professional Conduct govern the lawyer's services. This is so even though a lay person performing exactly the same services is free from the restrictions imposed upon a lawyer-lobbyist by the Rules.

This opinion is issued by the Standing Committee on Ethics and Professional Responsibility of the State Bar of Nevada pursuant to S.C.R. 225. It is advisory only. It is not binding upon the courts, the State Bar of Nevada, its Board of Directors, any persons or tribunal charged with regulatory responsibilities or any member of the State Bar.