The Ethics of Lobbying Under the District of Columbia Rules of Professional Conduct

Michael S. Frisch
Georgetown University Law Center, frischm@law.georgetown.edu


This paper can be downloaded free of charge from:
https://scholarship.law.georgetown.edu/facpub/1295

29 Law. Manual on Prof. Conduct (BNA), at 1-3 (Oct. 23, 2013)
Conflicts of Interest

The Ethics of Lobbying Under the District of Columbia Rules of Professional Conduct

BY MICHAEL S. FRISCH, THOMAS B. MASON & ALBERT W. TURNBULL

INTRODUCTION

The District of Columbia is the epicenter of lobbying in the United States. With the presence of the Congress, the Executive Branch and its various Departments and independent agencies, few industries, trade associations or large businesses lack a Washington-based government relations arm. Law firms and lawyers fill in the gaps for those entities that lack a Washington presence or supplement in-house staffing with additional expertise and contacts.

Under these circumstances, it should come as no surprise that the bar authorities in the District of Columbia have examined the issue of lawyers and lobbying and implemented rules that differ from the ABA Model Rules and are unique, to our knowledge, in the United States.

Like other jurisdictions, various Committees of the Bar and the Court have issued opinions that have concluded that lobbying is not the practice of law and can be done outside of the law firms. Hence the rise of the “K Street” lobbying shops that can be and frequently are composed of and owned and managed by nonlawyers. Unlike other jurisdictions, however, the D.C. Bar has concluded that the basic rule for current client conflicts — that a lawyer cannot be directly adverse to a current client — does not apply in the lobbying context.

Professor Michael S. Frisch is Ethics Counsel to the Georgetown University Law Center.

Thomas B. Mason, chair of Legal Profession and Ethics Practice at Zuckerman Spaeder LLP, Washington, D.C., advises and represents attorneys and law firms on a variety of malpractice and ethics matters.

Albert W. Turnbull of Hogan Lovells US LLP practices in the area of legal ethics and professional responsibility, and is co-chair of his firm’s Legal Ethics Committee.
DISCUSSION

Lobbying and the Practice of Law

In 2007, the District of Columbia Court of Appeals’ Committee on the Unauthorized Practice of Law issued an opinion on whether legislative lobbying constituted the practice of law in the District of Columbia. In Opinion 19-07, the Committee defined legislative lobbying as follows: “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.” Opinion 19-07 at 1.

Such lobbying could be conducted in person, in writing or through electronic communications and directed at members themselves, congressional staff or committees, and includes preparation and planning for such contacts and research and strategy development. Id. at 1-2. When Congress acts in an adjudicative capacity, hearing evidence and rendering a judgment, such matters may involve the practice of law for those lawyers appearing in such proceedings. Id. at 7.

The Committee relied in part on District of Columbia Rule 5.7, Law Related Services, which gives “legislative lobbying” as an example of “law related services.” See Comment [9] to D.C. Rule 5.7. The net result is that nonlawyers can lobby the Congress and conduct all of the activities attendant to such lobbying.

Similarly, lawyers admitted in other jurisdictions but not in the District can also engage in such lobbying without seeking admission to the District of Columbia Bar. Opinion 19-07 at 4. Such lawyers can do so even if they are based in the District of Columbia, provided that they make clear with suitable disclaimers that they are not authorized to engage in the practice of law and that their practice is limited to legislative lobbying. Id.

Nomenclature. The Committee cautioned that law firms employing nonlawyer lobbyists should be clear with their clients that such lobbyists are not attorneys and could not provide legal advice. Nonlawyer lobbyists employed by law firms should also avoid the use of titles normally associated with lawyers — e.g., “Esq.,” “Partner” or “Associate” — and use titles such as “Government Affairs Specialist,” “Legislative Consultant” or “Political Consultant.” Id. at 5.

The Committee stressed that its opinion applied only to those individuals based in the District of Columbia. “Ordinarily, individuals whose principal office is outside of the District of Columbia and who travel here occasionally to lobby the U.S. Congress are not engaged in an activity ‘in’ the District of Columbia . . . even if that activity otherwise constitutes the practice of law.” Id. at 6.

For those individuals based in the District of Columbia, however, they must be enrolled members of the D.C. Bar if any portion, no matter how small, of their activities constitutes the practice of law.

The Committee’s 2007 Opinion left open the issue of whether lobbying before the Executive Branch constitutes the practice of law.

That open question was addressed in a letter opinion issued by the Committee in 2009. Simply stated, the letter concluded that if conducted before the Executive Branch, activities designed to influence policy, legislation, regulations or the like did not constitute the practice of law.

The letter noted, however, that the Executive Branch acted frequently in an adjudicative capacity or otherwise in a nonlegislative function “such as the investigation of compliance with law, the enforcement of alleged violations of law, the issuance of licenses and the adjudication of private and public rights and obligations.” Under such circumstances, the Committee expressed “no opinion” on whether such activities constituted the practice of law. Letter at 1-2.

Conflicts in Lobbying Engagements

The District of Columbia conflicts rules for current clients differ from the ABA Model Rules and those jurisdictions which have adopted the Model Rules, either in whole or in large part.

The ABA has a two-part formulation for conflicts involving current clients, prohibiting a lawyer from being “directly adverse” to a current client and likewise prohibiting scenarios where there is a “significant risk” that the lawyer’s representation of a client will be “materially limited” by the lawyer’s own interests or obligations to a third party. See ABA Model Rule 1.7(a)(1) & (2).

Five Scenarios. The District of Columbia Rule takes the two-part ABA formulation and expands it to address five distinct scenarios:

1. unwaivable conflicts where a lawyer is on adverse sides of the same matter on behalf of different clients (D.C. Rule 1.7(a));
2. conflicts where a lawyer is adverse to a current client on an unrelated matter (D.C. Rule 1.7(b)(1));
3. conflicts that arise because the lawyer’s representation of a client in a new matter is likely to be adversely affected by the lawyer’s representation of an existing client (D.C. Rule 1.7(b)(2));
4. the converse: an existing representation is adversely affected by a new representation undertaken by the lawyer (D.C. Rule 1.7(b)(3)); and
5. the lawyer’s representation is reasonably likely to be affected by the lawyer’s own interests or the interests of others (D.C. Rule 1.7(b)(4)).
A 2008 D.C. Bar ethics opinion highlighted the effect of a 1996 conflicts rule change on lawyers’ lobbying activities.

As indicated above, the first scenario presents an unwaivable conflict; the remaining scenarios can be waived, provided the requisites for a valid waiver are met. D.C. Rule 1.7(c).

In the lobbying context, the D.C. Bar made a subtle change to the second scenario — that which prohibited a lawyer from being adverse to a client on an unrelated matter — in 1996 to require that the conflict arise in the context of a “matter involving a specific party or parties.” The intent of the drafters of this change was to exempt lobbying engagements from this particular type of conflict.


Opinion 344 concluded that the phrase “matter involving a specific party or parties” “is a term of art which . . . has the effect of removing lobbying representations from the operation of [D.C. Rule] 1.7(b)(1).” Opinion at 5.

The Opinion went beyond the issue of whether lobbying necessarily constitutes the practice of law and addressed situations where lobbying services were being provided by a lawyer as part of the rendering of legal services. In other words, Opinion 344 addressed the impact of the conflicts rules on those lobbying engagements conducted by lawyers that constituted the practice of law in the District of Columbia.

The Opinion concluded that a lawyer may lobby on particular issues and otherwise be governed by the Rules of Professional Conduct, even if the lawyer knows that another client is lobbying for the opposite result, albeit through other counsel, nonlawyer lobbyists or in-house personnel. A lawyer can lobby on behalf a client for a tax break even if the lawyer knows that another client is lobbying against that position.

Opinion 344 limited the lobbying exception to the D.C. conflict rules to D.C. Rule 1.7(b)(1). The same lawyer or law firm still cannot lobby on adverse sides of an issue on behalf of different clients, a situation addressed and prohibited by D.C. Rule 1.7(a)(1).

Similarly, if a lobbying engagement would be adversely affected by another representation by the lawyer or the lawyer’s law firm, such a scenario remains a conflict, as does the converse. D.C. Rule 1.7(b)(2) & (3). Finally, “punch-pulling” conflicts prohibited by D.C. Rule 1.7(b)(4) also remain prohibited in lobbying engagements.

In sum, Opinion 344 crafts a narrow but significant exception to the D.C. Rules that apply to current clients and allows a lawyer to be adverse to other clients in lobbying engagements as normally prohibited by D.C. Rule 1.7(b)(1), provided that none of the other provisions of D.C. Rule 1.7 are violated.

Application of the D.C. Lobbying Conflict Rule to Lawyers Not Admitted in D.C.

For nonlitigation matters, the ABA Model Rules provide that the rules of conduct to be applied shall be the rules in which the predominant effect of the lawyer’s conduct occurred.

One could well argue that lobbying activities may have their “predominant effect” in the District of Columbia, the situs where the lobbying occurred and the policy, law or regulation would be passed or otherwise promulgated.

The ABA Model Rules further provide, in situations where it is unclear where the predominant effect of the lawyer’s conduct has occurred or will occur, that the lawyer shall not be subject to discipline “[s]o long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur.” Comment [5] to ABA Model Rule 8.5.

For jurisdictions that follow the Model Rule choice of law approach, non-D.C. based lawyers may well be able to take advantage of the more permissive D.C. conflict rules for lobbying for their lobbying work before the federal government in the District of Columbia.

