Legal Times WEEK OF MARCH 23, 2009 • VOL. XXXII, NO. 12

Why Lobbying Isn't Just Another Practice

Ethics decision should push law firms to focus more on avoiding conflicts of interest in lobbying work.

By Arthur D. Burger

Many Washington lobbyists are lawyers, and many are not. But until recently, lobbyists who are lawyers, and nonlawyer lobbyists employed by law firms, have not had a clear answer to whether the D.C. Rules of Professional Conduct apply to their work.

They had been left to wonder: "If one doesn't need to be a lawyer in order to be a lobbyist, can lobbying constitute the 'practice of law'? And if not, apart from such basic obligations as complying with lobbying laws and avoiding deceptive conduct, do legal ethics rules have any bearing on what they do?"

Notwithstanding the vital role of our capital as the nation's central locus for lobbying activity, these basic questions festered for decades. Now, however, some guidance, or at least authoritative opinions, exist from two sources, and there are some clear and specific things that law firms need to do to ensure that they don't trip up.

First, the D.C. Court of Appeals Committee on the Unauthorized Practice of Law (made up of attorneys, not judges) issued Opinion No. 19-07 in December 2007, addressing whether, and if so when, lobbying, in the context of legislative lobbying in Congress, constitutes the practice of law.

Second, and partly as a consequence of the UPL opinion, in July 2008, the D.C. Bar Legal Ethics Committee wrote a lengthy opinion, D.C. Opinion No. 344, clarifying the unique application of conflict-of-interest rules to lobbying matters handled by lawyers and law firms. (Full disclosure: I am a member of that committee but do not speak for it here.)

Lobbying, Not Law

The UPL committee concluded that nonlawyers may engage in legislative lobbying in Washington, D.C., without violating the prohibition against practicing law without a license. The committee wrote: "In the Committee's opinion, U.S. legislative lobbying does not constitute the practice of law," reasoning that the client does not have a reasonable expectation that the lobbyist will provide legal advice.

So nonlawyer lobbyists, who are not associated with a law firm and who do not in some fashion hold themselves out as lawyers, are not governed by the legal ethics rules, though as with all lobbyists, they must of course comply with the registration, disclosure, and other requirements established by Congress. Thus, pure lobbying firms, which don't create a false impression that they are practicing law, are unaffected by legal ethics rules.

The UPL opinion also addressed nonlawyer lobbyists who work in law firms and whether their presence in such firms may create a false impression on clients that they are lawyers. The committee suggested use of such titles as "government affairs specialist," "political consultant," or "legislative consultant," to negate that impression.

The opinion also states that the nonlawyer lobbyists should be listed separately from the lawyers on firm Web sites. For firms whose Web sites permit searches of firm personnel only by names, the requirement to list nonlawyer professionals separately does not have a practical application because there are no real lists. Such distinct listings would apply only to postings such as in Martindale-Hubbell, in which various categories of persons may be presented. For firms whose Web sites permit searches by categories of professionals, the use of appropriate titles for nonlawyer professionals will lead to searches that distinguish lawyers from nonlawyers from the outset.

Regardless, the opinion reminds all firms to review their Web pages to ensure that they avoid terms such as "counsel" or "legal advice" in reference to lobbyists who are not lawyers.

But the UPL committee declined to address whether D.C. lawyers who lobby "may be subject to the professional obligations of lawyers." In other words, when a lawyer lobbies for a client, is it treated as a legal representation with all of the mandates of a lawyer-client relationship?

This provided an impetus for the ethics committee to cover that issue (answer: "yes"). The committee also clarified the manner in which D.C.'s ethics rules regarding conflicts of interest apply to lobbying matters, which is quite distinct from how they apply to other legal cases.

But Lawyers Who Lobby

As to the threshold question of whether lawyers who lobby are bound by the ethic rules, the ethics committee stated that an affirmative answer is inescapable in view of the definition of a "matter" in the D.C. rules, which includes "lobbying activity" among the examples of cases falling within the definition.

The ethics committee went on to clarify the meaning of an obscure but important phrase in the District's Rule 1.7, governing conflicts of interest. That phrase, "a specific party or parties," was inserted in 1991 to address a unique aspect of lobbying matters. Unlike conventional cases between adverse parties, in conducting lobbying, the client is seeking to change a provision of law of general applicability. In a very real sense, therefore, there is no adverse party.

As a practical matter, therefore, the D.C. rules recognize that in taking on a new lobbying matter, conventional procedures for determining the existence of potential conflicts of interest may be inadequate. In a conventional case, prospective client "Smith" wants to sue "Jones." The firm will run the name Jones through its database, in search of former and current clients, to see if Jones is among them.

Whereas, if a new lobbying matter is presented to a firm, let's say to increase tariffs on imported sugar, there is no adverse party in the traditional sense, and therefore no obvious names to check in the firm's database.

The ethics committee's opinion clarified that as a result of that clause, the automatic conflicts that arise solely because an adverse party is a firm client do not apply to lobbying matters. Eliminating the application of such automatic conflicts provides some flexibility to firms in assessing potential conflicts.

Pulling Punches

But by no means do lobbying matters get a free ride when it comes to conflicts. The portions of the conflicts rules geared to so-called "punch-pulling" situations fully apply to lobbying matters. Accordingly, if a particular lobbying matter will lead to a harmful impact on another firm client, such that the lawyers handling the lobbying matter could feel pressure to "soften the blow" in some fashion, this could create a conflict of interest, requiring consent from the affected clients.

Moreover, since the clients for whom such harmful impact may fall are more difficult to identify than directly opposing parties, it is prudent that a firm's screening procedures account for these difficulties. As part of the conflicts screening process for a prospective lobbying matter, the firm should provide a sufficient description of the prospective client's lobbying goal so that the firm's partners, particularly practice group chairs, can review these descriptions and spot whether other firm clients would find that goal antithetical to their economic or competitive interests. In that event, the firm can make an assessment whether such concerns will cause pressure for punch-pulling. This can also assist the firm in spotting "business conflicts" that do not rise to the level of ethical conflicts, so that any potentially affected clients can be identified.

In short, while the conflict rules for lobbying matters provide a degree of forbearance with respect to automatic conflicts, to diligently identify punch-pulling conflicts and to otherwise avoid a lobbying matter from angering other clients down the road, law firms should ensure that they use a procedure which enables them to spot other firm clients that may potentially be impacted by the new matter, including an expectation that the firm's partners will scrutinize the descriptions of such undertakings and not simply rely on the firm's database to catch potential problems.

A firm's database alone cannot be relied upon alone to steer clear of such potential conflicts.

Arthur D. Burger is a director at D.C.'s Jackson & Campbell and is chairman of the firm's professional responsibility practice group. He represents law firms and lawyers in matters related to professional ethics.