

**McCurdy, Lauren**

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**From:** Kevin Mohr [kemohr@charter.net]  
**Sent:** Thursday, October 29, 2009 10:53 AM  
**To:** McCurdy, Lauren; Difuntorum, Randall  
**Cc:** JoElla L. Julien; Ellen Peck; Ignazio J. Ruvolo; Mark Tuft; Harry Sondheim; Kevin Mohr G  
**Subject:** RRC - 1.19 [Lawyer As Lobbyist] - III.P. - 11/6-7/09 Meeting Materials  
**Attachments:** RRC - 1-19 - 10-28-09 KEM Memo to RRC re Lobbying Rule.pdf

Greetings Lauren & Randy (and fellow drafters):

I've attached a memo concerning the adoption of a rule regulating lawyers acting as lobbyists. To cut to the chase, I've recommended that the Commission not adopt such a rule.

I apologize to my fellow drafters for not having circulated the memo sooner but much of my last week or two has been devoted to grading exams in my courses. Any errors or omissions should be attributed to me alone.

I hope you receive this in time to include it in the agenda package.

Thanks,

Kevin

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## MEMORANDUM

To: Rules Revision Commission  
From: Kevin Mohr [Lead Drafter, Rule 1.19 Drafting Team (Julien, Peck, Ruvolo, Tuft)]  
Date: October 28, 2009  
Re: "Rule 1.19" – Adoption of Rule Regulating Lawyer As Lobbyist  
**November 6-7, 2009 Meeting; Agenda Item III.P.**

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**DISCLAIMER**: The other members of the Drafting Team have not had an opportunity to review this memorandum.

### **RECOMMENDATION**

Do not pursue the adoption of a Rule of Professional Conduct that is specifically addressed at regulating a lawyer acting as a lobbyist.

### **DISCUSSION**

1. **Background Concerning A Rule Concerning Lawyer As Lobbyist and Its Assignment to the Rule 1.6 Drafting Team**

Several years ago, the Chair and Staff identified a category of rules outside the scope of its charge that the Commission might consider for adoption: Rules that other states had adopted but which have no Model Rule or California counterpart. In my capacity as Consultant to the Commission, I had been compiling a list of such Rules over the course of the Commission's work and, in early summer 2008, I did further research and generated a list of all such rules my research had revealed. Pennsylvania Rule 1.19, Lawyer Acting As Lobbyist, was one rule that I was part of the list. Because it implicated confidentiality, it was assigned to the Rule 1.6 drafting team as a rule for further consideration. In other words, the primary stimulus for considering a rule regulating lawyers as lobbyists was the Pennsylvania Rule.

2. **Pennsylvania Rule 1.19**

Pennsylvania Rule 1.19 was promulgated following an imbroglio between the Pennsylvania Legislature and the Pennsylvania Supreme Court. The court had taken issue with the legislature's attempted infringement of the court's authority to regulate lawyers, and in 2002 struck down a lobbying statute. Subsequently, the Legislature enacted a new statute and the court promulgate new Rule 1.19, which has no comment and which provides:

#### **Pennsylvania Rule 1.19 Lawyers Acting as Lobbyists**

(a) A lawyer acting as lobbyist, as defined in any statute, or in any regulation passed or adopted by either house of the Legislature, or in any regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania shall comply with all regulation, disclosure, or other requirements of such statute, resolution, or regulation which are consistent with the Rules of Professional Conduct.

(b) Any disclosure of information relating to representation of a client made by the lawyer-lobbyist in order to comply with such a statute, resolution, or regulation is a disclosure explicitly authorized to carry out the representation and does not violate RPC 1.6.<sup>1</sup>

Aside from the vagueness of a rule that requires compliance “with all regulation, disclosure, or other requirements of such statute, resolution, or regulation **which are consistent with** the Rules of Professional Conduct,” paragraph (a) (emphasis added), paragraph (b) conflicts with California’s strong policy of protecting a client’s confidential information by carving out a further exception to California’s nearly absolute duty of confidentiality. See Rule 3-100 and Bus. & Prof. Code § 6068(e). In short, adoption of a rule akin to Penn. Rule 1.19 would not be a good fit for California and I do not recommend its adoption.

### 3. Model Rule 5.7

Model Rule 5.7 regulates lawyers regarding “law-related services”. Paragraph (b) of that Rule defines “law-related services” as follows:

(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.

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<sup>1</sup> Pennsylvania Rule 1.6 includes all of the permissive exceptions to confidentiality found in MR 1.6 except for MR 1.6(b)(6), which permits disclosure “to comply with other law or a court order.” It adds an exception that permits disclosure “to effectuate the sale of a law practice consistent with Rule 1.17,” as well as a mandatory exception that states a “lawyer lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3” [Candor to a Tribunal]. Pennsylvania, unlike California, has already carved out numerous express exceptions to confidentiality.

In addition, Pennsylvania has added Comment [26] to its version of MR 1.6 to track its Rule 1.19:

#### Lobbyists

[26] A lawyer who acts as a lobbyist on behalf of a client may disclose information relating to the representation in order to comply with any legal obligation imposed on the lawyer-lobbyist by the legislature, the executive branch or the Commonwealth which are consistent with the Rules of Professional Conduct. Such disclosure is explicitly authorized to carry out the representation. The Disciplinary Board of the Supreme Court shall retain jurisdiction over any violation of this Rule.

California needs no such comment.

Comment [9] to Model Rule 5.7 includes “legislative lobbying” among its examples of law-related services:

[9] A broad range of economic and other interests of clients may be served by lawyers' engaging in the delivery of law-related services. Examples of law-related services include providing title insurance, financial planning, accounting, trust services, real estate counseling, **legislative lobbying**, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

Model Rule 5.7 is on the November 6-7, 2009 agenda as agenda item IV.B. The Commission has already voted not to recommend its adoption and the drafting team has stated its recommendation not to pursue the Rule further. Regulating a lawyer's lobbying activities through that Rule does not appear an option. Conversely, as there does not appear to be a compelling need for a lawyer lobbying rule, regulating lawyer lobbyists does not support adoption of a Model Rule 5.7 counterpart.

4. D.C. Rule 1.0, Definition of “Matter” and Comment; Rule 1.11, Comment [10]

D.C. Rule 1.0(h) defines “matter” to include “lobbying activity”:

(h) “Matter” means any litigation, administrative proceeding, **lobbying activity**, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule.

No other jurisdiction that includes a definition of “matter” in its terminology section (Alaska, New York, North Dakota and Oregon) include “lobbying” or “lobbying activity”.

Every jurisdiction has adopted some version of Model Rule 1.11. Comment [10] to MR 1.11 provides:

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

That provision does not appear to bear any relation to this discussion.

5. Is there a need for a Rule Regulating Lawyers Engaging in Lobbying Activities?

There has been no concern expressed by Commission members or other interested parties in having a Rule addressed to lawyer lobbying activities. As noted above in paragraph 1, this topic is on the Commission's agenda simply because Pennsylvania

Rule is a rule that fits within the category of rules adopted in other jurisdictions that have no counterpart in either the Model Rules or the California Rules.

It is an interesting topic that was raised several years ago at a time when the Commission still had years to go on this project and it appeared that considering unique rules in other jurisdictions would be a fruitful endeavor: the Commission would have an opportunity to choose good ideas that would comport with the purpose and scope of our Rules and reject those ideas inimical to California policy. As discussed in paragraph 2, above, a lawyer lobbying rule akin to Pennsylvania Rule 1.19 fits in the latter category. Rule 5.7 has been rejected. See paragraph 3 and there appears to be no compelling reason to adopt a definition of “matter” that would include “lobbying activity”.

More important, given the Commission’s current schedule, its limited time and resources should be devoted to ensuring it fulfills its charge to revisit the current California Rules in light of Ethics 2000 and the Restatement, as well as regulations related to MDP and MJP, and to “[e]liminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.”

As I noted in my e-mail to the Drafters concerning the adoption of a “pay-for-play” rule that addresses concerns raised in Model Rule 7.6, I am uneasy with pursuing a rule that addresses a topic that only two jurisdictions have seen fit to address (and one in a manner inimical to California’s policy on confidentiality), “until we know that California has a real problem that needs to be addressed, and we have made a careful consideration of the alternatives to resolving the problem besides a rule of professional conduct. If the State Bar, the Judiciary or the Legislature is so inclined, then they should investigate the issue further and request that a rule be drafted.” See 10/28/09 KEM E-mail to Rule 7.6 Drafters, cc Chair & Staff, included in 11/6-7/09 Agenda Materials, Agenda Item III.G.

## **CONCLUSION**

Do not pursue a rule regulating lawyer’s conduct as lobbyists.

**RRC – Rule 1.19 [Lawyer As Lobbyist]  
E-mails, etc. – Revised (11/3/2009)**

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real estate counseling, **legislative lobbying**, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

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**CONCLUSION**

Do not pursue a rule regulating lawyer's conduct as lobbyists.

**October 31, 2009 Julien E-mail to Drafters, cc Chair & Staff:**

I agree with Kevin re not including a rule regulating lawyers acting as lobbyists. It seems to me that between the B&P code and our rules, there should be enough ammunition to prevent any misbehaving lawyer from misbehaving when acting as a lobbyist, an accountant, real estate broker, etc., and, if the rules are not the cure then, there are enough rules under which they could be prosecuted.