-- *N.J.L.J.* --
(December --, 2015)
Issued by ACPE & UPLC December 10, 2015

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Appointed by the Supreme Court of New Jersey

OPINION 730

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

OPINION 52

COMMITTEE ON THE UNAUTHORIZED PRACTICE OF LAW

Lawyer-Lobbyists Providing Services in a Company That is Not a Law Firm

Inquirer asked the Advisory Committee on Professional Ethics and the Committee on the Unauthorized Practice of Law if a lawyer who works for a lobbying and government affairs services company that is not a law firm may use the designation "Esq." after his name on company letterhead. Some New Jersey companies are owned and operated by both lawyers and non-lawyers and offer lobbying or government affairs services as well as marketing, public communication, and other related services. Several lawyers in these companies are designated as "Esq." in company marketing materials. In the United States, the "Esquire" or "Esq." designation generally conveys the fact that the person is a lawyer. Use of this designation in

certain contexts implies that the person is holding him or herself out as available to render legal services or provide legal advice.

The inquiry raises the broader question of whether lawyers who provide lobbying and government affairs services at a company that is not a law firm are practicing law. The resolution of this question can have significant consequences, as the *Rules of Professional Conduct* prohibit lawyers from sharing legal fees with non-lawyers or forming a partnership with non-lawyers when the activities of the business consist of the practice of law. *RPC* 5.4(a) and (b).

In this Joint Opinion, the Committees find that lawyers may provide lobbying and government services in a non-legal setting but they cannot hold themselves out as lawyers and they must communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship. Lawyers at lobbying and government services companies that are not law firms should not be designated as "Esquire" or "Esq."

The Committee on the Unauthorized Practice of Law initially considered whether providing lobbying and government affairs services is the practice of law. The New Jersey Supreme Court has adopted a functional definition of the practice of law. "The practice of law in New Jersey is not limited to litigation. . . . One is engaged in the practice of law whenever legal knowledge, training, skill, and ability are required." *In re Jackman*, 165 *N.J.* 580, 586 (2000). While the Court has the power to prohibit a non-lawyer from engaging in conduct that is the practice of law, it exercises this power only when doing so is in the public interest. *In re Opinion No. 26 of the Committee on the Unauthorized Practice of Law*, 139 *N.J.* 323, 340 (1995). The Court has cautioned that "in cases involving an overlap of professional disciplines we must try to avoid arbitrary classifications and focus instead on the public's realistic need for

protection and regulation." *In re Application of New Jersey Society of CPAs*, 102 *N.J.* 231, 237 (1986).

A lobbyist presents a position on behalf of another, in a representational capacity, to a governmental legislator or regulator. The position often involves a change in law or an interpretation or application of the law. The lobbyist must understand the law and its interpretation and application to be an effective advocate on behalf of the client. Clients rely on the expertise of their representatives.

The Committee on the Unauthorized Practice of Law finds that many of these activities are the practice of law but it is in the public interest to allow registered non-lawyers to provide lobbying and government affairs services, provided they do not hold themselves out as able to provide legal services. Lobbying and government affairs services are regulated by the Election Law Enforcement Commission (ELEC). *N.J.S.A.* 52:13C-18 *et seq.* A lobbyist ("governmental affairs agent") is defined in the ELEC regulations as a person who receives compensation "to influence legislation, to influence regulation, or to influence governmental processes, or all of the above, by direct or indirect communication with, or by making or authorizing . . . any expenditures providing a benefit to a member of the Legislature, legislative staff, the Governor, the Governor's staff, or any officer or staff member of the Executive Branch . . . ." *N.J.A.C.* 19:25-20.2; *see also* ELEC Lobbying Manual, Part I. Governmental affairs agents must register with ELEC and file a notice of representation prior to engaging in communication or making expenditures for a client. *N.J.S.A.* 52:13C-21a. Potential harm to the public is mitigated by the protections inherent in the regulatory framework. Accordingly, both lawyers and registered non-lawyers may engage in this conduct. Lawyers may have an advantage in providing these services, though non-lawyers – particularly those with deep subject matter expertise and familiarity with the governmental process – can be highly adept and capable representatives.

The Advisory Committee on Professional Ethics considered the broader issue presented when lawyers work in a non-legal lobbying and government affairs company. Lawyers are permitted to engage in non-legal businesses, though ethics concerns arise when there is overlap between the legal business and the non-legal business. ACPE Opinion 657 (1992) states that a lawyer may engage in both a legal and a non-legal business provided the businesses are entirely separate, in physically distinct locations, and there is no joint advertising or marketing or demonstration of a relationship between the two businesses. The inquiry here is different. The focus is not on whether a lawyer may provide lobbying services from both a law firm and a non-legal business, but whether a lawyer may associate with non-lawyers and provide lobbying services at a non-legal business.

In general, lawyers may practice law only as part of a law firm or as in-house counsel. In-house counsel in a non-legal company may provide legal services only to their employer; they may not provide legal advice or legal services to customers of the company, or hold themselves out as available to provide legal services or legal advice. *R.* 1:27-2; *R.* 1:21-1; *RPC* 5.4(a) and (b); ACPE Joint Opinion 716/UPL Committee Joint Opinion 45 (2009).

In a law firm, non-lawyers generally may not provide services to lawyers' clients except under the direct supervision of a lawyer. *In re Opinion No. 24 of the Committee on Unauthorized Practice of Law*, 128 *N.J.* 114, 123 (1992). Lawyers may not share legal fees with non-lawyers, with limited exceptions. *RPC* 5.4(a). Further, "[a] lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law." *RPC* 5.4(b). Nor may law firms offer non-legal services to clients, except when it is ancillary to legal services provided to clients. ACPE Opinion 657 (1992).

Lawyers who provide lobbying and government affairs services from a law firm generally offer those services along with tailored legal advice and other, related legal services.

In the law firm setting, the client is accorded all the protections that accompany the lawyer-client relationship. Those protections include the lawyer-client privilege, strict confidentiality of information relating to the representation, adherence to ethics rules on conflicts of interest, and the duty to abide by the client's objectives. See *RPC* 1.6; *RPC* 1.7; *RPC* 1.9; *RPC* 1.2. A client retaining a law firm for lobbying and government affairs services is aware that he or she is in a law firm environment and expects all the accoutrements that accompany that relationship.[1]

As noted above, lawyers may not share legal fees with non-lawyers or form a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law." *RPC* 5.4(a) and (b). Lobbying and government affairs, however, is a unique field and the clients and customers tend to be sophisticated. The non-legal companies offering these services (through lawyers and non-lawyers) should be able to effectively communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship. Provided the companies take appropriate steps to inform their customers of the limited nature of their representation, the Advisory Committee on Professional Ethics finds that the prohibition of *Rule of Professional Conduct* 5.4 does not apply to lobbying and government affairs companies.

Rule of Professional Conduct 5.4 promotes professional independence in the practice of law. "Those limitations [in *Rule of Professional Conduct* 5.4] are prophylactic and are designed to safeguard the professional independence of lawyers. A person entitled to share a lawyer's fees is likely to attempt to influence the lawyer's activities so as to maximize those fees. That could

---

[1] The Committees note that rules governing attorney advertising, including the rules on law firm names, apply to all law firms, including firms that primarily offer lobbying and government affairs services. The firm name must include the full or last name of a lawyer practicing in the firm (or the names of lawyers who are no longer associated in the firm through death or retirement) and may contain only limited additional information pertaining to the nature of the firm's legal practice. See *RPC* 7.5(a) and (e). The names of some lobbying law firms do not appear to comply with these rules.

lead to inadequate legal services." *Restatement of the Law (Third), The Law Governing Lawyers*, Section 10, Comment b, p. 98 (American Law Institute 2000). "Problems of professional independence – the subject of Rule 5.4 – are thought to arise when nonlawyers either invest in or assume positions of authority in nontraditional practice arrangements that might give the nonlawyer some ability to direct or regulate the way in which the lawyers go about their work." G. Hazard, Jr., W. Hodes, P. Jarvis, *The Law of Lawyering* (4th Ed.), Section 48.02 (Wolters Kluwer 2015). "Rule 5.4(b) prohibits a lawyer from sharing the profits and losses of a law practice with a nonlawyer partner." *Id.* at Section 48.03.

The Committees find that if non-legal companies that provide lobbying and government affairs services effectively communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship, their services would not "consist of the practice of law" within the meaning of *Rule of Professional Conduct* 5.4(b). The lawyers who work at these companies *must not hold themselves out as lawyers*. As expressed in the *Restatement*:

> When those services [rendered by a lawyer to a customer of a non-legal business] 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, the physical location at which the services are provided, and the identities and affiliations of lawyer and nonlawyer personnel working on the matter.
>
> [*Restatement of the Law (Third), The Law Governing Lawyers*, Section 10, Comment g, p. 102 (American Law Institute 2000).]

American Bar Association (ABA) *Model Rule of Professional Conduct* 5.7 addresses law-related businesses and participation in such businesses by lawyers. The *Model Rule* provides:

(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.

[ABA *Model Rule of Professional Conduct* 5.7.]

While New Jersey has not adopted *Model Rule* 5.7, its principle – that a lawyer providing non-legal services should ensure that customers are aware that the lawyer is not acting in a legal capacity – informs the Committees' analysis. The *Rule* cautions lawyers that if they are providing law-related services outside a law firm, they must take reasonable measures to communicate to customers that the protections of a lawyer-client relationship are not present in the business. Comment 6 to the *Model Rule* warns lawyers offering law-related services outside a law firm that "the lawyer should communicate to the person receiving the law-related services, in a manner sufficient to assure that the person understands the significance of the fact, that the relationship of the person to the business entity will not be a client-lawyer relationship. The communication should be made before entering into an agreement for provision of or providing law-related services, and preferably should be in writing." Comment 9 to the *Model Rule* includes legislative lobbying as an example of a law-related business.

The Committees reviewed ethics opinions from Maine and Virginia on lawyers owning or operating a non-legal lobbying company. Maine prohibits a lawyer from forming a partnership with a non-lawyer in a lobbying firm. Opinion #158 ("Formation of a Partnership With a Non-Lawyer for the Provision of Governmental Services Including Lobbying") (April 3, 1997).[2] The Maine Commission stated:

> 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. It should be obvious that for a lawyer to associate herself as a partner of a non-lawyer in the rendition of such services creates an intolerable risk of confusion, or worse, misplaced reliance.

The Maine Commission concluded that the arrangement violates its version of *Rule of Professional Conduct* 5.4. It added, however, that the lawyer may assume inactive status and, provided the lawyer does not hold herself out as a lawyer and "makes clear to her government relations clients that her role is not that of an attorney, and they will not benefit by the protection offered by the lawyer-client relationship," the arrangement would be permissible.

The Virginia Ethics Committee found that a lawyer may work for a non-legal lobbying firm provided the lawyer does not provide legal advice and does not hold him or herself out as a lawyer. Legal Ethics Opinion 1819 (September 19, 2005).[3] The Virginia Committee noted that the lawyer who works at such a non-legal company has an ethical duty to ensure that the customers are aware that no legal advice will be offered and the protections of a lawyer-client relationship do not exist.

---

[2] This Opinion may be found at www.mebaroverseers.org/attorney_services/opinion.html?id89609.

[3] This Opinion may be found at www.vacle.org/opinions/1819.htm.

In this Joint Opinion, the Advisory Committee on Professional Ethics and Committee on the Unauthorized Practice of Law find that lawyers may provide lobbying and government services in a non-legal setting but they cannot hold themselves out as lawyers, may not provide legal services, and must take measures to assure that their customers are aware that there is no lawyer-client relationship and the company does not afford the protections of a law firm. The lawyers should not be designated as "Esquire" or "Esq."

This Joint Opinion should not be read as an implicit adoption of *Model Rule of Professional Conduct* 5.7 or as a grant of permission to lawyers to operate any non-legal law-related business free from application of the New Jersey *Rules of Professional Conduct* or other pertinent *Court Rules* governing the practice of law. The Committees recognize that lobbying and government affairs companies in New Jersey have a longstanding tradition of employing the services of both lawyers and non-lawyers, and there have been no reports of harm suffered by customers of those companies. Hence, this Opinion merely permits lawyers to associate with non-lawyers in lobbying and government affairs services companies, outside a law firm, provided the company communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship and the lawyers do not hold themselves out as acting in the capacity of lawyers.