MEMORANDUM OF LAW

DATE: September 17, 1998

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: Interpretation of New City Lobbying Ordinance

On July 15, 1998, attorneys representing several local law firms met with the City Attorney to ask his interpretation of the City's new lobbying ordinance. This memorandum addresses the questions that resulted from that meeting. Since that time, your staff has indicated they also have the same questions.

QUESTIONS PRESENTED

1. May a law firm, as opposed to an individual lawyer in the law firm, register as a lobbyist?

2. Does the City's lobbying ordinance unlawfully require lawyers to violate their duty of confidentiality owed to clients by requiring them to register as lobbyists even though the lawyers have no personal "behind the scenes" contact with a City official?

3. What purpose is served by the requirement that lobbyists disclose the range of fees they receive?

SHORT ANSWERS

1. Given the broad language in San Diego Municipal Code [SDMC] section 27.4007(d), allowing "persons" to register as lobbyists before qualifying as such, law firms may register as lobbyists under the current ordinance.

2. For an individual to qualify as a lobbyist under the new ordinance, the individual must have had at least one direct communication with a City official "behind the scenes." The City's new lobbying ordinance is expressly authorized by recent amendments to the State Bar Act and it does not require attorneys to violate the duty of confidentiality to their clients.

3. As articulated in public hearings, fee disclosure requirements in a lobbying ordinance are the means by which the public can learn which entities are trying to influence City officials and how much money is being spent on that effort by those entities.

DISCUSSION

The City's new lobbying ordinance was adopted by the City Council on May 18, 1998. It went into effect on June 18, 1998, and the City Clerk implemented it July 1, 1998. A copy of the new ordinance is attached to this memorandum. The new ordinance replaced the City's former "Municipal Advocates" ordinance, which was adopted in 1973 and remained in place without substantial change until this year. Like the new lobbying ordinance, the former municipal advocates ordinance contained registration and reporting requirements for local lobbyists. Unlike the new ordinance, the previous municipal advocates ordinance contained a major exemption for lawyers acting as lobbyists and did not require them to comply with either the registration or reporting requirements. As a result, very few lawyer-lobbyists were registered with the City. Among other major changes, this new lobbying ordinance eliminates the broad exemption for lawyers acting as lobbyists.

The City Clerk and City Attorney held two public hearings about the City's proposed new lobbying ordinance, and the Council's Rules Committee and the Council itself also held several public hearings on the new ordinance. Following the Council's adoption of this new ordinance, several local attorneys raised questions about it as it pertains to lawyer-lobbyists; these questions are addressed here.

I. May a law firm, as opposed to an individual lawyer in the law firm, register as a lobbyist?

The first question arises because of a discrepancy in the ordinance's new definition of "lobbyist" and the registration requirements of the ordinance.

SDMC section 27.4002 defines "lobbyist" as an individual. However, other provisions of the new ordinance point to a broader definition of lobbyists.

In particular, the registration section of the new ordinance contemplates that lobbyists may be other than individuals. SDMC 27.4007. SDMC section 27.4007(d) states that "nothing in this division precludes a Person from registering as a Lobbyist prior to qualifying." "Person" is defined in Section 27.4002 to include "any individual, business entity, trust, corporation, association, committee, or any other organization or group of Persons acting in concert." Under this definition, a law firm could indeed be a Person, and thus considered eligible to register as a Lobbyist under Section 27.4007.

Given the breadth of the statement in SDMC section 27.4007(d), we conclude that, law firms may register as lobbyists under the current ordinance.

II. Does the City's lobbying ordinance unlawfully require lawyers to violate their duty of confid

This question requires interpretation of the new ordinance to determine whether an individual is a "lobbyist" even though the individual has had no direct "behind the scenes" contact with a City official. It also requires examination of recent amendments to the California Business and Professions Code, which governs lawyers in this state.

A. Interpretation of New Lobbying Ordinance

The attorneys who met with the City Attorney in July interpret the new lobbying ordinance to require individuals to register as lobbyists even though they have had no direct contact with a City official, but rather have only monitored City legislation for clients. This interpretation is incorrect.

The new ordinance does not require all lobbyists to register, but only those who "qualify" as lobbyists. A lobbyist qualifies when he or she receives, or becomes entitled to receive, $1000 in a three month period for lobbying activities. The new ordinance contains a section that is designed to assist lobbyists in determining when they qualify as lobbyists, that is, when they have met the "threshold" compensation that triggers the registration requirement. SDMC 27.4005. For purposes of determining whether the threshold is met, under Section 27.4005, a lobbyist must keep track of various lobbying activities, such as, monitoring City legislation, preparing testimony, attending hearings, communicating with the lobbyist's clients, waiting to meet with City officials, and similar activities. Looking at SDMC section 27.4005 in isolation, the local attorneys asked whether merely monitoring legislation without ever meeting a City official "behind the scenes" would trigger the registration requirement. The answer is "no."

According to SDMC section 27.4002, a "lobbyist" is defined as one who is compensated for lobbying. "Lobbying," under the same code section, means direct communication with a City official, and "direct communication" is defined as talking or corresponding. A person who monitors a hearing, but never talks to or corresponds with a City official, is not a "lobbyist," and is thus not required to register. Even though SDMC section 27.4005 includes monitoring hearings as a factor to be considered when calculating the registration threshold, that activity alone does not qualify an individual as a "lobbyist" as that term is defined in SDMC section 27.4002. Even though the new ordinance contains no "contacts" threshold per se, but only a "compensation" threshold as a means to determine who qualifies as a lobbyist for purposes of registration, the definitions of "lobbyist" and "direct communication" establish that a lobbyist must have at least one "behind the scenes" contact with a City official to trigger the registration requirement.

Although we think the above discussion should alleviate the major concerns expressed by the local attorneys in the July meeting, the question still remains whether the City's lobbying ordinance conflicts with the California Business and Professions Code, which governs attorneys practicing in this state. There is no conflict, as discussed below.

B. California Business and Professions Code Expressly Contemplates and Permit

Under California law, an attorney is required to keep certain information confidential. The California Business and Professions Code states that it is the duty of an attorney "to

maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Cal. Bus. & Prof. Code 6068(e).

On the other hand, as amended in 1994, the California Business and Professions Code states that a local public entity may require that an attorney lobbyist disclose certain information regarding his or her employment as an attorney, including certain information regarding the client. Cal. Bus. & Prof. Code 6009. A lobbyist attorney may be required to disclose "the name, business address, and business telephone number of each client who pays the lobbyist to lobby; the specific matter and agency lobbied, itemized by client; and the amount of money paid to the lobbyist for lobbying and the total expenses of the lobbyist for lobbying, itemized by client." Cal. Bus. & Prof. Code 6009(b)(2). Section 6009 does not define "lobbyist," but instead states that a lobbyist is to be "defined by the local jurisdiction."

1. Legislative History of California Business and Professions Code Section 6009

The legislative history of Section 6009 reveals that it was enacted to remedy the existing State Bar Act which was pre-empting any local ordinance requiring the registration of attorney lobbyists. The State Supreme Court had ruled in *Baron v. Los Angeles*, 2 Cal. 3d 535 (1970), that a local ordinance requiring registration of attorneys for services constituting the practice of law conflicted with the State Bar Act (California Business and Professions Code 6000, et seq.) and was thus pre-empted and void. The legislature, therefore, enacted Section 6009 and made it part of the State Bar Act.

As stated in the "author's statement" section of the April 4, 1994 bill analysis associated with Section 6009, the author wanted to "close the loophole that permits attorneys, who lobby, to evade the registration and disclosure requirements with which all other lobbyists must comply." The author also stated that "this disparate treatment is unfair and irrational."

In the "arguments in support" portion of the August 10, 1994 bill analysis, it states that "any person engaged in paid lobbying activities aimed at influencing decisions by City government should be subject to the same regulations, restrictions, and requirements, regardless of their background, training or professional license." In other words, a "client" should not be allowed to remain anonymous for the sole reason that he or she chooses an attorney lobbyist over an non-attorney lobbyist when the services in question may be performed by either person.

2. California Business and Professions Code Section 6009 and An

Sections 6009 and 6068 are inconsistent with each other only if one takes the position that the information to be disclosed under Section 6009 falls under the category of confidential or secret information. We believe the legislators were well aware of the attorney-client privilege and thus did not intend to violate that privilege by enacting section 6009. "[T]he better and more modern rule of construction is to construe a Legislative enactment in accordance with the

ordinary meaning of the language used and to assume that the legislature knew what it was saying and meant what it said." *Educational and Recreational Services, Inc. v. Pasadena Unified School District*, 65 Cal. App. 3d 775, 782 (1977). It is unlikely the legislature intended to tamper with issues of confidentiality. "Without the most cogent and convincing evidence, a court will never attribute to the Legislature the intent to disregard or overturn a sound rule of public policy." *In re Cox*, 3 Cal. 3d 205, 215 (1970). The legislative history of Section 6009 does not contain any inference that the attorney-client relationship would be affected.

Disclosure of a client's name, address, and telephone number, and the identity of the matter and agency lobbied, is not disclosure of a secret or confidence. "Thus, it is the majority American rule that the identity and address of an attorney's client is not per se a confidential communication protected by the attorney-client privilege when there is a legitimate need for a court to require such disclosure." *Willis v. Superior Court of Los Angeles County*, 112 Cal. App. 3d 277, 291 (1980).

By enacting California Business and Professions Code section 6009, we conclude that the legislature has determined there is a legitimate need for disclosure of information about local lobbyists and their clients. Exceptions to the rule prohibiting an attorney's disclosure of information about a client exist only where there is a showing that "a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which the legal service was sought," *id*., or where the disclosure might reveal a patient's medical ailments. *See Rosso v. Superior Court of San Francisco*, 191 Cal. App. 3d 1514 (1987). These exceptions clearly do not apply to the clients of attorney lobbyists.

III. What purpose is served by the requirement that lobbyists disclose the range of fees they receive?

As originally proposed by the City Clerk to the Rules Committee, the new lobbying ordinance did not require lobbyists to disclose fees they received for lobbying. The requirement for lobbyists to disclose the range of fees they receive for lobbying was added only after public testimony at Rules Committee and significant discussion by the Committee members. In exercising their legislative judgment, the Committee members accepted the reasons articulated in public testimony and ultimately approved a change to the ordinance as part of their recommendation to the full City Council.

Lisa Foster of Common Cause testified at the Rules Committee hearing in February 2, 1998. She urged the Committee to add the fee disclosure requirement so that the public could learn which entities are trying to influence the council, and how much money is being spent on that effort by those entities. She asserted that a lobbying ordinance should provide comprehensive information to the public about who is trying to influence City Hall. She also asserted that disclosure of how much money is spent for lobbying on a project informs the public of the magnitude of the lobbying effort. She argued this type of information is critical for the public to have.

At the March 23, 1998, Rules Committee hearing, in response to the public testimony at the previous Rules Committee hearing, Deputy City Clerk Joyce Lane proposed amending the

ordinance to require disclosure of ranges of compensation instead of disclosure of exact amounts. A proposal to require disclosure of exact fees had been specifically discussed and opposed at previous public hearings held by the City Clerk.

Although there was no universal agreement among Committee members about whether disclosure of fees accomplished the goals sought, the Rules Committee ultimately adopted the Clerk's suggestion to amend the ordinance to include the requirement for lobbyists to disclose ranges of fees. This was the version eventually adopted by the City Council on May 18, but with slight changes in the amounts of the ranges.

CONCLUSION

The City's new lobbying ordinance, adopted in May of this year, was intended to eliminate the broad exemption for lawyer-lobbyists that existed under the City's previous "Municipal Advocates" ordinance, which the new lobbying ordinance replaced. The Municipal Code section governing lobbyists' registration, however, allows entities, including law firms, to register as lobbyists.

The lobbying ordinance requires that an individual have at least one "behind the scenes" contact with a City official to qualify as a lobbyist, even though such activities as monitoring City legislation, preparing testimony, waiting for meetings with City officials, and similar activities count for purposes of determining whether a lobbyist meets the threshold for registering as a lobbyist. The City's new lobbying ordinance does not, on its face or in application, require attorneys to violate their duty of confidentiality to their clients. Finally, the ordinance's fee disclosure requirements serve the purposes of informing the public of which entities are trying to influence City decision-making and of how much money is being spent on that effort by those entities.

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