

TENNESSEE ETHICS COMMISSION
ADVISORY OPINION NO. 06-01
December 12, 2006

Interpretation of T.C.A. § 3-6-301 *et seq.*
with respect to the commencement of the filing
deadline for lobbyists.

INTRODUCTION

The following Advisory Opinion is written at the request of J. Richard Lodge, Jr., with the law firm of Bass, Berry & Sims PLC, as to whether a lobbyist is not required to register until seven days after the lobbyist engages in actual lobbying.

For the reasons discussed below, the Tennessee Ethics Commission (“Commission”) concludes that a lobbyist is required to register within seven (7) days after entering into an agreement or arrangement with an employer to provide lobbying services.

DISCUSSION

The Comprehensive Governmental Reform Act of 2006 (“Act”) brought about many significant changes to the lobbyist registration process. Prior to the Act, lobbyists registered with the Registry of Election Finance (“Registry”) on an annual basis after January 1st of each reporting year. The Act, which created the Commission, provides that, commencing on October 1, 2006, lobbyists would no longer register with the Registry, but with the Commission. The lobbyist reporting year now runs from October 1st through September 30th. The Act also provided new and enhanced prohibitions, as further discussed below, on the activities of lobbyists and their employers.

In addition to establishing the Commission and a new reporting year for lobbyists, the Act requires, for the first time, that employers of lobbyists register with the Commission. T.C.A. § 3-6-301(8) defines an “employer of a lobbyist” to mean “any person or entity that *employs, retains or otherwise arranges* for a lobbyist to engage in lobbying on behalf of the person or entity for compensation.” (Emphasis added.) Moreover, T.C.A. § 3-6-302 requires that “not later than seven (7) days after *becoming an employer* of a lobbyist, the employer shall electronically register with the Tennessee Ethics Commission.” (Emphasis added.) As discussed below, it is the *formation of the employment relationship* between the employer and the lobbyist which triggers *both* the employer’s *and* the lobbyist’s duty to register within seven days after entering into the agreement or arrangement with the lobbyist.

In his submission to the Commission, Mr. Lodge places primary emphasis on the definition of “lobbyist” in T.C.A. § 3-6-301(17), which provides that a lobbyist means “any person who engages in lobbying for compensation,” in the context that to “lobby” means “to communicate, directly or indirectly, with any official in the legislative branch

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or executive branch for the purpose of influencing any legislative or administrative action.” T.C.A. § 3-6-301(15). Thus, he argues that one cannot be a lobbyist until that moment when one engages in actual lobbying which, could occur days or even months after entering into a lobbying agreement or arrangement with an employer.

Mr. Lodge and others who share his view rely on the fact that under a prior interpretation of the law, lobbyists did not register until they actually engaged in lobbying. While the definition of the term may have remained the same, the statutory scheme is now different given the Legislature’s express requirement that employers of lobbyists register within seven (7) days after employing a lobbyist. In addition, the Legislature, in establishing the independent Commission, conferred upon it the authority to interpret the statute. It is within this context that the definition of lobbyist must be interpreted and applied. However appealing Mr. Lodge’s approach might be, there is a more simple approach in interpreting the statute, one which provides greater clarity and is more consistent with the Legislature’s intent.

The term “lobbyist” is a noun and is used to define a member of a profession -- one “who engages in lobbying for compensation.” Just as an attorney is one who practices law, a realtor is one who is licensed to represent buyers and sellers of property, a cosmetologist is one who provides beauty treatments, and a truck driver is one who drives a large commercial vehicle, a person is a “lobbyist” by occupation whether or not he or she is “lobbying” at the exact moment. One is not an attorney only at the times when he or she is actively practicing that profession, e.g., signing a legal document or appearing in court (T.C.A. § 23-3-103). Likewise, one is not a realtor only when one is negotiating or closing a sale or otherwise earning a commission (T.C.A. § 62-3-103). A cosmetologist is not a cosmetologist only when she is actually cutting someone’s hair (T.C.A. § 62-4-108). Thus, a lobbyist does not become “one who lobbies” only when she makes her first communication with an official in the legislative or executive branch. Rather, one becomes a lobbyist when one is employed, retained or otherwise arranges to provide lobbying services to an employer. At that point it is appropriate for one to identify himself or herself to the public as a “lobbyist.” The employment as a lobbyist triggers the seven-day period within which the lobbyist must register.¹

This is not the only context in which lobbyists are treated in the same manner as attorneys and real estate brokers. Tennessee tax law, for example, lists lobbyists, along with these other professions, for the payment of occupational taxes (T.C.A. § 67-4-1702). From this, it is clear that such individuals are “lobbyists” even when they are not actually engaged in lobbying but have been employed as lobbyists.

¹ In those situations in which an entity employs an in-house lobbyist, the lobbyist and the employer must register within seven (7) days after the commencement of the employment relationship. However, if an employee performs tasks unrelated to lobbying but is subsequently asked to lobby for the employer, the seven (7) day registration requirement commences upon the employee’s acceptance of the role of lobbyist and the associated duties.

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In addition, there are certain commonsense reasons for using this approach.

First, it would certainly frustrate the Legislature's intent to have employers of lobbyists register seven days after employing, retaining or otherwise arranging for a lobbyist's services, but to have lobbyists register at some future and underdetermined date when they engage in actual lobbying, as these two events may be months apart. Clearly, the Legislature intended that *both* the lobbyist *and* the employer of lobbyist registrations should occur contemporaneously.

Second, the employment relationship provides a simple, bright-line approach in determining when the registration requirement commences. The approach suggested by Mr. Lodge would provide vague guidance and lead to ambiguities as to when a lobbyist should register. For example, if a lobbyist places an informational piece about a particular issue in a trade journal, which may be read by legislative or executive branch officials, is that a direct or indirect communication for the purpose of influencing legislative or administrative action which would trigger the seven-day registration requirement? Are "lobbying" and the requirement that the communication have as its purpose "to influence," going to be defined by the provider of the communication or the recipient? A bright line approach, defined by the formation of the lobbyist and employer relationship would remove such ambiguities. Once the engagement has been entered into and the employer and the lobbyist have registered, the lobbyist can communicate freely.

Third, and perhaps most important, is the following: The tenor of the Act emphasizes public disclosure and the Act provides new and enhanced prohibitions. Lobbyists are required to disclose their employers, the name and business address of any member of the lobbyist's immediate family who is an official with the legislative or executive branch, and any direct business arrangement or partnership between the lobbyist and any candidate for public office or any official in the legislative or executive branch. T.C.A. §§ 3-6-302(b)(2)(D) and (E). In addition, lobbyists are subject to specific restrictions contained in T.C.A. § 3-6-304 *et seq.*, such as making certain campaign contributions, making loans to candidates for public office, and providing gifts to candidates or officials of the legislative and executive branches. If, as Mr. Lodge argues, one does not become a lobbyist until seven days after one engages in actual lobbying, then there is a window of time within which a lobbyist has been retained by an employer (and may already be receiving compensation for lobbying services), but has not publicly disclosed any information about his or her relationships with legislative or executive officials and is not prohibited from providing gifts to candidates, legislators or executive officials. The Commission believes that the Legislature did not intend to defeat the purpose of the statute by creating such a loophole.

For example, on October 1st, an employer employs, retains or arranges to have a lobbyist perform lobbying services for the upcoming legislative session. The employer registers with the Commission on October 8th and, as part of the registration process, provides the lobbyist's name, business address, telephone number, and e-mail address as required by T.C.A. § 3-6-302. However, the lobbyist decides not to register and disclose

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the required information, and further decides to arrange to provide gifts to officials of the legislative and executive branches and campaign contributions that would otherwise be prohibited had the lobbyist registered on October 8th.

The Commission concludes that this is impermissible. In emphasizing the employment relationship, the Legislature intended to couple disclosure with the prohibitions on a lobbyist's activities once that employment relationship was established and not at a later, undetermined date.

Thus, it is the Commission's position that the statute uses the term "lobbyist" in the commonly understood descriptive sense of "one who is a member of the lobbying profession" and requires its disclosures and prohibitions to apply contemporaneously to both the lobbyist and the employer upon the formation of an employment agreement between the lobbyist and the employer.

A lobbyist is "employed" when the employer and the lobbyist enter into an agreement that the lobbyist will lobby, whether that agreement is formal or informal, written or unwritten. The Act cannot be circumvented by an artificial delay between the time the parties enter into an unwritten agreement, and the time their agreement is formally reduced to writing.

The Commission does agree with Mr. Lodge that for lobbyists who lobbied for a employer during the 2006 legislative session, but have no continuing agreement with or obligation to the employer, there is no requirement to register until seven days after the lobbyist and the employer enter into a new agreement or arrangement for lobbying services for the 2007 legislative session.

CONCLUSION

A lobbyist must register within seven (7) days after entering into an agreement or arrangement with an employer to provide lobbying services.

Thomas J. Garland,
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