

EXECUTIVE BRANCH ETHICS COMMISSION  
ADVISORY OPINION 94 - 4

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April 19, 1994

RE: Are certain lobbying registration requirements applicable to attorneys?

DECISION: Yes, in most cases.

This opinion is in response to your four requests, dated November 29 and 30, 1993, for advisory opinions from the Executive Branch Ethics Commission (the "Commission"). These matters were reviewed at the February 3, March 22, and April 19, 1994, meetings of the Commission and the following opinion is issued.

At the onset, it must be noted that the Commission is duly authorized to interpret and issue advisory opinions concerning the Executive Branch Code of Ethics' lobbying issues (KRS 11A.110(1)). The Commission recognizes that attorneys in the Commonwealth are also bound by SCR 3.130 in that the Supreme Court of the Commonwealth of Kentucky has adopted Rules of Professional Conduct.

It should be readily apparent that attorneys are bound by the law (as any other citizen) and in particular, the Executive Branch Code of Ethics in KRS Chapter 11A. By their own Rules of Professional Conduct, an attorney cannot: 1) violate or attempt to violate rules of professional conduct or knowingly assist another to do so; 2) commit a criminal act that reflects adversely on the attorney's honesty, trustworthiness, or fitness as an attorney; 3) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation; and, most importantly, 4) state or imply an ability to influence improperly a government agency or official (Rule 8.3).

In addition, recognizing that an attorney has "confidential communications" similar to psychiatrists, doctors, and priests within the Commonwealth of Kentucky, attorneys' Rules of Professional Conduct do not allow them to counsel or assist a client who is committing a criminal or fraudulent act (Rule 1.2(d)).

A firm of lawyers is essentially one lawyer for the purposes of the rules governing loyalty to the client or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Thus, if one lawyer in the law firm knowingly violates KRS Chapter 11A, other lawyers in the law firm may have some ethical dilemma.

At the outset, the Commission believes that a law firm may be an "employer" within the meaning of such in KRS 11A.201(3), and is a "business" within KRS 11A.010(1).

One of the requests submitted to the Commission proposes a hypothetical situation in which a lawyer represents a client in litigation against an agency of the Commonwealth of Kentucky. The matter, in settlement stages and negotiations between the lawyer and representatives of the agency, may result in expenditures of the executive agency, agreements to incur expenditures by agency, or foregoing of funds to which the agency may be entitled. You ask the following:

- 1) *Are the negotiations which could lead to the preparation of such a settlement agreement included within the definition of an "executive agency decision" in KRS 11A.201(7)?*
- 2) *Are the other attorneys representing private parties in the litigation "executive agency lobbyists" within the meaning of KRS 11A.201(8)?*
- 3) *Are the clients for whom the attorneys for the private parties are acting included within the definition of "employer" in KRS 11A.201(3)?*

KRS 11A.201(3),(7), and (8) provide:

- (3) "Employer" means any person who engages an executive agency lobbyist;

...

(7) "Executive agency decision" means a decision of an executive agency regarding the expenditure of funds of the state or of an executive agency with respect to the award of a contract, grant, lease, or other financial arrangement under which those funds are distributed or allocated;

(8) (a) "Executive agency lobbyist" means any person engaged to influence executive agency decisions or to conduct executive agency lobbying activity as one (1) of his main purposes on a regular and substantial basis.

(b) "Executive agency lobbyist" does not include an elected or appointed officer or employee of a federal or state agency, state college, state university, or political subdivision who attempts to influence or affect executive agency decisions in his fiduciary capacity as a representative of his agency, college, university, or political subdivision;

In response to whether attorneys representing private parties in litigation, including settlement negotiations, are "executive agency lobbyists", the Commission believes as a general rule they are not. However, the Commission believes if an attorney, as a main purpose of employment, contacts on a regular and substantial basis a member of the executive branch other than for the pending litigation, and is attempting to influence an executive agency decision of over \$5,000, registration would be required.

In situations where the attorney is considered an executive agency lobbyist, the law firm who engaged the lobbyist is considered the employer under KRS 11A.201(3), and the client on whose behalf the lobbyist is acting is the "real party in interest" on the registration statement.

In another request, you ask :

1) *If an attorney is engaged by a client to influence executive agency decisions or to conduct executive agency decisions, does the attorney's law firm also become an employer that is required to register with the Commission?*

2) *If an executive agency contacts an attorney regarding an issue before the agency and seeks comments on the issue and if the attorney provides comments to the executive agency but does not bill his time for this work to any client, is he "engaged" by his law firm within the meaning of KRS 11A.201(4) if clients of the law firm may have an indirect interest in the issue even though the law firm has no direct interest in the issue?*

3) *If an executive agency contacts an attorney to award him a personal service contract, does he have to register as an executive agency lobbyist even though he made no attempt to influence the award of the contract? If an attorney responds to an executive agency's request for proposals or otherwise attempts to obtain a personal service contract from an agency, does the attorney register as an executive agency lobbyist? Is the attorney's law firm required to register as an employer? If the law firm does register as an employer, is the firm thereafter required to report all expenditures made by any attorney working for the firm even if the expenditure is unrelated to executive agency lobbying?*

4) *If a client contacts an attorney regarding the possibility of obtaining tax incentives if it chooses to locate in Kentucky, do the client and the attorney have to register with the Commission as an employer and an executive agency lobbyist under the Code?*

A law firm consists of members who are partners, associates, public service corporations and/or employees thereof. Members are employed by the firm. They receive income from the firm. When a client makes an engagement or pays a legal fee, the fee is deposited in the firm's account. Further KRS 11A.201(3) and (4) defines "employer" and "engage" as follows:

(3) "Employer" means any person who engages an executive agency lobbyist;

(4) "Engage" means to make any arrangement, and "engagement" means arrangement, whereby an individual is employed or retained for compensation to act for or on behalf of an employer to influence executive agency decisions or to conduct any executive

agency lobbying activity;

The fact that a lawyer is a partner in a law firm does not change the legal or ethical rules. A lawyer who is a partner in a law firm and is engaged as an executive agency lobbyist performs acts on behalf of the client and the law firm. Thus, as noted above, the law firm would be considered the employer of the executive agency lobbyist and would be required to register with the Commission as such.

An attorney who, in providing comments to an executive agency, is not attempting to influence an executive agency decision, is not required to register with the Commission regardless of whether or not he is compensated by the client. Alternatively, if an attorney is attempting to influence an executive agency decision and is compensated by his firm, whether or not the firm bills a client, he should register with the Commission if his attempts are a main purpose of his employment and are on a regular and substantial basis.

An attorney who is simply responding to an invitation of an executive agency or a request for proposals is not required to register with the Commission. In Advisory Opinion 93-34 (a copy of which is enclosed), the Commission has addressed whether an attorney pursuing a personal service contract must register with the Commission. In addition, in Advisory Opinion 93-54 (a copy of which is enclosed), the Commission concluded that a response to a request for proposals is not executive agency lobbying if no attempts are made to influence the award of the contract. However, if the attorney is attempting to influence the agency relative to the awarding of the personal service contract through regular contacts with state officials, and the contract sought involves state expenditures of more than \$5000 per year, then the attorney must register as an executive agency lobbyist and the law firm as the employer.

As provided in Advisory Opinion 93-41 (a copy of which is enclosed), a law firm registered as an employer, or attorney registered as a lobbyist, must report all expenditures by the "firm" or "lobbyist" made to or for the benefit of executive branch officials or members of their staff even if the expenditure is unrelated to executive agency lobbying. However, an attorney who is not required to register with the Commission, although other attorneys in his law firm may be, is not required to report expenditures he made to or for the benefit of executive agency officials, unless he is acting for others in order to avoid reporting. Likewise, the firm is not required to report the expenditures of the nonregistered attorney unless the expenditures are made or reimbursed by the firm.

Under provisions of HB 511 recently passed by the General Assembly, and effective July 15, an attorney representing a client in order to promote, oppose, or otherwise influence the outcome of a decision relating to the issuance or award of a tax credit pursuant to KRS 42.45, 103.210, Chapter 154 or Chapter 224A is not considered an executive agency lobbyist. However, before final action is taken by the state agency concerning tax incentives, a financial disclosure statement must be filed by the beneficiary of the tax incentives listing any person employed to act on behalf of the beneficiary and reporting any financial transactions between such persons and any agent or public servant of the agency awarding the tax incentives.

In an additional request you ask the following:

*In connection with registration as an executive agency lobbyist, must a law firm register when it merely responds to an invitation to bid or furnishes facts to an executive agency (a "beauty contest") and if required to register must the law firm register each new matter or each new contract? When does the duty to register arise? When the first communication is made, when a person is engaged by the employer or when the contract is awarded? Do registration requirements apply to contracts in existence prior to the effective date of the legislation? When an executive agency contacts a law firm about representation, is the attorney required to register or is the firm required to register or is any registration required since the executive agency decision was made without any attempt to influence it? Who should register? The law firm or the lawyer engaged in communications? Are attorneys who merely work on the matter required to register? After an attorney or firm has been awarded the personal service contract is it necessary for the attorney or firm to continue to file updated registrations or statements of expenditures for entertainment of employees of the executive agency?*

As stated previously, merely responding to an invitation to bid is not executive agency lobbying if no attempt is made to influence an executive agency decision. Contacts between law firms and state agency officials do not constitute executive agency lobbying activity when no attempt is made to influence the outcome of an executive agency decision. When contacts do involve attempts to promote, oppose, or otherwise influence the

outcome of an executive agency decision, the attorney making such contacts must register with the Commission within ten (10) days of his engagement as a lobbyist.

KRS 11A.201(4) defines engage:

"Engage" means to make any arrangement, and "engagement" means arrangement, whereby an individual is employed or retained for compensation to act for or on behalf of an employer to influence executive agency decisions or to conduct any executive agency lobbying activity;

The "engagement" will begin when an attorney is retained by a client or assigned by his employer to act for or on behalf of the employer to influence executive agency decisions. Once an attorney is registered, he should report, on the "updated" form, any changes in the executive agency decisions he is attempting to influence. A separate initial registration form is not necessary for each executive agency decision an attorney is attempting to influence. After an attorney is awarded a personal service contract, and is no longer attempting to influence any executive agency decisions, then the attorney should file the termination notification as executive agency lobbyist. After a lobbyist's engagement is terminated, "updated" forms are not required to be filed. However, if during the course of the contract, the attorney expends money on an executive agency official in an effort to influence the official toward the renewal of the contract, the attorney is again engaged in executive agency lobbying activity and should register with the Commission and report those expenditures.

The registration requirements for executive agency lobbyists took effect September 16, 1993, for engagements in existence on and after that date, and the reporting requirements apply to expenditures made on and after that date.

In your final request you ask:

*How can the absolute disclosure requirements of KRS 11A.211 be fulfilled by attorneys in light of the strict confidentiality restrictions created by Kentucky's attorney-client privilege and Kentucky's Rules of Professional Conduct?*

You seem to indicate that the name of the client may be privileged from an attorney's registration statement. The Commission recognizes that from time to time an attorney may very well represent a client who wishes to remain anonymous. However, in the context of KRS Chapter 11A, if the attorney desires to act as a lobbyist, then the attorney must comply with the law. The attorney should inform the client that there is not attorney-client privilege as to the client's name. This opinion is upheld by Kentucky Rule of Professional Conduct 1.6(b)(3) which states, " A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except ...a lawyer may reveal such information to the extent the lawyer reasonably believes necessary...to comply with other law or a court order".