



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

September 18, 2009

RE: Lobbyist Principal Reporting of “Payment for Services”
Interpretation of G.S. 120C-100(a)(11k) and 120C-403(b)(3)
AO-L-09-010

Dear Requester:

You requested a formal advisory opinion regarding whether certain activities and services you provide to your lobbyist principal clients should be reported on those clients’ Principal Expense Reports as payments for services. This formal advisory opinion addresses the application of Chapter 120C of the North Carolina General Statutes (“G.S.”), the Lobbying Law, to the reporting of payments made for those professional services. It was adopted by the State Ethics Commission (“the Commission”) at its September 18, 2009, meeting.¹

I. Brief Conclusion.

When contacts with designated individuals or their immediate family members involve attempts to influence legislative or executive action, or both, the individual making such contacts is lobbying. An individual is not lobbying if there is no communication or activity with a designated individual or that individual’s immediate family member, or if that contact does not or is not intended to influence current or future legislative or executive action. Payments by a principal to a lobbyist for (1) direct or goodwill lobbying services or (2) activities directly connected to those lobbying services, are “for the purpose of lobbying.” Therefore, the principal must report those payments on its Principal Expense Report.

II. The Facts.

You are a practicing attorney in a law firm and a registered lobbyist representing a number of lobbyist principals. You are one of a number of registered lobbyists authorized to lobby on behalf of one or more lobbyist principals.

¹ Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

You or one of the other registered lobbyists have provided a number of professional services to one or more of these lobbyist principals. These services have included, but have not been limited to: (i) developing a government affairs strategy; (ii) advising on government affairs trends in North Carolina; (iii) reviewing and monitoring legislation introduced in the North Carolina General Assembly; (iv) advising on particular courses of action regarding legislation; and (v) in the normal course of business, if required, advocating on a principal's behalf and, if necessary, opposing any efforts that might be harmful to a principal. You state that these services are typical of activities and services customarily performed by a lobbyist for a lobbyist principal

III. Applicable Statutory Provisions.

A. Definition of Lobbying.

G.S. 120C-100(a)(9) defines "lobbying" as any of the following:

(a) Influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual² or that designated individual's immediate family.

(b) Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both.

Communications or activities as part of various business or personal relationships that "are not connected to" legislative or executive action are specifically excluded from the definition of lobbying. "Legislative action" and "executive action" are defined by the Lobbying Law. The definition of "executive action" also excludes those activities set forth in G.S. 120C-100(a)(3).

B. Reporting of "Payment for Services."

Article 4 of G.S. Chapter 120C imposes certain reporting responsibilities on lobbyists and lobbyist principals. G.S. 120C-403 specifies the content of the lobbyist principal's report. G.S. 120C-403(b)(3) requires a lobbyist principal to report:

With respect to each lobbyist registered under G.S. 120C-206, payment for services paid to all lobbyists during that quarter. If the lobbyist is a full-time employee of the principal, or is paid by an annual fee or retainer, the principal shall estimate and report the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying. The principal may rely upon a statement by the

² "Designated individuals" include legislators, legislative employees and "public servants." G.S. 120C-100(a)(2).

lobbyist estimating the portion of the salary, fee, or retainer that is reasonably allocated for the purpose of lobbying.³

C. Definition of “Payment for Services.”

G.S. 120C-100(a)(11k) defines “payment for services” as “any money, thing of value, or economic benefit paid to a lobbyist *for the purpose of lobbying* other than reimbursement of actual travel, administrative expenses, or subsistence.” The phrase “for the purpose of lobbying” is not defined in G.S. Chapter 120C.

IV. Discussion.

A. Lobbying.

G.S. 120C-100(a)(9) defines “lobbying” to include two types of lobbying: “direct” lobbying and “goodwill” lobbying. Both direct lobbying and goodwill lobbying require that an individual engage in communication or activities with a designated individual or a designated individual’s immediate family member. Therefore, those actions that do *not* include communication or activity with a designated individual, or a designated individual’s immediate family member, are not lobbying. Thus, for example, meeting with a principal outside the presence of a designated individual or a designated individual’s immediate family member to discuss proposed legislative or executive action is not “lobbying” under G.S. Chapter 120C.

When an individual does engage in communication or activities with a designated individual, or a designated individual’s immediate family member, then the specific facts and circumstances of the communication or activity determine whether it is “lobbying” under G.S. Chapter 120C. The critical factor is whether the individual is, through that communication or activity:

1. influencing or attempting to influence legislative or executive action, in the case of direct lobbying, or
2. developing goodwill with the “intention” of influencing current or future legislative or executive action, in the case of goodwill lobbying.

Thus, in the above example, if a legislator is present at the meeting with the principal, and the meeting is held with the intention of influencing legislative action, that activity would constitute direct lobbying.

B. Reporting of Payment for Services “For the Purpose of Lobbying.”

“Payment for services” includes “[a]ny money, thing of value, or economic benefit paid to a lobbyist for the purpose of lobbying.” G.S. 120C-100(a)(11k). It clearly includes payments made by a lobbyist principal to a lobbyist for engaging in activities that constitute direct or goodwill lobbying. However, it is less clear whether the General Assembly, by requiring the reporting of

³ AO-L-08-004 provides advice as to the manner in which fees could be “reasonably allocated.”

payments “for the purpose of lobbying” rather than just payments “for lobbying,” intended that payment for activities directly related to lobbying also be reported.

Given the breadth of the reporting obligations imposed by the Lobbying Law and principles of statutory construction, it would be reasonable to conclude that by using the phrase “for the purpose of lobbying” rather than “for lobbying,” the General Assembly intended that lobbyist principals report payments for more services than the definition of “lobbying” encompasses.

Other states with lobbying reporting statutes with the same or similar language have interpreted it to require reporting of payments to lobbyists for services that are related to or are preparatory to the actual act of lobbying. Some of these states have used a “but for” test in determining whether certain services provided by a lobbyist are related to lobbying activities. For instance, the Hawaii Ethics Commission applied the “but for” test in concluding that payments to a lobbyist for waiting to testify at a hearing pertaining to a principal’s lobbying issues was “for the purpose of lobbying.” The Commission reasoned that “[t]he lobbyist would not be waiting at the hearing but for the fact that he is lobbying.” Hawaii Ethics Advisory Opinion No. 95-4 (1995).

Similarly, the Connecticut Citizen’s Ethics Advisory Board required that time spent by an individual preparing for a hearing be reported as an activity “in furtherance of lobbying.” Connecticut Ethics Advisory Opinion No. 2007-15. The Connecticut State Ethics Commission also concluded that payments to an individual to monitor legislation is “in furtherance of lobbying” and must be reported if it is related to direct lobbying activities. Connecticut Ethics Advisory Opinion No. 2003-6.

The Commission interprets the phrase “for the purpose of lobbying” to encompass more communications and activities than those included under the definition of “lobbying.” The Commission concludes that the “but for” test should be applied to the determination of whether services provided by a lobbyist are related to lobbying communication or activities. If the lobbyist would not be providing those services but for the fact that he or she is engaged in lobbying on behalf of a particular principal, those services are “for the purpose of lobbying” and those payments must be reported.

Accordingly, in the example of the lobbyist meeting alone with his or her principal to discuss proposed legislative or executive action, if the lobbyist would not be participating in this meeting but for the fact that he or she is performing lobbying services in connection with that particular legislative or executive action, payment to the lobbyist for this time is payment for services “for the purpose of lobbying” and must be reported.

It is important to note that this opinion’s primary focus is on interpreting the phrase “for the purpose of lobbying” for the sole purpose of determining those payments that must be included on the Principal Expense Report filed by lobbyist principals. Moreover, the question of whether a payment for services must be reported presumes that a lobbyist is being paid for the services in question.

V. Questions.

In your request, you did not provide specific facts that are necessary for the Commission to provide you with specific advice as to each question. Thus, the Commission responds to your two

primary questions with the following general advice, including reporting advice based on the type of service, activity, or communication for which the lobbyist is being paid.

A. Whether certain communication or activities constitute lobbying under G.S. 120C-100(a)(9)?

Section IV, part A, above, outlines the criteria for determining what activities constitute lobbying. Payments made by lobbyist principals for those services are reportable. You have asked specifically whether the following are lobbying activities:

1. An unanticipated communication, interaction, or activity with a designated individual or his or her immediate family member.

If the principal has current or future legislative or executive action that involves or will involve this designated individual, the specific facts of the unanticipated communication, interaction, or activity will determine if payment for such is “for the purpose of lobbying.”

If there is no current or future legislative or executive action, the payment is not “for the purpose of lobbying.”

2. An intentional communication, interaction, or activity with a designated individual or a designated individual’s immediate family member.

If the principal has current or future legislative or executive action that involves or will involve this designated individual, the specific facts of the communication, interaction, or activity will determine if payment for such is “for the purpose of lobbying.”

B. Does payment to the lobbyist for the following types of activities, communications, or services qualify as payment for services for the purpose of lobbying?

1. Research, preparation, strategy development, and bill review and drafting services.

If the service or activity relates to direct or goodwill lobbying activities, i.e. the lobbyist would not be providing these services but for his or her lobbying duties and responsibilities, the payment for such is “for the purpose of lobbying.”

2. Discussion, preparation, planning and other activities with the principal or others who are not designated individuals or their immediate family members.

See response to B.1.

3. An activity or service conducted or provided in the legislative buildings, such as observing committee meetings and legislative sessions, waiting for meetings to begin, requesting information from legislative staff,

providing information to legislative staff, and walking between legislative buildings.

If the service or activity relates to direct or goodwill lobbying activities, i.e. the lobbyist would not be attending the meetings or requesting or providing certain information but for his or her lobbying duties and responsibilities, the payment for such is "for the purpose of lobbying."

4. An activity or service conducted or provided to facilitate a meeting, communication, or activity with a designated individual or a designated individual's immediate family member.

If the service or activity relates to direct or goodwill lobbying activities, i.e., the lobbyist would not be involved in facilitating a meeting but for his or her lobbying duties and responsibilities, then the payment is "for the purpose of lobbying."

Formal Advisory Opinions of the State Ethics Commission
Issued Pursuant to the Lobbying Law

Upon the written request of any person, State agency, or governmental unit affected by G.S. Chapter 120C (“the Lobbying Law”), G.S. 120C-102 (a1) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions “on the meaning and application” of the Lobbying Law and “that person’s, State agency’s or any other governmental unit’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 120C-102(a) and (a1).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 120C-102(c). Requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 120C-102(d). However, the Commission is required to send an unedited copy of each formal advisory opinion to the Secretary of State’s Office at the time the formal advisory opinion is issued to the requester, and the Secretary of State is required to treat the formal advisory opinion as confidential and not a matter of public record. G.S. 120C-102(d1). In addition, Commission staff is specifically authorized to share all information and documents related to requests for formal advisory opinions with the Secretary of State’s Office. The Secretary of State’s Office is required to treat any such information and documents in its possession as confidential and not a matter of public record. G.S. 102(d1).