S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 06-009

Removing Administrative Law Practice Exemption from Ethics Act

QUESTION

Under 2005 Tenn. Pub. Acts Ch. 102, certain public officials may not receive pay for "consulting services." In addition, certain state officials and employees must disclose contracts under which they receive a fee for "consulting services." The definition of "consulting services" excludes representing clients in administrative legal proceedings. Could the General Assembly constitutionally remove this exclusion?

OPINIONS

The General Assembly may constitutionally extend the ban on paid lobbying by certain state officials to include state administrative law practice. The General Assembly may also extend the ban on paid lobbying by certain local officials to include representing private clients before a local agency in analogous local proceedings. The General Assembly may constitutionally extend the current disclosure requirements on state employees and officials to include a contract to represent private clients for a fee in state administrative proceedings. This extension would not violate First Amendment or privacy rights of the individuals to whom the prohibition and disclosure provisions apply, nor would it unconstitutionally encroach on the right of the judicial branch to regulate the practice of law. At the same time, however, sponsors of legislation affecting the practice of law should consult with the Board of Professional Responsibility to determine appropriate language for the legislation.

ANALYSIS

This opinion concerns possible amendments to 2005 Tenn. Pub. Acts Ch. 102, the "Ethics Act." Under Tenn. Code Ann. § 2-10-123(a):

> It is an offense for any member of the general assembly, member-elect of the general assembly, governor, member of the governor's staff, secretary of state, treasurer, or comptroller of the treasury to knowingly receive a fee, commission or any other form of compensation for consulting services from any person or entity, other than compensation paid by the state, a county or municipality.

Subsection (b) makes it an offense for a private party to pay a fee to any of these officials for consulting services. Tenn. Code Ann. § 2-10-124(a) provides:

> It is an offense for any member of a municipal or county legislative body, member-elect of a municipal or county legislative body, or other elected county or municipal official to knowingly receive a fee, commission or any other form of compensation for consulting services, other than compensation paid by the state, a county, or municipality.

Under Tenn. Code Ann. § 2-10-125 and § 2-10-126, information regarding a contract to pay a fee for consulting services to various state officials or employees must be disclosed to the Registry of Election Finance. The statutes require disclosure of the following information:

> (1) The person to whom the fee was paid;
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> (2) The position of the person to whom the fee was paid;
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> (3) The amount of the fee;
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> (4) The date the services were rendered; and
>
> (5) A general description of the services rendered.

Tenn. Code Ann. § 2-10-125(a); § 2-10-126(a).

The Ethics Act defines the term "consulting services" as follows:

> "Consulting services" with respect to an official in the legislative branch or an official in the executive branch means services to advise or assist a person or entity in influencing state legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist a person or entity in maintaining, applying for, soliciting or entering into a contract with the state. ***The term "consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure;***

Tenn. Code Ann. §2-10-122(1) (emphasis added). With respect to local officials, the Ethics Act defines the term "consulting services" as follows:

> "Consulting services" with respect to an elected municipal or county official, including members-elect of a municipal or county legislative body, means services to advise or assist a person or entity in influencing municipal or county legislative or administrative action as such term is defined in § 3-6-102(11), including, but not limited to, services to advise or assist such person or entity in maintaining, applying for, soliciting or entering into a contract with the municipality or county represented by such official. ***"Consulting services" does not mean the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding or rule making procedure.***

(Emphasis added).

The request asks whether the General Assembly could constitutionally remove this exemption for the activities in the emphasized sentence in each definition. If this exemption is removed, then the term "consulting services" would include the practice or business of law in connection with representation of clients by a licensed attorney in a contested case action, administrative proceeding, or rulemaking procedure. As a result, certain state and local officials would be prohibited from performing these services for compensation unless the compensation is received from the State, a county, or a municipality. Further, the statute would require all of the private parties, state employees, and officials subject to the disclosure requirements in Tenn. Code Ann. § 2-10-125 and -126 to disclose the same information for these activities as for other activities that constitute "consulting services" within the meaning of the Ethics Act.

This question implicates two constitutional provisions. First, the First Amendment protects the right of individuals to petition government officials. Second, under Article II, Section 1, of the Tennessee Constitution, the government is divided into three distinct departments: the legislative, executive and judicial. Under Article II, Section 2, the Separation of Powers Clause, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others," except as directed or permitted in the Constitution. This clause is implicated because the term "consulting services" would include services that only a licensed attorney may provide in Tennessee. Generally, the judicial branch is entrusted with regulating the practice of law in Tennessee.

A. First Amendment

1. Prohibition

We think the prohibitions and the disclosure requirements would be defensible even if the administrative legal practice exemption now in the definition of "consulting services" were omitted. The right to lobby is protected by the First Amendment. Legislation that burdens the right to engage

in paid lobbying must be narrowly tailored to promote a compelling state interest. This Office recently concluded that the current ban on paid lobbying imposed on certain state officials under the Ethics Act is constitutional because it is narrowly drawn to further a compelling state interest in preventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest. Op. Tenn. Att'y Gen. 05-173 (December 8, 2005).

This rationale would support the prohibition if it extended to representing clients before a state agency in a contested case or other administrative proceeding or rule making proceeding. While each of these activities may involve a hearing governed by elaborate legal procedures, each requires a decision by an executive officer or administrative body. Each, therefore, involves administrative action as defined in the Ethics Act. Like the prohibition already imposed under the Ethics Act, prohibiting certain high-ranking state officials from representing private clients before an executive agency is narrowly tailored to further the compelling state interest in preventing corruption or the appearance of corruption, ensuring the efficient operation of state government, and ensuring that officials and employees are able to exercise their judgment in the public interest. Prohibiting certain local officials from representing private clients in comparable proceedings on the local level promotes the same compelling state interest. For these reasons, extending the ban in this manner would not violate the First Amendment.

2. Disclosure

Under a similar rationale, the General Assembly may extend the current disclosure requirements on state employees and officials to include a contract to represent private clients for a fee in state administrative proceedings. *See* Op. Tenn. Att'y Gen. 05-073 (May 4, 2005). We think it can be argued that these disclosure requirements, like the current requirements, enable officials and the public to evaluate the different sources of lobbying pressure and to maintain the integrity of a basic governmental process. *See, e.g., Plante v. Gonzalez*, 575 F.2d 1119 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129, 99 S.Ct. 1043, 59 L.Ed.2d 90 (1979). As we noted in Opinion 05-073, to the extent the disclosure requirements apply to employees with no policymaking authority, they could be subject to challenge on the ground that they do not promote a substantial state interest.

B. Separation of Powers: Regulation of the Practice of Law

The second constitutional provision this request implicates is the Separation of Powers Clause of the Tennessee Constitution. Under that provision, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others," except as directed or permitted in the Constitution. Tenn. Const. Art. II, § 3. The Tennessee Supreme Court has original and exclusive jurisdiction to promulgate its own rules, and its rulemaking authority embraces the admission and supervision of members of the Bar of the State of Tennessee. *Petition of Tennessee Bar Association*, 539 S.W.2d 805, 807 (Tenn. 1976). But the Tennessee Supreme Court has previously recognized that areas exist in which both the legislative

and judicial departments have an interest. *See, e.g., Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994), *cert. denied*, 513 U.S. 869, 115 S.Ct. 189, 130 L.Ed.2d 122 (1994); *Petition for Rule of Court Activating, Integrating and Unifying the State Bar of Tennessee*, 199 Tenn. 78, 282 S.W.2d 782 (1955).

1. Prohibition

The Tennessee Supreme Court has defined the "practice of law" broadly to relate to "the rendition of services for others that call for the professional judgment of a lawyer." *In re Petition of Charles W. Burson*, 909 S.W.2d 768, 775 (Tenn. 1995); Op. Tenn. Att'y Gen. 05-132 (August 25, 2005). The current definition of "consulting services" as now written includes some activities that fall within this definition. As now written, therefore, the Ethics Act already prohibits some activities by state and public officials that constitute the "practice of law." But we think that the conduct of public officials, including those who are attorneys, is an area in which both the legislative and judicial departments have an interest. For this reason, we think the Ethics Act, to the extent it prohibits certain state or local officials and employees from receiving a fee for providing legal services to influence government action, does not unconstitutionally encroach on the authority of the judicial branch to supervise the profession of law. Including representing clients in administrative proceedings would not change this conclusion. For this reason, the General Assembly could constitutionally prohibit certain state and local officials from accepting a fee from a private client for representing that client in a contested case hearing, administrative proceeding, or rulemaking procedure before a state or local agency, respectively.

2. Disclosure

The Ethics Act also requires state employees and officials to disclose information regarding a contract to provide "consulting services" to a private client. Since the definition of "consulting services" includes some that constitute the "practice of law," the Ethics Act already requires state employees and officials who are attorneys to disclose some information regarding legal services.

The Tennessee Supreme Court has stated that the General Assembly is without authority to enact laws that impair an attorney's ability to fulfill ethical duties as an officer of the court. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 334 (Tenn. 1984). The Tennessee Supreme Court could find that the disclosure requirement, as applied to attorneys, violates the Separation of Powers Clause if it conflicts with an attorney's professional duties under the current Rules of Professional Conduct. This Office does not provide interpretations of the Rules of Professional Conduct. That authority is accorded to the Tennessee Board of Professional Responsibility. But we think the current disclosure requirement as applied to state officials and employees who are attorneys is defensible. Further, extending the disclosure requirement by broadening the definition of "consulting services" would also be defensible. We suggest, however, that sponsors of such legislation consult with the Board of Professional Responsibility to develop appropriate language.

Two arguments support this conclusion. First, it can be argued that the disclosure requirements, whether applied to the current definition of "consulting services," or a broadened one, do not conflict with an attorney's professional duties. In 2001, this Office was asked to review proposed legislation requiring members of the General Assembly to disclose information regarding "consulting services" provided any person doing business with the State. Op. Tenn. Att'y Gen. 01-083 (May 22, 2001). The information included the person from whom the fee was received, the person to whom the fee was paid, the amount of the fee, the date the services were rendered, and a description of the services rendered. While deferring to the judgment of the Tennessee Board of Professional Responsibility, this Office concluded that a public officer would not necessarily violate the Supreme Court rules governing attorneys in effect at that time. This conclusion was based on a review of case law interpreting the scope of the attorney-client privilege. Effective March 1, 2003, however, the Tennessee Supreme Court adopted the Rules of Professional Conduct. Tenn. Sup. Ct. 8. Rule 1.6 of these Rules provides in relevant part:

> (a) Except as provided below, a lawyer shall not reveal information *relating to the representation of a client* unless the client consents after consultation, except that the lawyer may make such disclosures as are impliedly authorized by the client in order for the lawyer to carry out the representation.
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
> (1) To prevent the client or another person *from committing a crime*, including a crime that is reasonably certain to result in substantial injury to the financial interest or property of another, unless disclosure is prohibited or restricted by RPC 3.3;
> * * * *
> (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:
> * * * *
> (2) To comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
> (3) To comply with RPC 3.3, 4.1, *or other law.*

(Emphasis added). The Tennessee courts have not yet directly addressed the scope of this rule. Commentary to the Rule, however, suggests that it was not intended to supersede existing case law on the scope of the attorney-client privilege, nor to prevent the General Assembly from requiring disclosure where appropriate. Comment 5 states in part,

> The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer *through compulsion of law.*

(Emphasis added). Comment 15 provides:

> The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. . . . In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes RPC 1.6 is a matter of interpretation beyond the scope of these rules.

As discussed in our 2001 opinion (01-083), the attorney-client privilege does not necessarily include information such as the name of the client, attorney's fees, and the scope and nature of the employment. But, under RPC 1.6, this information relates to the representation of a client and, therefore, may generally not be revealed. Because of the comments cited above, however, we think it can be argued that RPC 1.6 does not prevent the General Assembly from requiring disclosure of information not protected by the attorney-client privilege.

Second, the disclosure requirements — whether broadened to include administrative practice or not— address the conduct of state officials and employees. This is an area in which both the legislative and judicial branches have an interest. We think the disclosure requirements, therefore, are defensible as applied to the legal practice of state officials and employees. Broadening the definition of "consulting services" subject to disclosure to include administrative law practice would not change this result.

At the same time, however, sponsors of legislation affecting the practice of law should consult with the Board of Professional Responsibility. An official from the Board of Professional Responsibility testified briefly on this issue before the Joint Committee that developed the present Ethics Act. Joint Committee meeting, April 19, 2005 (testimony of Lance Bracey). Mr. Bracey testified that, depending on the language of the law, a disclosure requirement would not necessarily conflict with Rule 1.6 of the Rules of Professional Conduct. Courts in other states have reviewed the constitutionality of restrictions applied to the ability of lobbyists and public officials to practice law and reached conflicting results. *See, e.g., Gmerek v. State Ethics Commission*, 569 Pa. 579, 807 A.2d 812 (Pa. 2002) (lobbyist disclosure requirement violated the state supreme court's exclusive authority to regulate the practice of law; court divided three-to-three); *Forti v. New York State Ethics Commission*, 75 N.Y.2d 596, 554 N.E.2d 876, 555 N.Y.S.2d 235 (N.Y. 1990) (legislature could constitutionally permanently prohibit official from representing clients on matters within his department while he was in office).

PAUL G. SUMMERS
Attorney General

MICHAEL E. MOORE
Solicitor General

ANN LOUISE VIX
Senior Counsel

Requested by:

Honorable Gary Odom
State Representative
22 Legislative Plaza
Nashville, TN 37243-0155