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Lawyering and Lobbying: The Discipline of Public Policy Advocacy

Levi D. Andrist

Joel Gilbertson

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LAWYERING AND LOBBYING: THE DISCIPLINE OF PUBLIC POLICY ADVOCACY

LEVI D. ANDRIST[†] AND JOEL GILBERTSON^{††}

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[†]Levi D. Andrist is an associate at the Vogel Law Firm in Bismarck, N.D., focusing on government relations and regulatory representation. He earned a J.D. in 2010 from the University of North Dakota School of Law. Before joining the Vogel Firm, he served as the law clerk to Chief Justice Gerald W. VandeWalle of the North Dakota Supreme Court.

^{††}Joel Gilbertson is a shareholder at the Vogel Law Firm in Bismarck, N.D. Joel earned a J.D. in 1975 from the University of North Dakota School of Law. He has thirty-five years of experience in lobbying and regulatory representation and has represented, as a lobbyist, numerous industries, including pharmaceutical manufacturing, insurance, health care, agricultural and medical bioscience, organized bar, banking, alcohol retail and distribution, agricultural commodities, and automobile manufacturing.

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I. INTRODUCTION

Much has been written about attorneys being advocates for clients litigating in the judicial branch. All aspects of litigation have been analyzed in hundreds of legal journals for years, but relatively little has been written about advocacy for a client in the legislative branch. This area of issue resolution and public policy advocacy, in many ways, can be more powerful and can affect more people than hundreds of lawsuits.

Our judicial system is built on the premise that each case, each person, is important and issues are individually addressed and resolved within a specific factual scenario. The legislative system has a different premise because many legislative bills and issues are significantly broader in scope. Affecting and changing public policy can involve millions of people and many millions of dollars.

So let us take a closer look at effectively influencing public policy as a lawyer in the capacity as a lobbyist. This article will first explain the laws and regulations surrounding lobbyists and their unique set of talents and responsibilities that many lawyers have undertaken. This article will also suggest some "rules" based on a long-time lawyer and lobbyist's observations on how to successfully lobby and affect public policy.

II. THE LEGISLATURE’S REGULATION OF ITS LOBBYISTS

Lawyers need to know, or should at least consider, what solutions lobbying can provide their clients.¹ Legislative solutions can come in various forms. Whatever those solutions may be, the players are clear. The legislature passes or defeats bills, and the governor signs or vetoes those bills. Thus, a lobbyist seeks to influence the decisions of the legislature and the governor. In North Dakota, most “formal” lobbying takes place during the legislative session in the legislative wing of the state capitol. It should perhaps be noted that even more “informal” lobbying takes place in various cafes, meeting rooms, campaign fundraisers, restaurants, and e-mail exchanges—any place two or more people can communicate with each other outside of the capitol building.

Lobbyists recruit sponsors for bills. Lobbyists also prepare and deliver testimony to committees, whose job it is to recommend the passage or defeat of bills to the North Dakota House of Representatives and Senate. Above all, lobbyists serve as an integral source of information to the people who create the law of North Dakota—the legislature and the governor.

The influence and actions of a lobbyist are not without limits. The legislature itself has placed restrictions on what a lobbyist can or cannot do. For instance, lobbyists must register as such and lobbyists have a specified responsibility to report how much money they have spent to influence legislators.² Similarly, the North Dakota Supreme Court has adopted rules regulating a lawyer’s conduct when acting as a lobbyist.³

Within this regulatory environment, the importance of lobbyists is likely greater now than it ever has been in North Dakota history. Over 550 lobbyists registered in 2011.⁴ Hundreds of bills are heard each legislative session.⁵ And with the state’s record-growing wealth, more legal and policy issues will continue to arise, while the need to revisit numerous old ones remains.

The North Dakota Legislature has long taken a relatively laissez-faire view toward the regulation of legislative lobbyists. Considering the “great

1. Legislative solutions are even suggested by our state’s highest court, the North Dakota Supreme Court. From the bench, the court has often stated, “counsel, isn’t your relief at the other end of the hall?”—indicating the legislative wing of the state capitol instead of the judicial wing.

2. See *infra* Section II.A.

3. See *infra* Section III.

4. See Sec’y of State, *Registered Lobbyists*, ND.GOV (2011), <http://www.nd.gov/sos/lobbylegislate/lobbying/registered-2011.html>.

5. During the 2011 Legislative Session, 841 bills were introduced to both the Senate and House of Representatives, 514 of which became law. See N.D. Legis. Council, *N.D. Legis. Assemb. Summary of Bills and Res. Introduced and Passed*, ND.GOV (June 9, 2011), www.legis.nd.gov/information/library/docs/pdf/ndlasbrip.pdf.

increase in the number of lobbyists” and “the growing importance of state government,”⁶ it was not until 1975 that the legislature decided to take an active role in regulating lobbyists. Apparently agreeing with the assertion that citizens and legislators alike have the “right to know who is attempting to influence [legislative] decisions,”⁷ the 1975 Legislative Assembly adopted the state’s first comprehensive lobbying law. The original law adopted in 1975 has remained largely unchanged in its near forty-year existence.⁸

North Dakota’s regulatory regime for lobbying has been effective because it gives flexibility to those attempting to influence public policy in the state. Importantly, the state’s system encourages both professional and social interactions between and among political parties and between and among lobbyists and legislators. Consequently, the potential to develop respectful and fruitful relationships, which often lead to healthy discussion and good policy, is greatly increased.⁹

A. THE THREE RS: REGULATION, REGISTRATION, AND REPORTING

Chapter 54-05.1 of the North Dakota Century Code (the Lobbying Act) provides the substantive restrictions and requirements imposed on lobbyists. The chapter regulates lobbyists by defining who is and who is not a lobbyist. The chapter also spells out a lobbyist’s duty to register with the Secretary of State. In the same vein, the Lobbying Act requires a lobbyist to report to the Secretary of State certain information regarding their financial influence on the legislative process.

1. *Regulation: Who is a Lobbyist, and What Can’t They Do?*

Who is a lobbyist in North Dakota? Generally, a lobbyist is anyone who attempts to secure the passage or defeat of legislation.¹⁰ Anyone who attempts to influence decisions of legislative management, the interim

6. *Testimony in Support of S.B. 2368 Before the Standing Comm. on State & Fed. Gov’t*, 44th Legis. Assemb. (N.D. 1975) (statement of Robert Branconnier, Citizens’ Lobby of N.D.).

7. *Id.* (statement of Sally Oremland, Common Cause of N.D.).

8. *But see, e.g.*, 1995 N.D. Laws 1453 (expanding the list of people exempted from the strictures of the lobbying law).

9. Some have attributed legislative breakdowns—like those in Washington, D.C. and in St. Paul, Minnesota—to a lack of collegiality among elected leaders and those who attempt to influence their decisions.

10. N.D. CENT. CODE § 54-05.1-02(1)(a) (Supp. 2011) (defining a lobbyist as anyone who “[a]ttempts to secure the passage, amendment, or defeat of any legislation by the legislative assembly”).

governing body of the legislative assembly, is also considered a lobbyist.¹¹ Further, a person is considered a lobbyist when attempting to sway the governor to approve or veto legislation.¹²

The legislature, however, has exempted many individuals from being considered lobbyists. For instance, neither private citizens who are acting on their own behalf nor legislators themselves are considered lobbyists.¹³ Employees, officials, and agents of the state, or any of the state's political subdivisions,¹⁴ are also not considered lobbyists if they are acting in an official capacity.¹⁵ Further, a person who provides information to a legislative committee at the request of that committee is not considered a lobbyist.¹⁶ If the chairman of legislative management invites an individual to provide information to that body, the person is not required to register and report as a lobbyist.¹⁷ Similarly, a standing committee, which is a committee that meets during a legislative session, or an interim committee, which meets between legislative sessions, can exempt an individual from registration and reporting requirements if the committee invites the individual to provide information to the committee.¹⁸

Another exemption from the lobbying statute is triggered when a registered lobbyist introduces a representative of a trade or professional organization to a committee.¹⁹ In this instance, the organization's representative will not be subject to the registration and reporting requirements so long as the representative presents the views of the organization, industry, or business, and not his or her own personal views.²⁰ This exemption is frequently used by lobbyists who might bring in a representative of an organization from across the country to provide expertise on a bill.

11. *Id.* § 54-05.1-02(1)(b) (defining a lobbyist as anyone who “[a]ttempts to influence decisions made by the legislative management or by an interim committee of the legislative management”).

12. *Id.* § 54-05.1-02(1)(a) (defining a lobbyist as anyone who “[a]ttempts to secure . . . the approval or veto of any legislation by the Governor of the state”).

13. *Id.* § 54-05.1-02(2)(a)-(b).

14. *See generally id.* ch. 54-05.1 (not defining who is considered an agent of the state or a political subdivision within the lobbying act).

15. *Id.* § 54-05.1-02(2)(c). Regardless of whether a state agent is elected or appointed, paid or unpaid, they are not considered a lobbyist if acting in an official capacity. *Id.* One example of a state agent who would not be considered a lobbyist is a deputy director of a state agency who is trying to secure the agency's proposed budget.

16. *Id.* § 54-05.1-02(2)(d).

17. *Id.*

18. *Id.*

19. *Id.* § 54-05.1-02(2)(e).

20. *Id.*

Aside from the registration and reporting requirements of a lobbyist, the legislature has prohibited certain activities.²¹ For example, a lobbyist cannot directly or indirectly agree to give or receive something of value, including money or property, to or from someone in exchange for their service in passing or defeating legislation.²² Any attempt by a lobbyist to influence a legislator, without first telling the legislator of his or her “real and true” interest in the legislation, is also considered an unlawful means of influencing legislation.²³ Using any of these unlawful means to influence legislation is a class B misdemeanor, which carries a possible punishment of up to thirty days in jail and a fine of up to one thousand dollars.²⁴

The intent of the lobbyist in giving a gift or hosting a legislator at a function is key to avoiding any risk of using unlawful means to influence legislation. The receipt of a gift by a legislator or the participation of a legislator at a social gathering or other function is completely acceptable as long as the lobbyist has not agreed with a legislator to procure the passage or defeat of legislation in exchange for the gift.²⁵ This proposition is consistent with North Dakota’s hands-off approach of regulating lobbyists because it assumes a legislator will not give a vote or lobby on behalf of a certain position in exchange for a dinner or travel mug. A lobbying dinner, the law presumes, is an opportunity to make your client’s case to a legislator, and the statute prohibits the quid pro quo exchange of a gift for a vote.

For a legislator who seeks to avoid, or at least minimize, the appearance of undue influence by a lobbyist, the Lobbying Act requires a lobbyist to provide the estimated cost of a gift or the cost of attending a function to the legislator and allow the legislator to pay the cost.²⁶ The legislator must, however, ask the lobbyist for the estimated cost before a lobbyist is required to provide the cost to the legislator.²⁷

What is the consequence to a lobbyist if a lobbyist uses unlawful means to influence legislation? The Secretary of State is the chief regulator of lobbying and lobbyists by statute and has the authority to revoke a lobbyist’s certificate of registration or impose other penalties.²⁸ The

21. See N.D. CENT. CODE § 54-05.1-06 (2008). These prohibited activities apply equally to non-lobbyists. *Id.*

22. *Id.* § 54-05.1-06(1)-(2).

23. *Id.* § 54-05.1-06(3).

24. N.D. CENT. CODE § 12.1-32-01(6) (1997); *Id.* § 54-05.1-07 (penalty for unlawful influence) (relating to class B misdemeanor punishment).

25. *Id.* § 54-05.1-06(1)-(2).

26. *Id.* § 54-05.1-05(1)-(2).

27. *Id.*

28. *Id.* § 54-05.1-04(b).

secretary of state can also, on his own initiative, ask the attorney general to investigate any actions by a lobbyist who may have asserted unlawful means to influence legislation.²⁹

Beyond the Lobbying Act's prohibition against using unlawful means to influence legislation, the North Dakota Constitution prohibits bribery, solicitation of bribery, and unlawful influence of a legislator or the governor.³⁰ Other criminal statutes prohibit certain actions by lobbyists. For example, a lobbyist would be guilty of bribery of a public official, a class C felony, if the lobbyist knowingly offers, gives, or agrees to give to another something of value in exchange for an official action by a legislator.³¹ Additionally, a lobbyist would be guilty of trading in special influence, a class A misdemeanor, if the lobbyist knowingly offers something of value for exerting, or soliciting another person to exert, special influence on a legislator or the governor.³² Exerting special influence on a legislator or the governor might even involve a family relationship or a relationship within a political party.³³

2. Registration

One of the two primary goals of the Lobbying Act is the registration of lobbyists.³⁴ Registration of lobbyists allows for citizens to have open access, within limits, to certain reported expenditures by a lobbyist.³⁵ Further, because all lobbyists must register, the public is able to view the people who are attempting to influence lawmakers in North Dakota.³⁶

A lobbyist's duty to register with the Secretary of State is a minimal burden. Simply, registration is a prerequisite to lobbying. The registration year generally runs from July 1 to June 30 each year.³⁷ However, a lobbyist can request the Secretary of State to grant an earlier expiration date.³⁸

Registration is a three-step process. First, a lobbyist must fill out a registration form, which includes the lobbyist's full name, business address, the lobbyist's client, the duration of the employment, and the person or

29. *Id.* § 54-05.1-04(c).

30. N.D. CONST. art. IV, § 9, art. V, § 10.

31. N.D. CENT. CODE § 12.1-12-01 (1997). A class C felony carries a possible penalty of five years' incarceration and a five thousand dollar fine. *Id.* § 12.1-32-01(5).

32. *Id.* § 12.1-12-05.

33. *Id.* A lobbyist is guilty of a class C felony if a lobbyist threatens harm to a legislator. *Id.* § 12.1-12-06(1).

34. N.D. CENT. CODE § 54-05.1-01 ("It is hereby declared to be the intent of the legislative assembly to require that lobbyists register as such before engaging in lobbying activity . . .").

35. *Id.* § 54-05.1-04(1)(d).

36. *Id.* § 54-05.1-04(4).

37. N.D. CENT. CODE § 54-05.1-03(1)(c) (Supp. 2011).

38. *Id.*

entity that pays the lobbyist.³⁹ The form also asks the lobbyist to indicate the general industry or interest that is represented.⁴⁰ This form is available on the Secretary of State's website.⁴¹ Second, the lobbyist must procure a letter of authorization from the lobbyist's client.⁴² This letter, which is also available on the Secretary of State's website,⁴³ must be signed by the client.⁴⁴ Third, a fee of twenty-five dollars for a lobbyist's first-listed client must be paid to the Secretary of State, and a fee of fifteen dollars must be paid for any additional clients.⁴⁵

Once registered, lobbyists receive a number and must wear a badge of identification when lobbying.⁴⁶ The Secretary of State provides an official badge lobbyists can wear,⁴⁷ but lobbyists can wear their own badge as long as it identifies the name of the lobbyist and includes the word "lobbyist," the lobbyist's registration number, or the organization name of the lobbyist.⁴⁸ Failure to register or wear a badge of identification is an infraction,⁴⁹ which carries a maximum fine of five hundred dollars.⁵⁰

3. Reporting

Aside from registration, the other primary goal of the lobbying act is reporting—another public transparency requirement.⁵¹ Reporting allows the public to know, within limits, how much money has been spent on hosting a legislator or giving them a gift. Not only is the Secretary of State required to associate a lobbyist's expenditures with an individual legislator,⁵² the Secretary of State is also required to compile a public report that logs the total amount of reported expenditures by each lobbyist once

39. *Id.* § 54-05.1-03(1)(b)(1)-(2).

40. *Id.*

41. N.D. SEC'Y OF STATE, LOBBYIST REGISTRATION (2011), available at <http://www.nd.gov/eforms/Doc/sfn11106.pdf>.

42. N.D. CENT. CODE § 54-05.1-03(1)(d).

43. N.D. SEC'Y OF STATE, LETTER OF AUTHORIZATION FOR LOBBYIST (2011), available at <http://www.nd.gov/sos/forms/pdf/lobauth.pdf>.

44. N.D. CENT. CODE § 54-05.1-03(1)(d).

45. *Id.* § 54-05.1-03(1)(e).

46. *Id.* § 54-05.1-03(1)(a).

47. *Id.* If lost or destroyed, the Secretary of State can replace an official badge for ten dollars. *Id.*

48. *Id.* If lobbyists elect to use their own name badges, the letters on the badge, other than the letters of their name, must be at least one-quarter inch tall. *Id.*

49. *Id.* § 54-05.1-07.

50. N.D. CENT. CODE § 12.1-32-01(7) (1997).

51. N.D. CENT. CODE § 54-05.1-01 (2008) ("It is hereby declared to be the intent of the legislative assembly to require . . . certain reporting procedures by lobbyists.").

52. *Id.* § 54-05.1-04(1)(d).

the statutory limit is reached.⁵³ The responsibility to report is a greater burden than registration because lobbyists must account for any expenditure of sixty dollars or more per person per event that is associated with their lobbying efforts.⁵⁴

The only significant deadline for reporting expenditures is the first of August—the deadline for filing the lobbyist expenditure report,⁵⁵ which is available on the Secretary of State’s website.⁵⁶ Again, expenditures greater than sixty dollars per person per event on a legislator or the governor must be reported.⁵⁷ Beyond the date and amount of the expenditure, the lobbyist must include the name of the recipient and a brief explanation of the nature of the expenditure.⁵⁸ The explanation should also include the name of the lobbyist’s client.⁵⁹ Even if a lobbyist does not have reportable expenditures or any expenditure at all, the report must still be filed with the Secretary of State.⁶⁰ Besides the specified reporting requirements of the Lobbying Act, state agencies or officials cannot require a lobbyist to report more.⁶¹ Any violation of these reporting requirements is considered an infraction,⁶² which can lead to a fine of up to five hundred dollars.⁶³

Timeliness in filing expenditure reports is crucial. The late fees are not fiscally burdensome; failure to file an expenditure report by August 1 results in a twenty-five dollar late fee, and failure to file after October 1 results in a fifty dollar late fee.⁶⁴ However, the failure to file may place a lobbyist’s ability to lobby at stake. Significantly, if a lobbyist fails to file a report or pay a late fee by October 1, the lobbyist’s registration is automatically revoked.⁶⁵ If, however, the lobbyist rectifies his or her tardiness by filing the report and paying any late fees, the lobbyist’s registration can

53. *Id.* § 54-05.1-04(3). While not available online, this report is available from the Secretary of State’s office. The Secretary has forty days after August 1 to compile the expenditure reports and to make them available for public inspection. *See id.* § 54-05.1-03(4).

54. *See id.* § 54-05.1-03(2).

55. *Id.*

56. N.D. Sec’y of State, *Required Lobbyist Reports*, ND.GOV, <http://www.nd.gov/sos/lobbylegislate/lobbying/reports.html> (last visited Nov. 9, 2011); *see also* N.D. SEC’Y OF STATE, LOBBYIST EXPENDITURE REPORT (2011), *available at* <http://www.nd.gov/eforms/Doc/sfn07654.pdf>.

57. N.D. CENT. CODE § 54-05.1-03(2). This reporting requirement extends to expenditures on the family members of a legislator or the governor. *Id.*

58. *Id.*

59. *See* N.D. SEC’Y OF STATE, *supra* note 56 (requiring disclosure of both the nature of the expenditure and on whose behalf the expenditure was made).

60. N.D. CENT. CODE § 54-05.1-03(2).

61. *Id.*

62. *Id.* § 54-05.1-07.

63. N.D. CENT. CODE § 12.1-32-01(7) (1997).

64. *Id.* § 54-05.1-03(2)(a)-(b).

65. *Id.* § 54-05.1-03(3).

be reinstated at the discretion of the Secretary of State.⁶⁶ This, of course, is public information, so a tardy lobbyist can cause embarrassment to not only the lobbyist, but to the organization the lobbyist represents.

Along with monitoring reports and registration forms and assessing late fees, the Secretary of State has the ability to assess civil penalties against a lobbyist up to one hundred dollars.⁶⁷ While the Secretary of State must give adequate written notice to the lobbyist before a civil penalty can be assessed, any civil penalty is appealable to a district court.⁶⁸ If unchallenged, the lobbyist must pay the penalty before he or she is able to again register as a lobbyist.⁶⁹

B. ATTORNEY GENERAL OPINIONS

Although there have been no reported cases in North Dakota analyzing or applying the Lobbying Act, several attorney general opinions have interpreted the law, albeit in narrow circumstances. For instance, one opinion explained that a county or city with a home rule charter has the authority to adopt an ordinance allowing the county or city to hire a lobbyist.⁷⁰ Another opinion illustrated the “official capacity” exception to the Lobbying Act: the North Dakota Wheat Commission’s board members and staff can lobby the legislature as long as they are acting in their official capacity because state law grants them broad powers and duties “to foster and promote the sale, utilization, and development of wheat.”⁷¹

Additionally, the Attorney General has explained the use of public money to hire a lobbyist. In the opinion, the Attorney General found that public funds cannot generally be used for the purpose of paying a lobbyist without a statute expressly permitting the practice.⁷² Even then, the provision expressly permitting the practice must be congruent with

66. *Id.* (stating that registration “may” be reinstated). That is, a lobbyist may need to persuade the Secretary to allow for reinstatement. The only statutory exception for a late filing is an extenuating circumstance that justifies the tardiness. If the Secretary has been notified in writing by August 1 of the extenuating circumstance and the circumstance justifies a late filing, a lobbyist’s registration cannot be revoked. *Id.*

67. *Id.* § 54-05.1-07.

68. *Id.* A lobbyist can appeal to either district court in Burleigh County or in the county of their residence, but only on the basis that the Secretary’s assessment was clearly erroneous. *Id.*

69. *Id.*

70. N.D. Op. Att’y Gen. L-06 (2011) (letter to North Dakota House Minority Leader, Jerry Kelsh). More specifically, the Attorney General determined that the North Dakota Association of Oil and Gas Producing Counties can hire a lobbyist if (1) the city or county has the home-rule authority to hire a lobbyist, and (2) the power to hire a lobbyist is within a joint powers agreement between counties, cities, and school districts. *Id.*

71. N.D. Op. Att’y Gen. L-63 (2002) (letter to Representative Merle Boucher).

72. N.D. Op. Att’y Gen. L-152 (1998) (letter to Representative Shirley Meyer).

generally applicable statutes and constitutional provisions.⁷³ More specifically, the Attorney General found that non-governmental organizations are free to use non-public money—such as funds raised from voluntary members of the organization—to hire a lobbyist.⁷⁴

C. A COMPARATIVE ILLUSTRATION: MINNESOTA V. NORTH DAKOTA

North Dakota's largely hands-off approach to regulating lobbyists is different than many other states. The state's regulation of lobbyists does not compare to the strenuous restrictions placed on lobbyists in our neighbor to the east, for example. The Minnesota Legislature has taken a heavy, hands-on approach to regulating lobbyists. A few key differences illuminate the flexibility given to lobbyists in North Dakota, compared to lobbyists in Minnesota.

Minnesota defines lobbying much broader than North Dakota. In Minnesota, lobbying includes any attempt to influence legislative action, administrative action, or any action of the state's metropolitan governmental unit, which consists of the seven metropolitan counties.⁷⁵ In North Dakota, lobbying refers only to the passage or defeat of legislation, and does not include any attempts to influence the passage or defeat of administrative rules or rules promulgated by political subdivisions.⁷⁶ Consequently, a Minnesota lobbyist is subject to regulation for activities that would not be regulated in North Dakota. Most notably, an individual seeking to influence the passage or defeat of an administrative rule is not subject to regulation as a lobbyist in North Dakota.⁷⁷

Perhaps the most visible difference is that a Minnesota lobbyist, and the entities that employ a lobbyist, cannot generally give gifts worth five dollars or more to legislators.⁷⁸ Some gifts like plaques of recognition or services of insignificant value are allowed.⁷⁹ But a lobbyist cannot buy a Minnesota legislator dinner unless the recipient is answering questions or

73. *Id.*

74. *Id.*

75. PETER J. COYLE & JULIE L. PERRUS, *LOBBYING, PACS, AND CAMPAIGN FINANCE: 50 STATE HANDBOOK* 831-32 (Edward E. Poliakoff & Jocelyn Y. Dyer eds., West Publishing 2011).

76. Minnesota law, like North Dakota law, exempts many individuals from the requirements of the lobbying law. *See, e.g., id.* at 833-34 (explaining Minnesota's exemptions of elected officials acting in an official capacity, public officials, and experts testifying at the request of a committee).

77. *See* N.D. CENT. CODE § 54-05.1-02(1) (Supp. 2011) (definition of lobbyist).

78. *Id.* at 838, 840.

79. *Id.* at 840.

speaking as part of a program.⁸⁰ North Dakota law does not prohibit such gifts or dinners. In Minnesota, a cup of coffee is pretty much the limit.

While Minnesota's registration requirements are largely equivalent to North Dakota's requirements,⁸¹ its reporting requirements are more strenuous. A Minnesota lobbyist must categorize all lobbying expenses into one of nine categories, report the name and address of each recipient, and include the date of each transaction.⁸² Further, a Minnesota lobbyist has to report his or her lobbying expenses twice a year, unlike North Dakota, where expenses need be reported only once a year.⁸³

Not only must lobbyists report what they have spent on their lobbying efforts, but lobbyists' clients also have a duty to report.⁸⁴ Specifically, clients, commonly known as principals, are required to report detailed and sensitive information concerning their lobbying efforts. Principals must report, rounded to the nearest \$20,000, any money spent on a lobbyist's compensation, advertising, research, dissemination of information, or public relations, and any money spent on staff and administrative expenses connected to their lobbying efforts.⁸⁵

It should be noted that both North Dakota legislators and lobbyists have been vocal in asserting that the North Dakota system encourages more socializing among not only legislators and lobbyists, but also among legislators of both parties. These legislators and lobbyists see each other and socialize at numerous social events during the legislative session. The result is a legislature that is less polarized and simply gets more legislative agreement and better results with less animosity.⁸⁶

80. *Id.* (citing MINN. STAT. ANN. § 10A.071, subd. 3 (Supp. 2011)).

81. *See id.* at 834-35 (describing the contents of a lobbying registration form). One small difference in the registration process is that in Minnesota, a separate form must be filed for each entity a lobbyist is representing, whereas in North Dakota, one form is sufficient. *Id.* at 835; *see also supra* Section II.A.3 (explaining North Dakota's registration laws).

82. COYLE & PERRUS, *supra* note 75, at 837 (citing MINN. STAT. ANN. § 10A.04, subd. 4(b)-(c)). The nine categories include the preparation and distribution of lobbying materials, media advertising, telegraph and telephone, postage, fees and allowances, entertainment, food and beverages, travel and lodging, and other disbursements. *Id.*

83. *See id.* at 836-37; *see also supra* Section II.A.3 (explaining North Dakota's requirements).

84. COYLE & PERRUS, *supra* note 75, at 836 (citing MINN. STAT. ANN. § 10A.04, subd. 6).

85. *Id.*

86. The reference is anecdotal, but is based on discussions with legislators and lobbyists from both North Dakota and Minnesota.

III. ETHICAL CONSIDERATIONS FOR THE LAWYER-LOBBYIST

A. WHEN THE RULES OF PROFESSIONAL CONDUCT APPLY

Considering the flexibility given to North Dakota lobbyists by the legislature, lawyer-lobbyists must consider the potential ethical pitfalls and obligations when advocating before the legislature. While the North Dakota Rules of Professional Conduct generally regulate a lawyer's delivery of legal services, the rules do not necessarily apply to a lawyer who is acting as a lobbyist. Rule 5.7 explains when a lawyer-lobbyist is subject to the rules of professional conduct.⁸⁷ Rule 5.7 also attempts to guide a lawyer who provides "law-related services," and legislative lobbying is considered a law-related service.⁸⁸ Specifically, the rule contemplates two situations when a lawyer-lobbyist is bound by the rules of professional conduct.

First, the rules of professional conduct apply if the lobbying occurs in "circumstances that are not distinct from the lawyer's provision of legal services to clients"⁸⁹ The distinction between law-related services and legal services can be a tricky determination. Consider hypothetical-lawyer Theodore's practice:

Theodore is a licensed lawyer in North Dakota. He practices primarily in the area of estate planning and tax. During the legislative session, he lobbies for a couple of his estate planning clients as well as a couple of agricultural trade associations. When do the rules of professional conduct govern his practice?

On one side of the spectrum, the distinction between law-related services and legal services might be clear. For Theodore's trade association clients—assuming Theodore does not provide legal representation to the trade associations, he does not provide legal advice concerning employment law or contracts, and he is not involved with any of the association's current or prospective litigation—Theodore only lobbies the legislature on their behalf. Because his non-lobbying law practice is focused on estate planning and tax, the circumstances surrounding his lobbying efforts on behalf of his trade association clients are distinct from the circumstances surrounding his estate planning practice. The legislative venue is distinct

87. N.D. RULES OF PROF'L CONDUCT R. 5.7 (2006). *See generally* Dennis J. Block, Irwin H. Warren, & George F. Meierhofer, Jr., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 GEO. J. LEGAL ETHICS 739 (1992) (providing an explanation of the history of Model Rule 5.7 of the American Bar Association).

88. N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 7 ("Examples of law-related services include . . . legislative lobbying . . .").

89. *Id.* R. 5.7(1)(a).

from a judicial venue, and Theodore's practice areas are clearly distinct. Further, while he might use the same office and support staff for all his clients, the professional interactions involved in his lobbying for the trade association are distinct from those in his estate planning and tax practice. Theodore will not likely be bound by the rules of professional conduct while lobbying on behalf of the trade associations.

On the other side of the spectrum, the delivery of law-related services and legal services might be so closely interrelated that the lawyer may not even be able to exempt his lobbying from the rules of professional conduct.⁹⁰ Consider Theodore's estate planning and tax clients. Assume Theodore has not indicated to his clients that his legal services are unrelated to his lobbying; he uses the same law practice letterhead, he provides legal advice concerning tax benefits and also lobbies the legislature to protect those tax benefits, and his clients often testify before the legislative finance and tax committees, as private citizens, to protect the tax benefits they enjoy. Additionally, he has no separate lobbying agreement with those clients. Because the matter of the legal services he provides to his tax clients is nearly indistinguishable from the matter he advocates for as a lobbyist for his tax clients, Theodore would likely be subject to the rules of professional conduct.⁹¹

This hypothetical situation highlights potentially damaging ethical pitfalls.⁹² Theodore's tax clients might expect confidentiality related specifically to his lobbying efforts. The tax clients might also expect Theodore not take on other lobbying clients who have a possible conflict of interest. Further, the tax clients might expect Theodore to maintain professional independence in his lobbying efforts and refrain from making lobbying decisions based on factors other than the best interests of his tax clients. To isolate himself from any confusion regarding the protections of the client-lawyer relationship, Theodore should, as described below, make reasonable efforts to distinguish his law-practice from his lobbying.

Despite the fact that the circumstances of lobbying are generally distinct from the circumstances of legal services—a situation where the rules of professional conduct will not likely apply—Rule 5.7 contemplates a second situation where the rules of professional conduct do apply.⁹³ If the

90. *Id.* at R. 5.7 cmt. 6.

91. *Cf.* N.D. Ethics Comm., Op. 01-03 (2001) (explaining that a lawyer who prepared taxes was bound by the rules of professional conduct because “[n]o indication was made that preparing tax returns was a business unrelated to the practice of law,” including the use of his law practice letterhead).

92. *See* N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 1, 6.

93. *Id.* at R. 5.7 cmt 2.

lobbying is delivered by an entity controlled by a lawyer-lobbyist who fails to take “reasonable measures” to inform the client that the client-lawyer relationship and its concomitant protections do not exist, the lawyer’s conduct as a lobbyist is governed by the rules of professional conduct.⁹⁴

What is considered an “entity” under Rule 5.7 is unclear. One broad view is that, under the American Bar Association’s Model Rule 5.7, an entity is simply the “mechanism” that provides the law-related services.⁹⁵ The mechanism might simply be a practice group within a law firm. A narrower view of what could be considered an entity is a separate business structure, like a wholly-owned subsidiary.⁹⁶ It is advisable to take the broader, more inclusive, view that regardless of how you characterize the lobbying entity, a lobbyist should take reasonable measures to define the relationship they seek to create.⁹⁷ Taking this view protects both the client and the lawyer-lobbyist from making any assumptions about expectations created by the relationship.⁹⁸

One issue concerning a lawyer-lobbyist’s attempt to take “reasonable measures” to define the relationship is control.⁹⁹ That is, if a lawyer-lobbyist does not have control over the mechanism for delivering the lobbying services, need the lawyer-lobbyist even take reasonable measures to define the relationship to be exempted from the rules of professional conduct? While the technical answer to this question is likely “no” under the plain language of the rule, the better answer is “yes.”

Taking reasonable measures to define the relationship, regardless of a lawyer’s control, will establish the expectations of the relationship. Preventing uncertainties in the relationship protects the client’s best interests because they will know, to the extent the lawyer explains, what the lawyer can and cannot do.¹⁰⁰ Specifically, the client will know if the lawyer

94. *Id.* at R. 5.7(1)(b).

95. See Andrew M. Goldner, *Minding Someone Else’s Businesses: Pennsylvania Rule of Professional Conduct 5.7 Leads the Way*, 11 GEO. J. LEGAL ETHICS 767, 784 (1998).

96. *Id.* at 775.

97. See James Podgers, *House of Delegates: Ancillary Business Provision Added to Model Rules*, A.B.A.J., Apr. 1994, at 117 (explaining Model Rule 5.7 without considering the entity delivering the law-related services).

98. See John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 101 (2000).

99. N.D. RULES OF PROF’L CONDUCT R. 5.7 cmt. 3. (“A lawyer’s control of an entity extends to the ability to direct its operation. Whether a lawyer has such control will depend upon the circumstances of the particular case.”); *cf.* PA. RULES OF PROF’L CONDUCT R. 5.7(d) (2005) (extending the obligation to take reasonable measures to define the relationship not only to those who control the entity, but to employees, agents, or other affiliates).

100. *Joint Attorney Standards Comm. Minutes*, June 13, 1995, at 7. (“[A]doption of the rule in other states has also been intended to serve interests of client protection.”).

must maintain confidentiality and avoid conflicts of interest. Moreover, preventing uncertainties in the relationship also protects the lawyer's best interests because the lawyer can elect to have a more structured relationship under the rules of professional conduct or possibly have a more flexible relationship with a non-client-attorney relationship under separate regimes, like the law of agency.¹⁰¹

The greater question is what constitutes "reasonable measures" when a lawyer is attempting to define the relationship. Succinctly stated, a lawyer should communicate "in a manner sufficient to assure that the person understands the significance of the fact[] that the relationship of the person to the business entity will not be a client-lawyer relationship."¹⁰² Consider, once again, Theodore's practice. Even if he is successful in making distinct his law practice from his lobbying practice, he should still take reasonable measures to define the relationships with his estate planning and tax clients as well as his trade association clients. Before entering into an agreement to deliver lobbying services, Theodore should communicate the parameters of the relationship with his clients.¹⁰³ Further, regardless of the client's sophistication, he should be sure to define the relationship in writing.¹⁰⁴

B. CONDUCT AS A LAWYER-LOBBYIST

One great benefit to lawyers under Rule 5.7 is that the rule gives each lawyer-lobbyist the choice as to whether or not the protections of the client-

101. N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 8. The law of agency does impose certain ethical requirements. If a lobbyist is exempted from the rules of professional conduct, the lobbyist, as an agent and fiduciary, has a duty of loyalty to the principal. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006). With regard to conflicts of interest, an agent must not compete with the principal or assist the principal's competitors. *Id.* § 8.04. Similarly, with regard to confidentiality, an agent has a duty not to disclose confidential information that may benefit either the agent or a third party. *Id.* § 8.05.

Another key difference between the rules of professional conduct and the law of agency is enforcement. To enforce an agent's duties, a lawsuit must be filed, which can be an expensive and time-consuming matter. To enforce a lawyer's ethical obligations under the rules of professional conduct, a client need only file a disciplinary complaint, which places most of the burden on the disciplinary board, not on the client. *See* N.D. RULES FOR LAWYER DISCIPLINE R. 2.4(E) (explaining the duties of a district inquiry committee, which include the investigation and review of a disciplinary complaint).

102. N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 5.

103. *Id.* The American Bar Association's Model Rule includes a comment that imposes on the lawyer the burden to show the lawyer has taken reasonable measures to define the relationship. MODEL RULES OF PROF'L CONDUCT R. 5.7 cmt. 7 (2007). In North Dakota, however, the lawyer-lobbyist does not have the burden of establishing the adequacy of his or her efforts to define the relationship and explain whether or not the protections of the rules of professional conduct apply. *See* N.D. RULES OF PROF'L CONDUCT R. 5.7; *see also Joint Attorney Standards Comm. Minutes*, Sept. 15, 1995 (observing a committee member was "unconvinced that the burden belongs with the lawyer"). Consequently, the pure circumstances of each situation indicate whether or not a lawyer-lobbyist has taken reasonable measures to define the relationship.

104. *See* N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 5-6.

attorney relationship should apply.¹⁰⁵ But regardless of whether the rules of professional conduct apply under Rule 5.7, a lawyer-lobbyist must still abide by the rules that apply generally to conduct as a lawyer.¹⁰⁶ For instance, even if lawyer-lobbyists are not generally subject to the rules of professional conduct, they cannot state or imply they have an ability to improperly influence a government official or judge,¹⁰⁷ they cannot commit a crime that indicates they are dishonest or untrustworthy,¹⁰⁸ and they cannot make misrepresentations or act fraudulently.¹⁰⁹

Even if a lawyer-lobbyist is confident he has exempted his lobbying practice from the rules of professional conduct under Rule 5.7, the lobbying practice is also subject to restrictions on advertising.¹¹⁰ Communications about lawyer-lobbyists or their services cannot be false or misleading.¹¹¹ A communication is misleading if comparisons with other lawyers cannot be factually substantiated or if a communication, albeit truthful, does not paint a full-enough picture and creates an unjustified expectation in the client.¹¹²

Likewise, restrictions on solicitation also apply to a lobbying practice, even if the practice is not subject to the rules of professional conduct.¹¹³ A lobbyist cannot solicit a prospective client when a “significant motive” is pecuniary gain unless the prospective client is a lawyer or the prospective client has a personal or professional relationship with the lobbyist.¹¹⁴ Similarly, a lobbyist cannot solicit a prospective client if the solicitation involves coercion, duress, or harassment, or if the prospective client has indicated a desire not to be solicited.¹¹⁵

105. See Dzienkowski & Peroni, *supra* note 98, at 183-84. But see N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 6 (describing that a lawyer is unable to be exempt from the rules of professional conduct when the circumstances of the law-related services and the legal services are “so closely entwined that they cannot be distinguished from each other, and the requirement of disclosure and consultation imposed by paragraph (a)(2) of the Rule cannot be met”).

106. See N.D. RULES OF PROF'L CONDUCT R. 5.7 cmt. 1.

107. *Id.* at R. 8.4(e).

108. *Id.* at R. 8.4(b).

109. *Id.* at R. 8.4(c).

110. *Id.* at R. 5.7 cmt. 7. If a law firm has an in-house, non-legal lobbying business, the law firm's advertising and letterhead can likely indicate the two entities are associated. See *Boston Bar Association Ethics Opinion 1999-B: Law-Related Services (LRS)*, BOS. B.J., Dec. 1999, at 16, 17-27 (citing contradictory authority).

111. N.D. RULES OF PROF'L CONDUCT R. 7.1.

112. *Id.* at R. 7.1 cmt. 2.

113. *Id.* at R. 5.7 cmt. 7.

114. *Id.* at R. 7.3(a). Interestingly, two justices dissented in the Supreme Court's adoption of Rule 7.3. See *id.* at R. 7.3 (Kapsner, J. and Sandstrom, J., dissenting). The dissent found the rule overly broad and argued it was an unconstitutional restriction on commercial speech. *Id.*

115. *Id.* at R. 7.3(b)(2)-(3).

IV. THE IMPORTANCE OF LOBBYISTS IN NORTH DAKOTA

At a time when talking heads of the twenty-four-hour news cycle harp on federal lobbyists and the influence of their money on the legislative process (for good reason or not), the importance of lobbyists in North Dakota goes largely unnoticed by both the voting public and practicing lawyers. In the Washington, D.C. beltway, many lobbyists are largely criticized for financing campaigns in exchange for advancing a legislative agenda. Commentators on both sides of the aisle criticize the growing influence of the other sides' lobbyists. Many assert that lobbyists in the beltway are peddlers of influence and horse traders. With a few high-profile exceptions, though, most criticism is likely the result of political polarization and not fact. In North Dakota, the influence of lobbyists is, at worst, misunderstood and, at best, understood and appreciated. To those engaged in the legislative process, lobbyists are, first and foremost, a source of information.

Making public policy through well-crafted laws demands the expertise of lobbyists. The legislature typically only meets for four months every two years. Further, North Dakota employs a citizen legislature.¹¹⁶ Legislators simply do not have the personal resources or time to comb through every piece of legislation, nor should they be expected to have or use those resources.

Likewise, legislators do not have personal staff to research the immense volume of law and policy they consider each day. While the legislature is supported internally by the staff of the legislative council, the staff has its own limitations. The professional staff consists of eight lawyers and six fiscal analysts and has great responsibility.¹¹⁷ They research and write bills, research and write legislative reports, compile budgets, and provide legal and fiscal advice to legislators as requested. With only fourteen professional staff, the limitations are evident considering the number of legislators: forty-eight senators and ninety-four representatives.

A lobbyist is, of course, on cog in the legislative wheel. Advancing a legislative agenda can also be accomplished through other means, like a

116. To serve as a legislator, an individual must be a qualified elector in their district who has been a North Dakota resident for at least one year. N.D. CONST. art. IV, § 5. A conviction for bribery, perjury, or any other infamous crime renders an individual ineligible to serve in the legislature. *Id.* § 12. Further, both the Senate and the House of Representatives have the authority to set additional qualifications of its members. *Id.*

117. See Rebecca Beitsch, *Four-Month Legislative Session Cost \$4.6M*, BISMARCK TRIB., July 17, 2011, at A1, A8 (referring to legislative staff and quoting a legislator saying, “[w]e do deal with a lot of money, but we also deal with people’s lives, and it’s important to have all the resources possible”).

grassroots campaign by a citizens' lobby. A grassroots campaign can be especially effective in advancing a legislative agenda through the initiated measure process in which a sponsoring committee collects signatures to put a possible law to a vote of the people. Another effective tool to advance a legislative agenda, albeit obvious, is to provide access to those groups who do not employ a lobbyist. A group with a lobbyist can run an effective grassroots campaign. And a group represented by a lobbyist can (and should) provide access to those most affected by legislation to legislators.

Aside from the needs of a client, lobbyists provide various levels of service depending on the needs of individual legislators. For new legislators who might not have experience with the subject matter of their committee, a lobbyist can provide much-needed context to a bill. For the veteran legislator who has significant experience in a particular issue, a lobbyist can fill the gaps of information the legislator has identified.

In each role, lobbyists must possess expertise—expertise that may not otherwise be available to legislators. That expertise is gained by working with clients to understand the unique intricacies of various interests and industries. Legislators vote for or against bills because, in their minds, it creates good policy for their constituents and makes good political sense, not because a lobbyist bought them dinner. Buying a legislator dinner most often serves as an opportunity to provide expertise and information.

It is the lobbyist's role to integrate a client's goals with a legislative solution. A good lobbyist finds and predicts problems created and prevented by legislation. Above all, a good lobbyist provides persuasive, expert, accurate, and helpful information. With the unfortunate reality that there are too few lawyer-legislators, who are trained to interpret and analyze laws, reliance on the expertise of lobbyists trained in the law is magnified.

V. A PRACTICAL PRIMER FOR LOBBYISTS IN NORTH DAKOTA

This co-author has “influenced public policy” as an advocate and lobbyist off and on for over thirty-five years. Many issues have been discussed and debated, and many meetings have been held with clients on recommendations for the strategy in reaching their legislative goals. Many evenings have been spent discussing issues, strategies, and legislative bills with legislators, executive branch officeholders, staff, other lobbyists, and clients. Over those years, certain priorities and “ways of doing business” have become a part of the lobbyist's life and daily routine. In addition, thoughts and ideas have been formulated on the strategies of being successful as a lobbyist. Whether the goal is to pass a bill or defeat a bill, the following subsections explain some ideas and thoughts to accomplish those goals, which we will refer to as “Joel's Ten Rules on Lobbying.”

A. RULE ONE: IT IS ALL ABOUT TRUST

In North Dakota, the system is one of heavy reliance on lobbyists by legislators. Legislators have very little or no staff, and there are hundreds of bills covering hundreds of topics. It is a challenge for each legislator to become familiar with the issues and answers on areas he or she covers in committees. It is also impossible to be knowledgeable in all areas.

While it may seem like a very troublesome, if not impossible, setup, it is not for one good reason. North Dakota is a small state with relatively few people. It is a stretch, but it is close to being true that “everyone knows everyone.” This fact brings in the huge saving grace or safeguard to the system. If a lobbyist is giving incorrect information, or in a worst-case scenario, lying to a legislator, word travels incredibly fast. Numerous examples exist of lobbyists, both in-state and out-of-state, who have been “caught” and the lobbyist, in a very short period of time, is either figuratively or literally gone. He or she becomes ineffective on that bill and any other bill due to lack of credibility or tainted reputation.

The system of government in the state is based on trust. Many other states might share a reliance on trust, but it is particularly true in North Dakota. As a result, a reputation for integrity and trustworthiness is the absolute basis for any success as a lobbyist. If there could be only one rule, this would be it. There are examples where usually inexperienced lobbyists have been absolutely emotional about an issue and when asked an adverse question, the incorrect and overly biased answer is given. If such emotional responses happen often, the short-term goal of swaying a legislator might be met, but the long-term effectiveness of the lobbyist is gone.

In the system of checks and balances in the legislative branch, trust is the biggest check, and a lobbyist should never forget it. The heart and soul of effective lobbying is relationships. There can be no effective relationship without trust.

B. RULE TWO: DON'T BOMB LUXEMBOURG

The axiom well-known to lobbyists is that one only has so many “chits” or favors with any particular legislator, or with any particular issue or any particular industry client. It is important for lobbyists, especially those working on a myriad of bills, to recognize developing priorities is important. There may well be a relatively small bill the lobbyist rushes in with a herd of horses, tramples the crowd, and gets the bill passed or killed. However, there will be casualties. There will be some legislators who were on the other side and who now vow to ensure the defeat of a much more important, bigger bill on which a lobbyist is working. There will also be

legislators who did what they could on that bill, but cannot help on the much bigger, more important bill.

The simple message here is to pick battles wisely, recognizing there can be big fallout from small bills. Of course, there can be big fallout from big bills, but that situation is sometimes a necessity if the most important goals of the client are going to be accomplished. If a lobbyist is going to bring out the bombs, save them for the big bills and leave Luxembourg alone.

C. RULE THREE: KNOW WHEN TO ZIP IT

The most difficult obstacle for many lobbyists is to simply stop talking. It is similar to the story of the little boy who said he could spell ba-na-na but he did not know when to stop! Because personal interaction is a part of advocacy, especially including lobbying, most lobbyists seem to have more difficulty knowing when to sit down and be quiet than what to say to a legislator about a bill. The commentator Sydney Smith once observed about a lobbyist: “[H]e ha[d] occasional flashes of silence, that [made] his conversation perfectly delightful.”¹¹⁸ This issue, of course, is not much different than litigation strategy. After a lawyer would make a point on cross-examination, the legendary speaker and teacher Irving Younger would always say, “Shut up and sit down[!]”¹¹⁹

Perhaps another, more congenial, way of stating the rule is that lobbyists should aim to be brief. As someone has said, talking to legislators is a lot like walking a jury through Disney World. With so much on their minds, it is a little difficult to keep their attention, so be brief. Lobbyists should think about what they want to say before and should be ready to make their point in about thirty seconds. Having said all of that, it is still important to remember that many times a lobbyist should simply “sit down and shut up.”

D. RULE FOUR: TEN MINUTES BEFORE THE PARTY IS NO TIME TO LEARN HOW TO DANCE

Preparation is essential. It is perhaps even more essential when a lobbyist is trying to get a bill passed, but it is always essential. Several questions are particularly important for lobbyists to answer in their

118. SYDNEY SMITH & EVERT A. DUYCKINCK, WIT AND WISDOM 439 (1856).

119. See IRVING YOUNGER, THE IRVING YOUNGER COLLECTION: WISDOM AND WIT FROM THE MASTER OF TRIAL ADVOCACY 271 (Stephen D. Easton ed., 2010). This co-author has been present at countless legislative hearings when a proponent of a bill talks so long on the bill the chairman has announced he was solidly in support of the bill at the beginning of the hearing, but if the hearing did not end quickly, that vote would be changing.

preparation process: What committee should be the committee to hear it? How does that committee's chairman perceive me or my bill? When will the hearing be? Who should be the prime sponsors? Who should be the other sponsors? Who will be the prime advocate on the committee when the bill is heard?¹²⁰ Who will oppose the bill? What questions should we anticipate in committee? Who should testify on the bill? When can we arrange to speak with the chairman? Who are the best people from his or her hometown to contact him or her? Has the bill been introduced in the past? What happened to it? Why?

One could list another twenty-five questions a lobbyist must answer long before the first witness stands in front of the committee and begins testimony. There could be yet another twenty-five questions to answer before it goes to the floor. Then, the process starts over again with the other chamber. In the end, preparation is another area that separates successful lobbyists from those who simply want to blame others for a bad vote on a bill and another unsuccessful lobbying effort.

E. RULE FIVE: RESEARCH "THE CASSIDY QUESTION"

In nearly all controversial bills, there will be individuals advocating the other side of the lobbyist and his or her clients. In the movie *Butch Cassidy and the Sundance Kid*, after each narrow escape from the pursuing posse, Paul Newman would turn to Robert Redford and ask, "Who are those guys?"¹²¹ Successful lobbyists should ask the same question and should find some answers. Often, a successful lobbyist will spend as much or more time on researching the opposition, their personalities, and their arguments, than on the lobbyist's supporters and arguments.

The answer to this question is not necessarily always an easy one. Sometimes, there are "background" hidden agendas by other interest groups that a lobbyist may have had no idea would be involved, such as a prominent legislator whose brother-in-law's "ox would be gored." As we often hear "keep your friends close and your enemies closer," it is equally true in the lobbying business.

"Those guys" also includes people who are interested in a bill because they may be in the administrative agency that will have to regulate the law if it is passed. State agency personnel can be vital to the health of a bill if they are for or against it or, for that matter, if they make it clear they are neither. There are many examples of a bill that is flying along nicely and a state agency staff person appears at the hearing and, in a manner of minutes,

120. In North Dakota, every bill is heard and goes to the floor for a vote.

121. *BUTCH CASSIDY AND THE SUNDANCE KID* (20th Century Fox 1969).

basically buries the bill. Similarly, if there is a significant change in current policy, whether it is tax or highways, the first place a committee chairman will look is usually to a pertinent agency head. The point is simply to know who “those guys” are, approach them, find out their views on the bill, be ready to address their comments, and make it clear to the committee that you view agency input as important and why you agree or disagree with their analysis.

F. RULE SIX: R-E-S-P-E-C-T

Growing up, this co-author’s preacher/father always said every person, as a person, deserves respect and grace as a person, which is true no matter who a person is, what that person does for a living, how much he or she makes, or what church he or she does or does not attend. Although the creed should apply to all people, including legislators, it often does not. High-income folks will look down on the relatively small salaries made by legislators. People who are active and emotionally involved in an issue like abortion, for example, may absolutely look down, politically and spiritually, on those legislators on the other side. Totally aside from making any judgmental call, from a lobbying side, embracing any such judgment can be disastrous, certainly in the long term and often in the short term.

Over many years, some of the citizen legislators have been better than others and some have voted the “right” way more than others, but nearly all have taken their oath and tried to do the best job they can for the people in their district and in the great State of North Dakota. They have undertaken this with loss of time, typically loss of income, and certainly with more time away from family, friends, and home. Legislators deserve the respect they should receive for all of their sacrifice, regardless of the bill and regardless of their position on a bill.

Furthermore and most importantly from a lobbying standpoint, nasty e-mails or dismissive and abrupt conversations can not only lose any semblance of support on this bill, but on any bill in the future. Every lobbyist should remember every legislator has legislative friends, and the friends can affect the outcome of the next bill. Simply giving others a certain amount of respect and dignity will allow a lobbyist to sleep much better every night, as well it should.

G. RULE SEVEN: BE UBIQUITOUS

A legislator approached the co-author at a legislative reception some years ago and said to him, “Ah, that ubiquitous lobbyist.” I smiled, changed the subject, and then ran home to look up “ubiquitous.” Yes, it is

good to be ubiquitous, I decided! The point is to be available, be seen, be approachable, be open, and be accessible. To be ubiquitous is not just being available during the legislative session, though. Good, bad, or indifferent, many legislative votes are won or lost at fish fries, receptions, dinners, or in the hallway, not in committee meetings. Noting the best time to lobby is when you do not need anything, lobbyists must take full advantage of all opportunities.

H. RULE EIGHT: LOGIC IS OFTEN YOUR WEAKEST ARGUMENT

Crucial to a lobbyist's efforts is determining the real reason a legislator would support or oppose a bill. Over the years, this co-author has collected various quotes from legislators, lobbyists, and others attending legislative hearings or floor debates. Three floor debate quotes from legislators (who will remain nameless) are offered in support of the above rule: (1) "Somebody is trying to confuse us with the facts," (2) "I didn't understand a single word the previous speaker said, but I agree with him 100%," and (3) "This is the dumbest idea I have ever heard and the stupidest bill I've ever seen Oh, yes, I'm in favor of it."

To step back from some of those admittedly unusual and rare statements, lobbyists should take a closer look at legislators, their interests, and perhaps most importantly, how they got elected. "Special interests" have a bad name in the popular political parlance. And when legislators are on the losing side of a bill, they take aim at "powerful special interest groups".

The whole world (and pretty much every legislator's world) is filled with "special interests." If one is old, there is a group that is interested. If one is young, one has special interests that are interested. If one is poor, one has special interests as one does if he or she is rich. If one is a farmer, does the farm grow corn, soybeans, barley, sugar beets, or hard red spring wheat? We have special interests for each, and some cover all. Are you a plumber? No problem. A doctor or lawyer? Special interests groups for each. And, of course, we can get into specialties in both professions because there are more special interest groups for each of them.

Simply put, every legislator comes from a background filled with so-called special interest groups. No matter what the legislator does, did, or did not do, there are special interests. More bluntly, though, it is many of those special interests that get a legislator elected, which is the legislator's ultimate goal in running for office. Before spending a lot of time talking to a legislator about the finer points of a good bill or a bad bill, a lobbyist should spend a lot more time determining what and whom got that legis-

lator elected, and how that fits into the arguments the lobbyist is about to make on a bill.

I. RULE NINE: GET THE VOTES

Legislative issues can revolve around many different emotions, many different arguments, many different ways of looking at an issue and, then, further refining that analysis (perhaps *ad infinitum*). The legislative process benefits greatly from many hours of discussion by lobbyists, legislators, and others, and it is great fun, of course, to discuss and debate the finer aspects of public policy issues with those people who thrive on that type of discussion. However, a lobbyist should never forget, even after a particularly fun evening of debate and discussion, that what is most important in all of this is, simply, “The Vote.”

When a bill is introduced, it cannot pass across to the other chamber unless it receives a majority vote. It cannot be defeated and put to rest unless a majority of the legislators push the red button and say no, which has to be the focus of any lobbying effort. The ultimate test for a lobbyist is the vote.

Discussion of various issues connected to a bill is great, and a legislator can talk about the issues, but it still all boils down to the vote. The most important part is the vote. There are strategies that can stall a vote when it looks bad or that can speed up a vote that looks good. There are strategies to amend a bill or to defeat it because it will then be a bad bill. There are strategies to make sure a high price tag is put on a bill to kill it, also known as “death by fiscal note.” All of these revolve around the premise that it is all about the vote.

There are several lobbyists familiar to this co-author who are not particularly ubiquitous. They sometimes talk too much. They are sometimes not particularly prepared. However, they deliver the vote, which is the true test. They are successful lobbyists and typically have been for a long time.

J. RULE TEN: FRIENDS COME AND GO, BUT ENEMIES ACCUMULATE

The rule that “friends come and go, but enemies accumulate” is perhaps a slight summation of some of the previous rules. It is simply an additional reminder that being an effective lobbyist is a long-time commitment. Don’t burn bridges, but if one does, only burn the bridges (1) that a lobbyist needs to burn when recognizing long-term consequences, or (2) that really do not matter, either with respect to a client or an issue, now and forever. Having said that, recognize these exceptions are very rare.

Also, lobbyists should be aware of bridges that may be blown when an all-out assault on Luxembourg ensues. Recognize there will be many legislators who will be on the opposite side of you on a bill. Recognize, as well, a lobbyist may need the vote of an opposing legislator on another bill. Be careful not to alienate the “no” vote enough so you lose the “yes” vote on the next bill.

Most of all, each of the rules discussed in this article are very much a part of the other rules. The easiest way to accumulate enemies is to violate the first rule in this section. In other words, a violation of trust will create enemies that are legislators and others, as well. In that respect, the first rule to maintain trust should also be the first rule for being an attorney and perhaps the first rule in life.

VI. CONCLUSION

Lawyers in North Dakota need to know that legislative solutions can often provide solutions to a client’s issues more directly than the judicial process. For those who enter the legislative wing of the state capitol with hopes of securing a legislative victory for their client, abiding by the regulation, registration, and reporting requirements of state law is not burdensome. Although the potential ethical pitfalls of lobbying as a lawyer can be great, a lawyer can avoid these potential pitfalls by thoughtfully defining his or her relationship with the client.

For lawyers, lobbying is a wonderful way to develop skills and become proficient in the art of advocacy. This article has attempted to demonstrate that lobbying is a discipline, as well. There are significant parameters and obligations that lawyer-lobbyists encounter. But there are also many great advantages. Lawyers are trained to be advocates built on a foundation of discipline, a foundation of trust and confidentiality, and a foundation of integrity. Those foundations provide great advantages to both clients and legislators who rely on the integrity and tradition of our profession of providing fair and accurate advice and advocacy, often in a controversial setting. The beneficiaries of that system also are the lawyer-lobbyists who participate because the sense of helping clients and doing what is right goes to the heart of the oath lawyers take when they are admitted to the bar. Whether it is in the judicial branch or the legislative and executive branch, that is pretty much what being a lawyer is all about.