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Opinion No. 05-098

Consulting under the Ethics Act of 2005

QUESTIONS

Under Chapter 102 of the Public Acts of 2005 (the “Ethics Act”):

1. May a firefighter or a farmer discuss and advise on firefighter issues or farming issues, respectively?
2. May a lawyer discuss and advise on legal issues?

OPINIONS

1. a. Under the Ethics Act, a member of the General Assembly, a member-elect of the General Assembly, the Governor, a member of the Governor’s staff, the Secretary of State, the Treasurer, or the Comptroller of the Treasury may only receive compensation from the State, a municipality, or a county for “consulting services” to influence action by the General Assembly or any state executive agency. Whether any particular activity falls within the definition of “consulting services” under the act depends on facts and circumstances. One of these state officials who is also a firefighter or a farmer may accept compensation from the State, a municipality, or a county to provide consulting services to influence state legislative or administrative action. Thus, where a legislator works for a city fire department, the Ethics Act would not prevent that legislator from sponsoring legislation on firefighting issues, or from working to promote or defeat legislation on firefighting issues. But none of these state officials may accept compensation from a private entity for these services. Thus, where a legislator works for a private firefighting service, he or she would violate the Ethics Act if his or her job duties include influencing state legislative or administrative action. The legislator should review any payment from a private party. If the payment is in exchange for that legislator’s services to influence state administrative or legislative action, then it is banned under the Ethics Act. The ban does not extend to consulting services to influence legislative or administrative action by a local government or a government out of state.

In the case of a self-employed farmer, the analysis is different. The Ethics Act explicitly forbids a legislator from receiving compensation from a private party to advocate state legislation or influence state administrative action. It does not forbid a legislator from advocating legislative or administrative action that may, directly or indirectly, benefit his or her business. If a legislator receives no compensation from a private party for sponsoring farming legislation, for example, the

legislator has not violated the Ethics Act. Thus, where a legislator is a self-employed farmer, the Ethics Act does not appear to prohibit that legislator from sponsoring legislation on farming issues, or from working to promote or defeat legislation on farming issues. Again, the legislator should review any payment from a private party. If the payment is in exchange for that legislator's services to influence state administrative or legislative action, then it is banned under the Ethics Act. This opinion does not attempt to address whether an arrangement would violate the ethics rules of either House or raise conflict of interest issues under Tenn. Code Ann. § 12-4-101 or any other statute.

b. Under the Ethics Act, a member or member-elect of a county or city legislative body or an elected county or municipal official may only receive compensation from the State, a municipality, or a county for "consulting services" to influence legislative or administrative action by a county or municipality. Whether any particular activity falls within the definition of "consulting services" under the act depends on facts and circumstances. One of these local officials who is also a firefighter or a farmer may accept compensation from the State, a municipality, or a county to provide consulting services to influence legislative or administrative action by a county or municipality. Thus, where a local official works for a city or county fire department, the Ethics Act would not prevent that official from sponsoring an ordinance or other local action on firefighting issues. Similarly, the Ethics Act generally would not prohibit a local official who is also a self-employed farmer from sponsoring an ordinance or other local action on a farm-related issue. The official should review every payment from a private party to make sure that it is not in exchange for influencing or county legislative or administrative action. The ban does not extend to consulting services to influence legislative or administrative action by the Tennessee state government.

2. a. As a general matter, the ban on receiving compensation for consulting services to influence legislative or administrative action by the State also applies to law-related consulting services by any of the covered state officials who is also a licensed attorney. Thus, in general, a state legislator/attorney may not receive compensation from a private party to influence state legislative or administrative action. Like any other legislator, therefore, a legislator/attorney should review every arrangement under which he or she receives private compensation. The arrangement would ordinarily violate the Ethics Act if the payment is for the legislator's services to influence state legislative or administrative action. But the definition of "consulting services" expressly excludes "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." New Tenn. Code Ann. § 2-10-122(1). The legislator/attorney, therefore, should review the arrangement to determine if he or she is being paid to represent a client in a contested case action, an administrative proceeding, or a rule making procedure in front of a Tennessee state agency. If the compensation is for these services, then the arrangement does not violate the Ethics Act.

b. As a general matter, the ban on receiving compensation for consulting services to influence legislative or administrative action by a county or municipality also applies to any law-related consulting services of any of the covered local officials who is also a licensed attorney. As a general matter, the ban on receiving compensation for consulting services to influence legislative or administrative action by a county or municipality also applies to any law-related consulting services of any of the covered local officials who is also a licensed attorney. Thus, in general, a

local elected official who is also an attorney may not receive compensation from a private party to influence local legislative or administrative action. Like any other local elected official, therefore, a legislator/attorney should review every arrangement under which he or she receives private compensation. The arrangement would ordinarily violate the Ethics Act if the payment is for the legislator's services to influence city or county legislative or administrative action. But the definition of "consulting services" expressly excludes "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." New Tenn. Code Ann. § 2-10-122(2). The local official, therefore, should review the arrangement to determine whether he or she is being paid to represent a client in a local contested case action, administrative proceeding, or rule making procedure. If the compensation is for these services, then the arrangement does not violate the Ethics Act.

ANALYSIS

This opinion concerns Chapter 102 of the Public Acts of 2005 (the "Ethics Act")¹. The Ethics Act bans some paid lobbying by some state and local officials and imposes disclosure requirements on other employees and officials. The request appears directed toward the scope of the ban. This opinion, therefore, will address that issue and not the more broadly applicable disclosure requirements.²

1. Lobbying by Firefighter or Farmer

a. State Officials

Under the Ethics Act, 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 compensation³ 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:

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 This opinion analyzes your questions only under the Ethics Act of 2005 and does not consider whether a particular activity for compensation beyond that paid by the government for an official position would violate other provisions, such as the general conflict of interest statute, Tenn. Code Ann. § 12-4-101, and/or the rules of the Senate and House. Before engaging in any particular activity for compensation beyond that paid by the government for an official position, a government official or employee should consider whether to engage in such activity in light of the specific facts and circumstances.

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

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.

New 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 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 that Chapter 102, 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).

Your question, specifically, concerns the ability of a state official — for example, a legislator — who is also a firefighter or a farmer to discuss and advise on firefighting or farming issues. Whether a particular arrangement is banned depends on who pays the legislator and what services the legislator is paid to provide. Where a legislator works for the State, a county, or a municipality, this analysis is fairly simple. The Ethics Act allows a state legislator to receive compensation for providing consulting services such as influencing legislation from the State, a county, or a municipality. Even if that legislator’s job responsibilities include advising and discussing firefighting issues to influence state legislative or administrative action, therefore, these activities do not violate the Ethics Act. Thus, where a legislator works for a city fire department, the Ethics Act would not prevent that legislator from sponsoring legislation on firefighting issues, or from working to promote or defeat legislation on firefighting issues.

The analysis is more complex where a legislator receives payment from a private party. Whether the arrangement violates the Ethics Act depends on the services for which the legislator is being paid. The Ethics Act bans private compensation for the legislator’s services to influence legislative or administrative action by the General Assembly or by any agency of state government. The terms “legislative action” and “administrative action” are broadly defined. If, for example, a legislator works for a private firefighting service— even a nonprofit corporation— the legislator should review his or her employment duties. The Ethics Act bans a legislator from receiving compensation from a private entity for consulting services including influencing state legislative or administrative action. Thus, where a legislator works for a private firefighting service, he or she would violate the Ethics Act if his or her job duties include influencing state legislative or administrative action. The same analysis should be applied to any payment a legislator receives from a private entity. The legislator should determine whether the payment is in return for influencing state legislative or administrative action. If so, the arrangement violates the Ethics Act. For a state official, the ban would not extend to influencing local governmental action.

Your second example is a legislator who works as a farmer. Where a farmer is self-employed, the analysis is different. There may be many instances where a legislator/farmer advocates state farming legislation or administrative action that may benefit his or her business. But the Ethics Act only forbids a legislator from receiving compensation from a private party to advocate such legislation or influence such administrative action. It does not forbid a legislator from advocating legislative or administrative action that may, directly or indirectly, benefit his or her business. In this case, the key issue would be identifying the compensation and the party from whom it is received. If a legislator receives no compensation from a private party for sponsoring farming legislation, the legislator would not violate the Ethics Act. Again, this opinion does not attempt to address whether an arrangement would violate the ethics rules of either House or raise conflict of interest issues under Tenn. Code Ann. § 12-4-101 or other statute.

b. City and County Officials

The Ethics Act also bans county and city legislators and other elected county and city officials from accepting compensation from an entity other than the State, a county, or a municipality to lobby county or city governments. Under new section 2-10-124(a):

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 new section 2-10-122(2):

The term “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. 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.

By its terms, therefore, this statute appears to include lobbying any local government, not just the particular county or city for which the individual is an official. Again, whether any particular activity falls within this definition will depend on 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 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.

Thus, the statute regarding lobbying by county and city officials incorporates a definition from the state lobbying laws, Tenn. Code Ann. §§ 3-6-101, *et seq.*⁴

⁴ As the other definitions from the lobbying laws quoted above indicate, this statutory scheme generally only applies to lobbying activity on the state level. Since the new section 2-10-122(2) refers to influencing *municipal or county* legislative or administrative action, the part of the statute dealing with lobbying by local officials evidently does not incorporate the other definitions of the lobbying act verbatim.

Under the Ethics Act, therefore, a city or county elected official may not accept compensation from a private party to influence legislative or administrative county or municipal action. Application of the Ethics Act in this context is similar to that for a state official discussed above. Thus, for example, where a city council member works for a city fire department, the Ethics Act would not prevent that legislator from sponsoring county or city action on firefighting issues. The member could not accept compensation from a private party to influence these actions. A similar analysis to that discussed above with regard to a state legislator would apply to a city or county elected official who is a self-employed farmer. The ban does not extend to consulting services to influence legislative or administrative action by the Tennessee state government.

2. Lobbying by an Attorney

a. State Officials

As a general matter, the ban on receiving compensation for consulting services to influence legislative or administrative action by the State also applies to any law-related consulting services of any of the covered state officials who is also a licensed attorney. Thus, in general, a state legislator/attorney may not receive compensation from a private party to influence state legislative or administrative action. Like any other legislator, therefore, a legislator/attorney should review every arrangement under which he or she receives private compensation. The arrangement would ordinarily violate the Ethics Act if the payment is for the legislator's services to influence state legislative or administrative action. But the definition of "consulting services" expressly excludes "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." New Tenn. Code Ann. § 2-10-122(1). The legislator/attorney, therefore, should review the arrangement to determine if he or she is being paid to represent a client in a contested case action, an administrative proceeding, or a rule making procedure in front of a Tennessee state agency. If the compensation is for these services, then the arrangement does not violate the Ethics Act.

b. Local Elected Officials

As a general matter, the ban on receiving compensation for consulting services to influence legislative or administrative action by a county or municipality also applies to any law-related consulting services of any of the covered local officials who is also a licensed attorney. Thus, in general, a local elected official who is also an attorney may not receive compensation from a private party to influence local legislative or administrative action. Like any other local elected official, therefore, a legislator/attorney should review every arrangement under which he or she receives private compensation. The arrangement would ordinarily violate the Ethics Act if the payment is for the legislator's services to influence city or county legislative or administrative action. But the definition of "consulting services" expressly excludes "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." New Tenn. Code Ann. § 2-10-122(2). The local official, therefore, should review the arrangement to determine whether he or she is being paid to represent

a client in a local contested case action, administrative proceeding, or rule making procedure. If the compensation is for these services, then the arrangement does not violate the Ethics Act.

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