



District of Columbia Court of Appeals
Committee on Unauthorized Practice of Law
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OPINION 19-07:

APPLICABILITY OF RULE 49 TO U.S. LEGISLATIVE LOBBYING

Issued December 17, 2007

The District of Columbia Court of Appeals Committee on Unauthorized Practice of Law (the “Committee”) periodically gets questions about whether and how Rule 49 applies to persons who represent individuals, businesses, and other entities before the United States Congress in connection with legislative action. The Committee believes that guidance concerning the applicability of Rule 49 to U.S. legislative lobbyists would be useful to lobbyists and law firms in the District of Columbia. In the Committee’s opinion, U.S. legislative lobbying does not constitute the practice of law under Rule 49, and Rule 49 does not require individuals engaged in such lobbying to be members of the D.C. Bar.

This Opinion uses the term “U.S. legislative lobbying” to refer to 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. Such activities may include, but are not limited to: oral, written, and electronic communications with members of Congress, congressional committees, and congressional staff with regard to the formulation, modification, or adoption of federal

legislation; preparation and planning activities, research, and other background work in support of such contacts; and development of legislative strategy and tactics. The term does not necessarily include all activities that have a relationship with congressional actions. For example, advising a client about how legislative testimony might affect pending or prospective criminal or civil litigation before a court may constitute the practice of law.

U.S. legislative lobbying does not constitute the practice of law within the meaning of Rule 49(b). Rule 49(a) generally permits only individuals who are active member of the D.C. Bar to engage in the practice of law, or hold themselves out as authorized or competent to practice law, in the District of Columbia. Rule 49(b)(2) defines the “practice of law” to mean “the provision of professional legal advice or services where there is a client relationship of trust or reliance.” Rule 49(b)(2) establishes a presumption that engaging in specified conduct on behalf of another constitutes the practice of law, including “[p]reparing or expressing legal opinions.”

U.S legislative lobbying may involve “preparing or expressing legal opinions.” Indeed, it may be difficult or even impossible to discuss with a client or others whether current federal law should be changed without discussing whether and how current federal law addresses an issue. However, individuals and companies who want assistance in presenting their views to the U.S. Congress understand that many lobbyists are not lawyers and that nonlawyers can function as effectively as – and perhaps in some instances more effectively than – lawyers. In that respect, lobbying is comparable to tax accounting, securities advice, and pension consulting, and as the Commentary to Rule 49(b)(2) explains, individuals who provide these services “are not engaged in the practice of law, because their relationship with the customer is not based on the reasonable expectation that learned and authorized professional legal advice is being given.”

The District of Columbia Rules of Professional Conduct adopted by the Court of Appeals confirm that legislative lobbying does not constitute the practice of law. Rule 5.7 concerns the applicability of the Rules to “law-related services.” Rule 5.7(b) provides, “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” (emphasis added). Comment [9] gives as an example of law-related services “legislative lobbying.” Thus, the Court of Appeals considers legislative lobbying not to be prohibited as unauthorized practice of law when the service is provided by a nonlawyer. The same understanding is reflected in comments to two other Rules. Comment [2] to Rule 3.9, which imposes obligations on lawyers in nonadjudicative proceedings, states that “[l]awyers have no exclusive right to appear before nonadjudicative bodies, as they do before a court,” and it gives as an example of such advocates “nonlawyer lobbyists.” Comment [7] to Rule 5.4, regarding the professional independence of lawyers, explains that Rule 5.4(b) permits “nonlawyer lobbyists to work with lawyers who perform legislative services.”¹

Because Rule 49 permits individuals who are not licensed as lawyers in any jurisdiction at all to lobby the U.S. Congress, it permits individuals who are licensed as lawyers in

¹ Rule 49 also does not prohibit conduct authorized and regulated by the federal executive and judicial branches. The exception in Rule 49(c)(2) applies if a U.S. department or agency authorizes individuals to practice before it and regulates their practice, and the (c)(3) exception applies to lawyers admitted to practice in federal courts. The Committee notes that the U.S. Congress regulates the conduct of lobbyists (among other things, requiring registration and financial disclosures and imposing ethical restrictions), and it does not require lobbyists to be lawyers, much less members of the D.C. Bar. Regulating through Rule 49 U.S. legislative lobbyists who happen to have offices in the District of Columbia could potentially conflict with federal regulation of lobbyists, and would not substantially further any specific interest of the District of Columbia, provided (as discussed below) that lobbyists do not state or imply that they are authorized to engage in the practice of law in the District of Columbia.

jurisdictions other than the District of Columbia and whose principal office is at a law firm in the District of Columbia to do so. Put differently, the fact that an individual is licensed as a lawyer elsewhere and affiliated with a D.C. law office does not disqualify him or her from acting as a U.S. legislative lobbyist in the District of Columbia.

However, lobbyists who are admitted to the bar in other jurisdictions and who are affiliated with law firms in the District of Columbia must make clear that they are not engaged in the general practice of law in the District of Columbia. Rule 49(a) prohibits not only the practice of law but holding out in any manner as authorized or competent to practice law in the District of Columbia, unless the practitioner is an active member of the D.C. Bar or the Court's rules otherwise permit. See Rule 49(b)(4), which defines holding out to mean "to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office of location in the District of Columbia." Identifying an individual as a lawyer in a D.C. law firm generally implies that the individual is authorized to practice law in the District of Columbia.

To avoid that implication, lobbyists practicing with a D.C. law firm who are not members of the D.C. Bar must make clear that they are not licensed here and that their practice is limited to legislative lobbying matters that do not constitute the practice of law. Without such disclosure, clients and others may mistakenly believe that such a practitioner is a member of the D.C. Bar. The Committee has previously provided guidance about the form and content of disclosures about a practitioner's bar status and limits on his or her practice. See Opinion 11-02, Amendments to Disclosure Requirements of Rule 49(c). With respect to bar status, the lawyer-lobbyist's business documents may state, for example, "Admitted only in [specified states]" or "Admitted only in D.C." With respect to limitations on practice, the notice may be general – for

example, “Practice limited to U.S. legislative lobbying.” The law firm and the lobbyist should include these disclosures in all business documents, which include, without limitation, letters, emails, websites, business cards, and promotional materials. See Opinion 11-02.

This disclosure obligation for U.S. legislative lobbyists is comparable to the disclosure obligation for lawyers practicing under the exceptions in Rule 49(c)(2) for practitioners before federal agencies and in Rule 49(c)(3) for practitioners before federal courts. Rule 49(c)(2) authorizes lawyers with an office in the District of Columbia to practice before federal agencies that authorize and regulate their practice, provided that “the practitioner expressly gives prominent notice in all business documents of the practitioner’s bar status and that his or her practice is limited consistent with this section (c).” Lawyers who practice only before federal courts in the District of Columbia are subject to the same disclosure obligations. See Opinion 17-06, *The Scope of the Federal Court Practice Exception in Rule 49(c)(3)*. The same reasons for these disclosures by D.C.-based lawyers who practice only before federal agencies and courts apply to D.C.-based lawyers who only lobby before the U.S. Congress. These disclosure requirements impose no significant or undue burden on U.S. legislative lobbyists.

Law firms should also make clear that nonlawyer legislative lobbyists are not attorneys. Engagement letters should state that nonlawyer lobbyists may not provide legal advice or give legal opinions. To avoid holding nonlawyers out as lawyers, law firms should identify them by titles such as “Governmental Affairs Specialist,” “Legislative Consultant,” or “Political Consultant.” In addition, nonlawyers should not be included in portions of law firm websites that provide biographical information about attorneys with the firm.

The Committee emphasizes that if a lobbyist affiliated with a D.C. law firm engages in any activity that constitutes the practice of law, the individual must be an active member of the

District of Columbia Bar, unless the person qualifies for an exception in Rule 49(c) and complies with the requirements of any applicable exception. For example, lawyer-lobbyists may advise clients about how to comply with obligations under federal law, and the provision of such advice may constitute the practice of law. Similarly, advising a client whether a communication with a lobbyist is subject to the attorney-client privilege and therefore protected from disclosure in a criminal or civil judicial proceeding may constitute the practice of law. If any part of the individual's activities in the District – no matter how small a percentage – consists of the practice of law outside any exception in Rule 49(c), Rule 49(a) requires a practitioner with an office in the District of Columbia to be an active member of the D.C. Bar. This Opinion does not address whether or to what extent (a) legislative lobbyists may be subject to the professional obligations of lawyers or (b) communications between lobbyists and clients may be protected by the attorney-client privilege.

Finally, the Committee addresses four limitations relating to this Opinion.

First, the disclosure obligations discussed above apply only to U.S. legislative lobbyists whose lobbying practice is based in the District of Columbia. Rule 49 “is intended to require admission where an attorney is using the District of Columbia as a base from which to practice.” See Commentary to Rule 49(b)(3). As defined in Rule 49(b)(3), practice “in” the District of Columbia includes “conduct in, or conduct from an office or location within, the District of Columbia, where the person’s presence in the District of Columbia is not of incidental or occasional duration.” Ordinarily, individuals whose principal office is outside 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 within the meaning of Rule 49(b)(3), even if that activity otherwise constitutes the practice of law. Accordingly, individuals whose practice is based

outside the District of Columbia may come to the District to lobby the U.S. Congress without disclosure of their bar status and limits on their practice in the District. The disclosure requirements discussed above apply only to practitioners with their principal office in the District of Columbia. The fact that the lawyer does not maintain an office here should be sufficient to alert clients and others that the lawyer is not generally authorized to practice law in the District of Columbia. Moreover, a requirement that attorneys based outside the District modify their business documents would impose a substantial and unanticipated burden on such lawyers. See Opinion 11-02.

Second, this Opinion does not address whether representation of a client before the U.S. Congress when it acts in an adjudicative capacity may constitute the practice of law. Rule 49(b)(2) creates a presumption that “[a]ppearing or acting as an attorney in any tribunal” or “[p]reparing ... any written documents containing legal argument or interpretation of law, for filing in any court, administrative agency or other tribunal” constitutes the practice of law, but the U.S. Congress ordinarily does not act as a “tribunal” within the meaning of this Rule. See D.C. Rule of Professional Conduct 1.0(n), which defines “tribunal” to include “a legislative body ... acting in an adjudicative capacity” and provides that “[a] legislative body ... acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”

Third, this Opinion does not address lobbying of the executive branches of the U.S. or D.C. governments, including federal and D.C. departments and administrative agencies. Representing clients before federal departments and agencies is addressed in Rule 49(c)(2), and Rule 49(c)(5) concerns representation of clients before D.C. departments and agencies.

Fourth, this Opinion does not address whether individual may use the District of Columbia as a base for lobbying legislative bodies other than the U.S. Congress, although some of the principles discussed in this Opinion may apply in that context.

Pursuant to Rule 49(d)(3)(G), a majority of a quorum of the Committee members present at its December 17, 2007, meeting approved this opinion. The staff of the Committee shall cause this opinion to be submitted for publication in the same manner as the opinions rendered under the Rules of Professional Conduct.

Done this 17th day of December, 2007.



Chair

District of Columbia Court of Appeals

Committee on Unauthorized Practice of Law