

# **ADVISORY ETHICS OPINION 2002-03**

## **SYNOPSIS:**

One law firm attorney may engage in lobbying activities on specific and particular issues before the state legislature on behalf of the firm's clients while a second attorney in the same firm serves as an elected member of the legislature if the lawyer-legislator does not participate in any aspect of legislation as to which the lawyer-lobbyist is representing the interests of the firm's clients.

## **FACTS:**

A law firm maintains a government relations practice that includes representation of clients on legislative matters by a firm associate who is a registered lobbyist. The lobbyist has a narrow area of legislative interest pursued on behalf of client's, and the firm does not engage, generally, in broad based lobbying on multiple and diverse issues. A director and shareholder of the firm has been elected to the Vermont Legislature. The firm and the lawyer-legislator note that the legislator will not participate in reviewing or voting on legislation as to which the firm is lobbying on behalf of a firm client. The firm asks whether it is ethically permissible for it to continue to represent clients in matters before the Vermont General Assembly while one of its directors and shareholders is an elected member of that body.

## **ANALYSIS:**

The answer to the inquiry raised by requesting firm does not lie wholly within the Rules. As more fully described below, our analysis is governed in part by provisions of the Rules of Professional Conduct but in part as well by the Rules of the House of Representatives which govern conflicts of interest involving House Members.<sup>1</sup>

The issue posed by the requesting firm is whether the legislator and lobbyist hats worn by the firm simultaneously (through two firm attorneys) present a conflict cognizable under the Rules of Professional Conduct, and if so, whether the firm attorneys can continue in their respective roles without violating the Rules. If the Rules would be violated, the firm asks what precautionary measures, if any, would be adequate to avoid a violation of the Rules. For the reasons set forth below and with the cautions and limitations noted below, we conclude that the Rules do not prohibit one firm attorney from lobbying the legislature while a second firm attorney who is also a director and shareholder of the firm serves as an elected legislator, as long as the legislator-attorney does not participate in the review of or vote on any legislation as to which the firm lawyer-lobbyist has lobbied on behalf of a firm client.

Rule 1.7 states the general conflict of interest prohibition of the Rules. That Rule states in pertinent part as follows:

### **Rule 1.7. CONFLICT OF INTEREST: GENERAL RULE**

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

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<sup>1</sup> Whether an attorney's violation of the House Rules would constitute conduct prejudicial to the administration of justice in violation of Rule 8.4 (d) is not before us because the inquiring firm has advised us that the lawyer-legislator will not participate in legislation on which the lawyer-lobbyist is representing a firm client.

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
  - (2) each client consents after consultation.
- (b) A lawyer shall not represent a client if the representation of that client may be *materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests*, unless:
- (1) the lawyer reasonably believes the representation will not be adversely affected; and
  - (2) the client consents after consultation. ...(emphasis added)

Rule 1.7 (a) addresses situations where an attorney's representation of a client will be in conflict with the attorney's duty to a second client. That situation is not present here. The lawyer in the legislature is not representing clients in connection with the lawyer's work as a legislator. Thus, there is no conflict presented under Rule 1.7 (a).

Rule 1.7 (b) contains a broader proscription. It prohibits the representation of a client if the representation may be materially limited by the lawyer's responsibilities ... to a third party, or by the lawyer's own interests. Here, the lawyer-legislator has responsibilities to the public under the legislator's oath of office<sup>2</sup>; further, the lawyer-legislator's own interests would be implicated by promoting the interests of firm clients and by the lawyer-legislator's compensation from the firm, which may be derived in part from fees generated by the lawyer-lobbyist. Thus, Rule 1.7 (b) has applicability to our analysis. The Rule applies to both lawyers as the conduct and duties of loyalty of each are imputed to the other under Rule 1.10<sup>3</sup>.

In instances when the lawyer-lobbyist takes a position on legislation which the lawyer-legislator does not support, Rule 1.7 (b) requires that the lawyer-legislator not work at cross-purposes to the interests of the firm client. Clearly, if a bill before the legislature was directly opposed to the interests of a firm client and if the lawyer-lobbyist was representing the client with respect to the legislation, the lawyer-legislator would be in violation of Rule 1.7(b) if the legislator worked against the firm client's interests. Such a circumstance would violate the Rule since working actively against a client's interests while at the same time representing the client with respect to the same issue would qualify as "materially limit[ing]" the lawyer's representation of the client, even if the representation by the lawyer-lobbyist were fully vigorous. The conflict between the roles of the two attorneys would be a materially limiting circumstance and not one capable of being waived or consented to by the client.

On the other hand, if the lawyer-legislator's position on the legislation were harmonious with the position of the firm client, a closer question is presented under Rule 1.7 (b) because the lawyer-legislator and the lawyer-lobbyist would be working for the same objective. There would not necessarily be a conflict between the interests of the client and the objectives of the legislator; however, even legislation generally favorable to a client's position may contain provisions deemed objectionable by the client or perhaps less favorable than could be achieved. Moreover, the lawyer-legislator's responsibilities to constituents or to the public may influence the legislator in a direction at odds with the interests of the client and may risk compromising the strict fulfillment of the client's desires with respect to the legislation, and risk violating the prohibitions of Rule 1.7(b). A potential for conflict, thus remains, even where the interests of the lawyer-legislator and the client are generally aligned on particular legislation. In this situation, client consent after consultation would ordinarily be permissible under Rule 1.7(b)(2) if

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<sup>2</sup> The Oath of office for each Representative is set forth at Chapter II, section 16 of the Vermont Constitution and provides in pertinent part that each member shall "... in all things, conduct yourself as a faithful, honest Representative and guardian of the people, according to your best judgment and ability...."

<sup>3</sup> Rule 1.10 imputes the knowledge and obligations of one firm attorney to all other attorneys in the firm. Thus, the lawyer-lobbyist can not engage in conduct that would be prohibited to the lawyer-legislator and vice versa.

no other constraints apply; but, as discussed below, House Rule 75 appears to bar the lawyer-legislator's participation under such circumstances. House Rule 75 states the following:

**House Rule 75:**

Members shall not be permitted to vote upon any question in which they are immediately or directly interested.

This Rule raises the question whether the firm director legislator may receive compensation from the firm if the basis of the compensation includes the fee earned by the lawyer-lobbyist. Benefitting from fees earned by the firm through the lawyer-lobbyist would place the legislator in violation of House Rule 75 if the lawyer-legislator participated in legislation as to which the lobbyist represented a firm client. The House Rule prohibits a legislator from voting on a matter in which the legislator has a direct pecuniary interest. Voting on legislation favored by a client may not give an attorney a direct pecuniary interest in the legislation, but if the firm earns a fee from the work of the firm lobbyist, there would be a direct pecuniary benefit to the legislator who is a director and shareholder in the firm. Thus, the lawyer-legislator would violate House Rule 75 if the lawyer participated in legislation as to which a client paid the firm for lobbying activities. Such conduct would also risk violating the Representative's oath of office since acting on legislation which produces a fee for the legislator's firm would risk compromising the implied requirement of the oath that all House members exercise wholly independent judgment with respect to their legislative activities.

The discussion of the House Rules here is academic because the firm has advised the committee that the lawyer-legislator will not be involved in any way in legislation as to which the firm is lobbying the legislature. The lawyer-legislator will not act on legislation which is generating fees for the firm. The lawyer-legislator may, therefore, benefit from the fees earned by the lobbyist without implicating House Rule 75 or the Representative's oath of office.

Rule 1.11 also appears to have applicability. The Rule states:

**Rule 1.11. SUCCESSIVE GOVERNMENT AND PRIVATE EMPLOYMENT**

- (a) Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation. No lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
  - (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and
  - (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
- (b) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom.
- (c) Except as law may otherwise expressly permit, a lawyer serving as a public officer or employee shall not:

- (1) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter; or
  - (2) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).
- (d) As used in this rule, the term "**matter**" includes:
- (1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and
  - (2) **any other matter covered by the conflict of interest rules of the appropriate government agency.**
- (e) As used in this rule, the term "confidential government information" means information which has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and which is not otherwise available to the public.

The second definition of "matter" under subsection (d)(2) extends to "any other matter covered by the conflict of interest rules of the appropriate government agency." Applied to the facts here, this definition appears to reinforce the prohibition against the lawyer-legislator acting on legislation on which the lawyer-lobbyist is lobbying. Even though Rule 1.11 is a rule that addresses successive government and private employment rather than contemporaneous government and private employment, the principles set forth for avoiding conflict appear applicable. The prohibition of Rule 1.11 will be avoided here because the lawyer-legislator will not participate in any "matter" as to which the lawyer-lobbyist is representing a law firm client.

The lawyer-lobbyist must be careful not to act in such a way as to trigger the prohibitions of Rule 8.4 (e). That Rule bars an attorney from stating or implying "an ability to influence improperly a government agency or official." Any suggestion by the lobbyist to the client that the lobbyist will be able to influence the legislative process because of the presence of the firm director in the legislature would cross this line.

We are mindful of the fact that this opinion reaches a very different result than an earlier opinion of this committee decided under the now superseded Code of Professional Responsibility. Our Opinion No. 82-5, held that members of a law firm in which a member is a legislator may not represent private clients before the legislature. The opinion relied on DR 8-101(A)<sup>4</sup>. Whether or not that opinion was rightly decided, the DR relied upon is no longer operative, and we see no similar

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<sup>4</sup> Former DR 8-101(A) read as follows:

DR 8-101 Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

prohibition under the Rules. We note that the Arizona State Bar Committee on the Rules of Professional Conduct has reached a similar conclusion. See Formal Opinion No. 93-09 of the Arizona Ethics Committee.

The committee cautions that the conclusion reached here has been based on a very specific set of facts. There are certainly circumstances where a firm's more broadly-based lobbying activities would prevent a lawyer-legislator from carrying out the duties of his or her office. The activities of a lawyer- lobbyist in such a firm could have the potential of rendering the lawyer-legislator unable to carry out substantial legislative duties. In that situation, the legislator's inability to perform the duties of the office would be tantamount to a violation of the constitutional oath of office which requires unencumbered service to the public.

As a committee, we have struggled with this Opinion because it presents an issue that has not been addressed by the Rules. The situation posed by the inquiring firm is not one which the Rules appear designed to address. The analysis requires reference to the State Constitution and to House Rule 75 and cannot be resolved solely within the framework of the Rules of Professional Conduct. The committee believes that this is an issue that the Vermont Supreme Court should review to determine whether any amendments to the Rules of Professional Conduct should be promulgated.

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(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client,

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.