Ethical Aspects of Practice before Legislative and Quasi-Judicial Boards and Tribunals

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Overview of Presentation

• Ethical Practice in Legal Profession Generally

• Rules of Professional Conduct
  • Appearing before Nonadjudicative Proceedings
    ➢ The history and effects of Rule 3.9 (effective 1 January 2010)

• Ethical Implications of the Lawyer as Lobbyist
  ➢ What does it mean to be “Engaged in the Practice of Law” vs. “Lobbying”?
Ethical Practice in Legal Profession
Generally
“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”*  

“Every lawyer is responsible for observance of the Rules of Professional Conduct.”  

Translation = while licensed, you’re always a lawyer even if you are not engaged in the practice of law

* Rules of Professional Conduct, Preamble, cmt. 1 and 12.
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- “Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance…. 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 legal rules. The Rules simply provide a framework for the ethical practice of law.”*
  - Translation = Ultimately, ethics is about the decisions you make

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- the good news…

- “The Rules of Professional Conduct are *rules of reason*.”*

- The legal scholar Karl Llewellyn wrote that “the rule follows where its reason leads; where the reason stops, there stops the rule.”*  

* Rules of Professional Conduct, Preamble, cmt. 16.  
* Karl Llewellyn, *The Bramble Bush*
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- Ethical issues can arise since lawyers wear coats of many and varied colors

**Attorney-Client Relationship**
- advocate
- advisor
- counselor
- evaluator
- negotiator

**Outside of Attorney-Client Relationship**
- public officials
- lobbyists
- commerce and business generally
Ethical Issues in Appearing before Nonadjudicative Proceedings
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- Both non-lawyers and lawyers may appear before legislative bodies or administrative agencies in *nonadjudicative proceedings*.
- With regard to lawyers, in 2010, the IL SCT amended its Rules of Professional Conduct to address a lawyer’s duty in such proceedings.
  - Rule 3.9 *Advocate in Nonadjudicative Proceedings*
    A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c) and 3.4(a) through (c).
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- **History of Rule 3.9: Advocate in Nonadjudicative Proceedings**
- Rule Promulgated TWICE – the second time to quiet the initial storm
  - 1 July 2009
    A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.
  - 23 November 2009
    A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), and 3.4(a) through (c), and 3.5.

ADDED REMOVED
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- **History of Rule 3.9**: *Advocate in Nonadjudicative Proceedings*
- Rule Promulgated TWICE – purpose of the 23 November 2009 second amendment:

1. removal of reference to Rule 3.5 (*Impartiality and Decorum of the Tribunal*) was to address concerns that one-to-one lobbying activities would have been prohibited for attorneys.

2. Comment 3 was amended to specifically note that Rule 3.9 “does not apply to representation of a client in *otherwise lobbying activities*….”
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- Nonadjudicative vs. Adjudicative Proceedings:
  - Adjudicative – judicial or administrative proceeding to reach determination affecting personal or property rights
    - *rights and duties of particular persons* are adjudged, often after notice and opportunity to be heard (due process implications)
    - often a concrete *factual dispute or question is presented*
  - by negative implication, Nonadjudicative Proceedings affect larger groups

- Comment 1 to Rule 3.9 provides *rulemaking or policymaking proceedings* as the perfect examples of Nonadjudicative proceedings
  - legislatures
  - municipal councils
  - executive/administrative agencies
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- What are the Ethical Duties of Lawyers Appearing before Nonadjudicatory Proceedings?

  Rule 3.9 *Advocate in Nonadjudicative Proceedings*
  
  A lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall [1] disclose that the appearance is in a representative capacity and shall conform to the provisions of [2] Rules 3.3(a) through (c) and [3] 3.4(a) through (c).

1. disclose appearance in representative capacity
2. follow Rule 3.3 (a-c) (*Candor Toward the Tribunal*)
3. follow Rule 3.4 (a-c) (*Fairness to Opposing Party and Counsel*)
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Does Rule 3.9 HELP or HINDER a lawyer versus a non-lawyer in a non-adjudiciary proceeding?

- HELP – credibility of lawyer
- HINDER – unlevel playing field
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- Does Rule 3.9 HELP or HINDER a lawyer versus a non-lawyer in a non-adjudiciary proceeding?

- Rule 3.9 has been discussed only once, and then only in passing *dicta*, in an Illinois State Bar Association Advisory Opinion, Op. No. 12-13 (May 2012):
  
  “As explained in Comments [1] and [2] to Rule 3.9, *legislative and administrative agencies have a right to expect lawyers to deal with them as they deal with courts, even if the rule subjects lawyers to regulations that are inapplicable to advocates before those agencies who are not lawyers.*"
Ethical Implications of the Lawyer as Lobbyist
Today numerous law firms have lobbying and government relations practice groups. Both lawyers and nonlawyers serve in such positions in these practice groups, and the tasks undertaken by these employees frequently overlap.

- Providing *lobbying services is part of a holistic approach to solving problems facing clients.*

- While a law degree is not required for lobbying, it can be very helpful to clients in designing a successful legislative strategy. Lawyers can provide a multidisciplinary approach, evaluating potential legal challenges to proposed legislation and potential implementation challenges (i.e., JCAR).
Rule 3.9, Comment 3 provides that the rule “does not apply to representation of a client in otherwise lobbying activities…."

- in this regard, Illinois deviates from the ABA Model Rules comment

What is “Lobbying”?
- much like Justice Stewart’s definition of pornography*, most of us know it when we see it!

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- The Rules of Professional Conduct do not define “matter” to include lobbying activities
  - Compare District of Columbia Rules of Professional Conduct*, which include “lobbying activity” within the definition of the term “matter”*
    - not unsurprisingly, the DC Bar has well-developed rules and guidance for the lawyer-lobbyist

- Is it therefore logical to conclude that “lobbying” does not fall within the definition of “engaged in the practice of law” under Illinois law?

- What Rules of Professional Conduct apply to govern the conduct of a lawyer-lobbyist?

* DC Rules of Professional Conduct, Rule 1.0(h)
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• What Rules of Professional Conduct apply to govern the conduct of a lawyer-lobbyist?

• “Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so.”*

• Uncertainty and doubt about whether a client-lawyer relationship exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is providing legal services as opposed to lobbying services.

* Rules of Professional Conduct, Preamble, cmt. 17.
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- What Rules of Professional Conduct apply to govern the conduct of a lawyer-lobbyist?

  - Those Rules tied to the attorney-client relationship are likely inapplicable.
    - Competence, Diligence, Communication? Rules 1.1, 1.3 and 1.4
    - Confidentiality? Rule 1.6

  - Those Rules governing general conduct are likely applicable.
    - Misconduct?
    - Rule 8.3 (Reporting Professional Misconduct)
    - Rule 8.4 (Misconduct)

- Uncertain – guidance needed from bench and bar
  - Conflicts? Rules 1.7 through 1.11
  - Advertising? Rules 7.1 through 7.3
Ethics Hypotheticals
(this is not a Live Fire Exercise)
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• HYPOTHETICAL

Lawyer represents the state debt collection professionals association. Municipality A is seeking to enact an ordinance to regulate debt collection activities. Lawyer’s general representation of the association would extend to this matter.

Lawyer and the Mayor of Municipality A are members of Bushwood Country Club. What, if any, ethical issues are presented by Lawyer and the Mayor of Municipality A discussing the merits of the ordinance during a round of golf?
HYPOTHETICAL

Municipality A is considering whether to sell certain real property. A hearing is scheduled to discuss the merits of the sale. Lawyer is hired to advocate for sale at the hearing by a prospective buyer.

Lawyer is advised by the prospective buyer that surveys of adjoining property reveal rich mineral deposits on the real property – the Comstock Lode part II. What, if any, is Lawyer’s duty to disclose the results of those surveys when appearing before Municipality A’s hearing on the sale?
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• HYPOTHETICAL

Lawyer has represented Client A against an Illinois Administrative Agency’s enforcement actions and represented Client A in licensing application proceedings before the same agency.

Illinois Administrative Agency recently issued proposed regulations, seeking comment from interested industry participants. Lawyer has been engaged by Client A to provide comments in response to the proposed regulations. Lawyer enjoys a relationship with the Illinois Administrative Agency’s Director and meets on an ex parte basis to discuss the proposed regulations. Is Lawyer’s conduct subject to discipline? Was Lawyer’s meeting with the Illinois Administrative Agency’s Director proper?
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- HYPOTHETICAL

Lawyer represents MWBE, a local construction company, in a variety of matters, ranging from transactional to regulatory. Lawyer represented MWBE at a municipal hearing at which approval was received to issue bonds for construction of a new municipal center. MWBE’s chief executive testified as to the economic benefits of the project to the local community. The executive also noted that MWBE was a certified minority-owned business under the relevant law, which municipal officials later commented was relevant in undertaking the project and approving the bond issuance.

Lawyer subsequently learns that MWBE was not at least 51 percent minority-owned, and thus MWBE is not entitled to certification under the law. What, if any, ethical issues are presented by Lawyer’s subsequent knowledge and the prior testimony of MWBE’s chief executive at the municipal hearing?
Lawyer represents MWBE, a local construction company, in a variety of matters, ranging from transactional to regulatory. Lawyer represented MWBE at a municipal hearing at which approval was received to issue bonds for construction of a new municipal center. MWBE’s chief executive testified as to the economic benefits of the project to the local community. The executive also noted that MWBE was a certified minority-owned business under the relevant law, which municipal officials later commented was relevant in undertaking the project and approving the bond issuance.

Lawyer subsequently learns that MWBE provided a bribe to municipal officials to secure approval of the project. What, if any, ethical issues are presented by Lawyer’s subsequent knowledge?
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• HYPOTHETICAL

Lawyer represented the state debt collection professionals association, and was successful in having Municipality A enact an ordinance to regulate debt collection activities. The association believed the ordinance was of benefit to consumers, but also incidentally benefitted larger debt collection companies by creating barriers to entry for smaller debt collection companies without robust regulatory compliance staffs.

Lawyer’s firm has been approached to represent a small debt collection company seeking to challenge the ordinance as unconstitutional. What, if any, ethical issues are presented by Lawyer’s prior representation of the state debt collection professionals association? Can Lawyer’s firm accept the representation?
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- HYPOTHETICAL

Lawyer has been asked to lobby in favor of a special tax break for Client A. Lawyer knows that the tax break will directly disadvantage another of the Lawyers’ clients, Client B. Is there a conflict of interest? Can Lawyer accept the representation?
The touchstone concept of this presentation is about preserving the integrity of proceedings before legislative and administrative bodies.

Public trust, once broken, is not easily restored.

- **Problem**: National Business Ethics Survey found ½ of all public employees indicated having knowledge of at least one instance of misconduct in past year.
  - This distrust breeds apathy and perpetuates culture of corruption.

- **Solution**: ethical organizations/individuals
  - Leadership
    - (role model – someone strong to guide others)
  - Enforce policies
  - Training
  - Dialogue
    - friends/colleagues routinely seek each others’ advice
Questions?

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