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Opinion No. 05-096

Advising and Consulting with Business Clients under the Ethics Act

QUESTION

Under 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act"), may a member of the General Assembly advise and consult with business clients as long as the legislator is not attempting to secure a state contract for the client or attempting to influence legislation for the client's benefit?

OPINION

The Ethics Act bans a member of the General Assembly from accepting a fee for consulting services from any entity other than the State, a county, or a municipality. The term "consulting services" means services to advise or assist a person or entity in influencing state legislative or administrative action, 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. As operative terms are defined, the Ethics Act is not limited to services to obtain a state contract or to influence legislation in favor of a client. State legislative action includes introduction, sponsorship, debate, voting, or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report, or any other matter pending or proposed in a legislative committee or in either house of the General Assembly. Administrative action includes the taking of any recommendation, report or nonministerial 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 and regulation, or any action of a quasi-legislative nature, by an official in the executive branch.

Whether mass marketing or other advertising services would be "consulting services" within the meaning of the ban under the Ethics Act depends on facts and circumstances, including the content of the advertising, its purpose, and its intended audience. We think the term "consulting services" was intended to include only services intended to influence specific state administrative or legislative action. For example, we think the term would include advertising or other informational services that directly promote specific legislation. We also think the term would include advertising or other informational services that specifically target legislators or state executive officials. We do not think, however, that the term includes advertising aimed at the general public that does not promote or otherwise attempt to influence specific legislative or administrative action.

ANALYSIS

This opinion interprets 2005 Tenn. Pub. Acts Ch. 102 (the "Ethics Act").[1] The question is whether, under this act, a member of the General Assembly may legally advise and consult with business clients as long as the legislator is not attempting to secure a state contract for the client or attempting to influence legislation for the client's benefit. The request cites the provision of mass communications, marketing, and public relations services to support the marketing, business development, and community relations of clients.

This question requires a review of the definitions in the Ethics Act, including those incorporated by reference from the state lobbying laws. These definitions are very broad. Under the Ethics Act, it is an offense for any member of the General Assembly to knowingly receive a fee, commission, or any other form of compensation[2] for consulting services from any person or entity, other than compensation paid by the State, a county, or a municipality. The statute defines "consulting services" as follows:

> The term "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). Whether any particular activity falls within this definition will depend on specific facts and circumstances. Tenn. Code Ann. § 3-6-102(11) provides:

> "Influencing legislative or administrative action" means 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

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[1] The General Assembly has passed two bills that amend the Ethics Act, Senate Bill 396/House Bill 1801 and Senate Bill 585/House Bill 1590. Assuming these bills become law, they appear to affect the Ethics Act's disclosure provisions and not the ban on consulting services discussed in this opinion.

[2] The terms "fee, commission, or any other form of compensation" do not include anything of value that may be accepted under Tenn. Code Ann. §§ 2-10-116 or 3-6-114(b) or (c). New Tenn. Code Ann. § 2-10-122(5).

> analyses, but not including 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.

We assume the bill, by incorporating this definition, also incorporates the definition of the other terms within this provision that appear in Tenn. Code Ann. § 3-6-102. The term "legislative action":

> means introduction, sponsorship, debate, voting or any other nonministerial official action or nonaction on any bill, resolution, amendment, nomination, appointment, report or any other matter pending or proposed in a legislative committee or in either house of the general assembly.

Tenn. Code Ann. § 3-6-102(12). The term "administrative action":

> means the taking of any recommendation, report or nonministerial 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 and regulation, or any action of a quasi-legislative nature, by an official in the executive branch.

Tenn. Code Ann. § 3-6-102(1). The term "official in the executive branch" is not defined for purposes of this bill by Tenn. Code Ann. § 3-6-102 but, instead, is found in § 2-10-122(3):

> The term "official in the executive branch" means the governor, any member of the governor's staff or any person in the executive service as such term is defined in § 8-30-208(b); provided, however, that such term shall not include members of boards and commissions who receive only expenses or a nominal per diem not to exceed six hundred dollars ($600.00) per month, unless they provide consulting services for compensation with respect to the activities of the board or commission of which they are a member.

If conduct giving rise to a violation of the provisions of this section would also constitute the offense of bribery prohibited by Tenn. Code Ann. § 39-16-102, then the violation is a Class C felony. Any other violation of the provisions of the section is a Class A misdemeanor. In either case, a person convicted of a violation of the section is disqualified from holding any office under the laws or Constitution of the State. New Section 2-10-123(c).

The request in this case concerns an individual who provides mass communications, marketing, and public relations services to support the marketing, business development, and

community relations of clients. The key issue in determining whether these transactions violate the ban is whether the state official in question is receiving compensation from a private party to provide "consulting services." By its terms, the statute does not prohibit a state official from receiving compensation for consulting services from the State, a county, or a municipality. Thus, even if, under the arrangement, the official is providing consulting services, he or she does not violate the ban if the compensation comes from the State, a county, or from a municipality. Where a state official receives compensation from a private party, the official should consider the particular services that he or she is providing in return. The term "consulting services" under the Ethics Act includes services to influence state legislative or administrative action. The term expressly includes services to advise or assist a person or entity in maintaining, applying for, soliciting, or entering into a contract with the State. The term expressly excludes furnishing information requested by a state official to such official, or giving testimony at an official hearing conducted by officials of the legislative or executive branch. We think the term "consulting services" was intended to include only services intended to influence specific state administrative or legislative action. For example, we think the term would include advertising or other informational services that directly promote specific legislation. We also think the term would include advertising or other informational services that specifically target legislators or state executive officials. We do not think, however, that the term includes advertising aimed at the general public that does not promote or otherwise attempt to influence specific legislative or administrative action.

This conclusion is based on a number of considerations. First, the statute itself prohibits certain state officials from "knowingly" receiving compensation for consulting services from a private entity. Second, the statute imposes criminal penalties for its violation. Criminal statutes must be strictly construed in favor of any person who may be charged with violating their provisions. *State v. Williams*, 623 S.W.2d 121, 124 (Tenn. Cr. App. 1981), *p.t.a. denied* (1981). Any reasonable doubt as to the intended meaning of a criminal statute must be resolved in favor of the defendant. *State v. Henderson*, 623 S.W.2d 638, 640 (Tenn. Cr. App. 1981), *p.t.a. denied* (1981). Finally, legislative history appears to support this interpretation. The ban on compensation for consulting services became part of the ethics legislation when the House adopted House Amendment 6 during its March 24, 2005, session. Representative McMillan, who sponsored the Ethics Act in the House, sponsored House Amendment 6. Shortly after Representative McMillan introduced the amendment, she and Representative Kernell had the following exchange:

> Kernell: I have another point of clarification. If someone, let's say, owns a newspaper or a radio station or does advertising, and someone is pushing for some idea, that's sort of an indirect payment, but it's not exactly a consulting contract. Is there a distinction — you're saying a, this would apply to direct consulting contracts for direct action. If your business is mainly incidental to the advertising . . . that's not included?
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> McMillan: That's correct, if it's incidental; this prohibits direct consulting contracts.

House Session Tape H29 (March 24, 2005) (remarks of Representatives Kernell and McMillan). This exchange suggests that the term "consulting services" was intended to include only services to influence specific legislative or administrative action.

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