

DONALD E. COVEY

Lawyer

Telephone
605-842-2601

409 Main Street • P.O. Box 1766
Winner, SD 57580

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RE: Ethics Opinion 90-4

Dear

You have requested the advisory opinion of the Ethics Committee based upon the factual information stated below.

FACTS

Your question is what ethical considerations are raised by a lawyer's legislative lobbying practice when that lawyer's spouse or law partner is elected as a member of a legislative body?

OPINION

The tenor of the responses from the members of the Committee is aptly pointed out in Mr. Von Wald's response to the question wherein he refers to the preamble to the Rules of Professional Conduct. As quoted in Mr. Von Wald's response, the pertinent portions of the preamble read as follows:

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by rules

Mr. Von Wald also quotes one of his partner's who reiterates a veritable axiom of professional ethics, "If you need to ask whether there is a conflict, it has been brought about by your conscience and you likely know the answer."

Once again, the identity of the individual partners of a law firm is considered as one individual for purposes of some ethical considerations. In this instance, Rule 1.10 must be considered in conjunction with Rule 1.7(b) wherein it is provided that

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

In this instance, the lawyer legislator would be clearly ineligible to represent a client as a lobbyist before the same legislature of which he is a member. Therefore, the law firm clearly cannot lobby the legislature in which one of its partners is a member.

The South Dakota Constitution provides in Article III Section 8 that members of the legislature may not accept any money or thing of value from any person with an eye toward any vote or influence that the legislator might cast or exert. In a partnership, presumably the lawyer legislator would share in the fees earned by the lawyer lobbyist. This would appear to be an indirect benefit to the lawyer legislator. Couple with this constitutional provision, the language of Rule 1.16(a) wherein a lawyer is prohibited from representing a client where such representation might result in a violation of the rules or any other law.

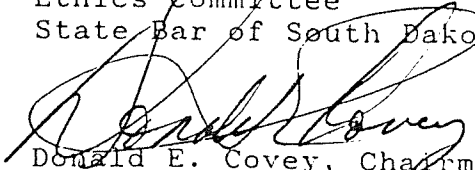
This particular constitutional provision and rule have application both to the law partner and the spouse. Clearly there is the appearance, at least, of an indirect benefit to the legislator from the fees earned as a lobbyist.

Rule 8.4(e) is also cited as having application wherein there may be at least an appearance if not a tacit representation that the lawyer lobbyist would be able to influence the spouse or partner who was also a legislator.

The ABA has addressed the lawyer/lobbyist/law partner situation. In Opinions 296 (1959) and 306 (1962), it is the clear position that a lawyer/lobbyist may not lobby before a legislature in which a partner or law associate is a member. As Committee Member McGregor points out, this is true even if there is a disclosure of the potential conflicts of interest and voluntary disqualification of the lawyer legislator from considerations of matters on which the lobbyist or lobbyist partner or associate is involved. Clearly, such a selfish position deprives the lawyer legislator's constituents of their rightful representation. This would certainly appear to reflect adversely upon the legal profession and bring it into disrepute.

A minority of the Committee believed that, with proper disclosures and waivers, the requirements of Rule 8.4(e) and Rule 3.3 together with Rule 3.9, would be met and there would be no conflict where the lawyer's spouse was a member of the legislature.

Respectfully submitted,
Ethics Committee
State Bar of South Dakota


Donald E. Covey, Chairman