Interpretation of T.C.A. §§ 3-6-301(15) and (17) and other statutes with respect to when attorneys, in their representation of clients, must register as lobbyists.

INTRODUCTION:

The following advisory opinion is written at the request of Charles A. Trost, with the law firm of Waller Landsen Dortch Davis, LLP ("WLDD"), and Byron R. Trauger, of the law firm of Trauger & Tuke, who both inquire about different scenarios as to whether they, as attorneys, must register as lobbyists when representing the interests of their clients and communicating with officials of the executive branch.

Mr. Trost poses the following scenario: WLDD is a law firm headquartered in Nashville that provides legal representation to public and private corporations, government agencies, as well as small and large business enterprises throughout Tennessee and the United States. Among its practice areas is tax law, including state and local tax laws. WLDD asks whether its attorneys must register as lobbyists when, pursuant to their representation of clients, they (1) appear at informal taxpayer conferences before employees of the Tennessee Department of Revenue[1]; (2) represent clients at hearings before the Tennessee Board of Equalization[2]; (3) represent clients at hearings regarding the promulgation of rules under the Uniform Administrative Procedures Act[3]; (4) communicate with executive branch officials regarding economic development incentive packages; and (5) furnish information on behalf of the client and at the request of legislative or executive branch officials.

Mr. Trauger poses the following scenario: A lawyer is employed by a client pursuant to an annual retainer agreement whereby the attorney is paid a flat fee regardless of the amount or the nature of the work performed. The attorney (1) provides general strategic advice; (2) provides general legal advice; (3) represents the client before the Health Services & Development Agency on certificate of need matters; (4) appears before executive agency employees regarding the potential or actual participation of the client in government programs or benefits; and (5) meets with executive branch officials outside of the hearing context to discuss compliance with state regulations including

[1] Such conferences are authorized by T.C.A. § 67-1-1801(c)(3) which allows taxpayers to "discuss any assessments of tax and to present such matters as may be relevant to the assessment."

[2] These hearings result from a taxpayer's dispute of an adverse ruling from a local board of equalization regarding property tax issues.

[3] According to Mr. Trost, WLDD often represents taxpayers in hearings regarding the promulgation of rules and regulations by the Department of Revenue and the Board of Equalization.

possible complaints or citations against the client. Mr. Trauger further asks, if any of these activities are considered lobbying, how his employer is to apportion lobbying compensation from attorney compensation for the purpose of reporting such information semi-annually to the Commission. *See* T.C.A. § 3-6-303.

DISCUSSION:

The Comprehensive Governmental Ethics Reform Act of 2006 ("Act") created an independent Tennessee Ethics Commission ("Commission") effective October 1, 2006. The Act requires that lobbyists and their employers register with the Commission. The Act further requires that employers of lobbyists file publicly-available reports disclosing not only compensation to lobbyists, but also expenditures made in influencing legislation.

In addition to its various registration and disclosure provisions, the Act prohibits certain activities by registered lobbyists and employers, including a prohibition against providing any type of gift to officials with the executive or legislative branches and to candidates for public office.

The requests for an Advisory Opinion discussed herein relate to when, under the Act, attorneys must register as lobbyists. To respond to these requests, relevant definitions contained in the Act, which appear in the Appendix to this Advisory Opinion, must first be analyzed.

T.C.A. § 3-6-301(17) provides that a lobbyist is "any person who engages in lobbying for compensation."

T.C.A. § 3-6-301(15) states that "lobby" means "to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative or administrative action." It is important to note that not all communications with the executive branch or legislative branch are within the definition of "lobbying." Under the Act, the communication must be "… *for the purpose of influencing any legislative or administrative action*…" in order to be lobbying. [Emphasis added.]

T.C.A. § 3-6-301(13) defines "influencing legislative or administrative action" as

> . . . promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including, but not limited to the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies or analyses requested by an official of the legislative or executive branch ….

T.C.A. § 3-6-301(1) defines "administrative action" as the taking of any recommendation, report or non-ministerial action; the making of any decision or taking any action to postpone any action or decision; action of the governor in approving or vetoing any bill or resolution; the promulgation of a rule; or any action of a quasi-legislative nature, by an official in the executive branch of state government; however, *"administration action" does not include ordinary and routine permitting, licensing, or compliance decisions by an official of the executive branch of state government*… [emphasis added]."

Thus, an individual who engages in any communication with a legislative or executive official is within the general definition of "lobbying" when such communication is for the purpose of influencing a legislative or administrative action, and the individual is not lobbying when the communication is not within the definition of "administrative action" or "legislative action."

The Act's general definition of "lobby" in T.C.A. § 3-6-301(15) is broad, but the definition also contains several exemptions, including an exemption for communications by ". . . a duly licensed attorney at law acting in a representative capacity on behalf of a client appearing before an official of the executive branch for the purpose of determining or obtaining such person's legal rights or obligations *in a contested case action, administrative proceeding, or rule making procedure.*" (Emphasis added.) Note, however, that this particular exclusion applies solely to communications with "an official of the *executive* branch."

An analysis of the attorney exemption in § 3-6-301(15) reveals that the legislative intent was *not* to simply exempt from the lobbying registration requirements *all* attorney communications relating to advocacy of a client's legal rights or obligations. Instead, the Legislature limited the attorney exemption; specifically, rather than simply ending the exemption clause after the word "obligations", the General Assembly added the words "in a contested case action, administrative proceeding or rule making procedure."

Of additional note is the fact that other exclusions contained in the definition of lobby apply to both attorneys and non-attorneys.

Thus, there are several types of communications with members of the executive or legislative branch that are not "lobbying" for purposes of the questions addressed in this Advisory Opinion. For example:

1. Communications that are not "for the purpose of influencing legislative action[4]."

[4] The definition of legislative action is not germane to this Opinion.

2. Communication that is not "for the purpose of influencing administrative action."

3. Communication "with officials of the executive branch . . . to promote, oppose, or otherwise influence the outcome of a decision related to any component of an economic development incentive package," *unless* that person is otherwise required to register as a lobbyist.

4. Communication that is ". . . the furnishing of information, statistics, studies or analyses requested by an official of the legislative or executive branch to such official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the legislative or executive branch;" and

5. Communication by a lawyer representing a client, appearing before an official of the executive branch for the purpose of determining or obtaining such person's legal rights or obligations in a contested case action, administrative proceeding, or rule making procedure.

This Opinion does not address at this time Item 2, above, which applies to ordinary and routine permitting, licensing, or compliance decisions by an official of the executive branch of state government.

For purposes of Item 5, above, the question becomes, "What is a contested case action, administrative proceeding or rule making procedure?" For guidance, we turn to certain definitions outside the Act.

T.C.A. § 4-5-102(3) defines a "contested case" as

> a proceeding…in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency *after an opportunity for a hearing*. Such proceeding may include rate making; price fixing; granting of certificates of convenience and necessity; the making, review or equalization of tax assessments; the granting or denial of licenses, permits or franchises where the licensing board is not required to grant the licenses, permits or franchises upon the payment of a fee or the finding of certain clearly defined criteria; and suspensions of, revocations of, and refusals to renew licenses.

(Emphasis added.)

The term "administrative proceeding" is commonly defined as "… a hearing, inquiry, investigation, or trial before an administrative agency, usually adjudicatory in nature…" (Black's Law Dictionary, 8th ed., 2004).

The third type of proceeding referenced in T.C.A. § 3-6-301(15) – "rule making procedure" - is one which is not typically adjudicatory in nature and is different from the contested case action or the administrative proceeding because the attorney's client is not necessarily a party or given party status[5]; instead, the client is someone that may be affected, whether positively or negatively, by the proposed rule[6]. In this situation, the attorney may communicate with an executive branch official to give his client's position on the proposed rule. Rule making procedures are, however, similar to adjudicatory proceedings in that they are hearings which must be held on the record, under specific state rules, and which require the executive agency to give notice to, and access by, the public.

POLICY CONSIDERATIONS:

An analysis of the "contested case action, administrative proceeding, or rule making procedure" exception yields several basic guidelines for attorneys; specifically, attorneys who communicate with an official of the executive branch for the purpose of influencing an administrative action are "lobbying" and must register as lobbyists unless the attorney meets all of the following criteria:

- The attorney is duly licensed;
- The attorney is acting in a representative capacity;
- A specific controversy which is adjudicatory in nature and to which the client is a party is occurring or is pending before that particular entity which has been designated by law to settle the controversy, or the agency with authority to promulgate a rule is holding a rule making procedure; and
- The attorney's communications are limited to those which are solely and directly related to the current or pending proceeding that arose from the specific controversy or rule making procedure.

In applying the Act, the Commission notes that one of the Act's express purposes, is "…increasing the integrity and transparency of state and local government through regulation of lobbying activities …" (T.C.A. § 3-6-102). Therefore, it is reasonable to analyze the statute in the light most likely to safeguard government transparency. In the majority of contested cases, administrative proceedings and rule making procedures, there is some type of public record required in which the attorney's appearance on behalf of the client is noted, and the majority of such proceedings must be open to the public.

[5] T.C.A. § 4-5-102(8) defines "Party" as "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."

[6] *See* T.C.A. § 4-5-102(10) for the definition of "rule."

Therefore, because contested case actions, administrative proceedings and rule making procedures have adequate safeguards against improper influence, the same level of concerns about unmonitored lobbying activities are not present. Accordingly, when attempting to analyze whether an activity will clearly fall under the exemption or will instead constitute "lobbying", it is important to note the requisite formality and openness surrounding those proceedings that the Act specifically lists as exempted.

Further, nothing contained in this Opinion prevents an attorney from making inquiries as to the status of a regulation or for an interpretation of a rule provided that the attorney does not engage in "lobbying" (e.g., provided that the attorney does not communicate with the purpose of influencing an "administrative action" as defined by the Act).

RESPONSES TO QUESTIONS:

In response to the inquiries of Mr. Trost:

1. Must an attorney register as a lobbyist when appearing at an informal taxpayer conference before employees of the Tennessee Department of Revenue?

Answer: No. While these conferences may not be formal procedures, they are certainly within the ambit of an administrative proceeding. An adverse decision to the client may result in a court case. Thus, such conferences relate to controversies which are adjudicatory in nature.

2. Must an attorney register as a lobbyist when representing clients before the Board of Equalization?

Answer: No. Such a hearing fits squarely within the definition of "contested case" contained in T.C.A. § 4-5-102(3). Further, it fits within the common understanding of the term "administrative proceeding" quoted above.

3. Must an attorney register as a lobbyist when representing clients at hearings regarding the promulgation of rules under the Uniform Administrative Procedures Act?

Answer: No. This is a "rule making procedure" that is within the explicit exclusion from "lobbying" set forth in T.C.A. § 3-6-301(15).

4. Must an attorney register as a lobbyist when communicating with executive branch officials regarding economic development incentive packages?

Answer: No, unless the attorney is otherwise required to register as a lobbyist. In other words, if an attorney is not performing other services for the client which *are* within the definition of "lobbying," then these communications are not, in and of themselves, "lobbying" under the explicit exclusion from "lobbying" contained in T.C.A. § 3-6-301(15).

5. Must an attorney register as a lobbyist when furnishing information on behalf of the client and at the request of legislative or executive branch officials?

Answer: No. Attorneys may provide information, statistics, studies, etc to legislative and executive branch officials on behalf of their clients when the request is made by the officials. The furnishing of such information is explicitly excluded from the definition of "influencing legislative or administrative action" in T.C.A. § 3-6-301(13) and is therefore not within the definition of "lobbying" in T.C.A. § 3-6-301(15).

In response to the inquiry of Mr. Trauger:

1. and 2. Must an attorney register as a lobbyist for providing general strategic advice or general legal advice to a client?

Answer: No. These communications are strictly between the attorney and the client, and do not involve communications with anyone in the legislative or executive branch of state government.

3. Must an attorney register as a lobbyist for filing requests for certificates of need with the Health Services & Development Agency and representing the client before the Agency on certificate of need matters?

Answer: No. CON applications entail a highly formalized and public process which is governed by T.C.A. § 68-11-1601, *et seq*. The process of seeking a CON begins with the filing of a letter of intent [*see* T.C.A. § 68-11-1607(c)(1)]. The letter of intent must be accompanied simultaneously, or almost simultaneously, with the publication of a notice in a newspaper of general circulation in the proposed service area. *Id*. The notice must contain a statement:

> (A) That any health care institution wishing to oppose the application must file written notice with the agency no later than fifteen (15) days before the agency meeting at which the application is originally scheduled; and
>
> (B) That any other person wishing to oppose the application must file a written objection with the agency at or prior to the consideration of the application by the agency.

Id. The statutes go on to set forth procedures for dealing with objections to the issuance of the CON, review of the Agency's decision, etc.

Clearly, from the inception, a CON proceeding is one in which in which "the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing." Thus, once an application for a certificate of need ("CON") has been filed, public notice has been provided, and the attorney has entered an appearance, the attorney may communicate with the agency without registering as a lobbyist.

4. Must an attorney register as a lobbyist for appearing before executive agency employees regarding potential or actual participation of the client in government programs or benefits?

Answer: These situations must be decided on a case-by-case basis. The attorney may need to register as a lobbyist when communicating with the agency to obtain the client's participation in an agency grant or benefit, as this could fall within the definition of lobbying if no exclusion otherwise applies. Each individual fact scenario must be analyzed in order to determine whether an exclusion will apply.

5. Must an attorney register as a lobbyist for meeting privately with an executive branch official, outside of the hearing context, to discuss possible complaints against the client for violations of state regulations?

Answer. No. An attorney who meets with executive branch officials outside of the hearing context for the purpose of discussing a client's compliance or failure to comply with agency rules is not lobbying because such a discussion is a preliminary step to an administrative proceeding; e.g. the attorney is representing a client who has a current or pending controversy (compliance or noncompliance with a rule), and the attorney's communication with the entity legally authorized to decide the controversy is solely intended to prevent or settle the controversy.

6. If any of these activities are considered lobbying, and the attorney is paid a flat fee for all services performed for the client, how is the employer to apportion lobbying compensation from attorney compensation for the purpose of reporting such information semi-annually to the Commission?

Answer: While the attorney in Mr. Trauger's scenario receives a flat monthly retainer fee irrespective of the amount and nature of the work performed, the compensation and disclosure requirement of T.C.A. § 3-6-303 will require that the employer of the attorney calculate the appropriate percentage of the attorney's compensation that is for lobbying.

CONCLUSION:

Whether an attorney must register as a lobbyist when communicating with executive or legislative branch officials depends upon whether an exemption exists under the statute and, therefore, must be decided on a case-by-case basis, using the above-described guidelines and standards.

Thomas J. Garland,
Chair
R. Larry Brown
Donald J. Hall
Linda W. Knight
Dianne F. Neal
Benjamin S. Purser, Jr.,
Members

Date: December 12, 2006

APPENDIX A
TEXT OF T.C.A. § 3-6-301(15)

(15) "Lobby" means to communicate, directly or indirectly, with any official in the legislative branch or executive branch for the purpose of influencing any legislative action or administrative action.

[Exception 1:]

"Lobby" does not mean communications with officials of the legislative or executive branches by an elected or appointed public official performing the duties of the office held;

[Exception 2:]

a duly licensed attorney at law acting in a representative capacity on behalf of a client appearing before an official of the executive branch for the purpose of determining or obtaining such person's legal rights or obligations in a contested case action, administrative proceeding, or rule making procedure;

[Exception 3:]

or an editor or working member of the press, radio or television who in the ordinary course of business disseminates news or editorial comment to the general public.

[Exception 4:]

"Lobby" does not mean communications by an incumbent or prospective contractor or vendor, or an employee of such contractor or vendor, while engaged in selling or marketing to the state, or any department or agency of the state, by demonstrating or describing goods or services to be provided or by inquiring about specifications, terms, conditions, timing, or similar commercial information; provided that any such contractor or vendor or employee thereof shall be deemed to be a lobbyist solely for the purposes of §§ 3-6-304 and 3-6-305.

[Exception 5:]

"Lobby" does not mean communications by an employee of a school board, municipal utility, utility district, or any department, agency or entity of state, county or municipal government; provided, however, if the board, utility, district, department, agency or entity employs, retains or otherwise arranges for lobbyist services in this state by a contractor, subcontractor or other representative, who is not an employee of such board, utility, district, department, agency or entity, then "lobby" includes communications by

such contractor, subcontractor or other representative and such contractor, subcontractor or other representative shall comply with the lobbying registration and other provisions of this chapter pertaining to lobbyists; provided further, however, the board, utility, district, department, agency or entity which employs such contractor, subcontractor or other representative is not deemed to be an employer of a lobbyist for purposes of this chapter.

[Exception 6:]

"Lobby" does not mean communications with officials of the executive branch by any person to promote, oppose, or otherwise influence the outcome of a decision related to the issuance or award of a bond, grant, lease, loan or incentive pursuant to §§ 4-3-701 – 4-3-733;

[Exception 7:]

and "lobby" does not mean communications with officials of the executive branch by any person to promote, oppose, or otherwise influence the outcome of a decision related to any component of an economic development incentive package; provided that any such person who is otherwise required to register as a lobbyist under the provisions of this act shall not be deemed to fall within this exception;