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Opinion No. 05-132

Lawyers as Lobbyists

QUESTIONS

1. Is lobbying the practice of law?

2. Is it mandated that all lobbyists be attorneys?

3. Do attorneys who practice law by lobbying have an obligation to turn in lobbyists who are not attorneys for illegally practicing law?

OPINIONS

1. Under state law, "lobbying" means to communicate for pay with an official in the legislative or executive branch to influence legislative or administrative action. Under the standard adopted by the Tennessee Supreme Court in *In re Petition of Burson*, 909 S.W.2d 768 (Tenn. 1995), the "practice of law" is "related to the rendition of services for others that call for the professional judgment of a lawyer." The "essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client." Under this standard, a lobbyist not licensed as an attorney would be engaged in the unauthorized practice of law only if the lobbying calls for exercise of a lawyer's professional judgment.

2. A lobbyist must be licensed as an attorney only if the particular lobbying services require the exercise of a lawyer's professional judgment.

3. As discussed above, lobbying is not *per se* the practice of law. Lobbying activities that require the exercise of a lawyer's professional judgment would constitute the practice of law. In interpreting a provision in the Code of Professional Responsibility, now replaced by the Code of Professional Conduct, the Tennessee Supreme Court held that an attorney had a "permissive" but not "mandatory" ethical obligation to report the unauthorized practice of law by a person supervising her to the Board of Law Examiners. Whether a lawyer is required to report an individual engaged in the unauthorized practice of law under the present Rules of Professional Conduct requires an interpretation of those rules, which are administered and interpreted by the Tennessee Board of Professional Responsibility.

ANALYSIS

1. "Lobbying" and the "Practice of Law"

This opinion addresses the relationship between the practice of law and lobbying. The first question is whether lobbying is the practice of law. As discussed below, the Tennessee Supreme Court has indicated that the definition of "practice of law" may be different depending on whether the actions are performed by a non-attorney or by a licensed attorney. In light of question 2, this opinion will address only whether lobbying activities engaged in by a non-attorney constitute the unauthorized practice of law; it will not address what lobbying activities engaged in by an attorney may be subject to regulation as the practice of law by the Tennessee Supreme Court.

Under state law, individuals engaged in lobbying must register with the Registry of Election Finance. That statutory scheme defines the term "lobby" as follows:

> "Lobby" means to communicate, directly or indirectly, with any official in the legislative branch or executive branch, for pay or for any consideration, for the purpose of influencing any legislative action or administrative action.

Tenn. Code Ann. § 3-6-102(13). "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). "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). Under Tenn. Code Ann. § 3-6-104(d)(2), a person need not register with the Registry of Election Finance if the person is:

> A person, or a duly licensed attorney at law acting in a representative capacity on behalf of a client, appearing before an official in the executive branch for the purpose of determining or obtaining such

> person's legal rights and obligations by presenting evidence, making oral arguments, or submitting written briefs to the official.

Because of this exclusion, many lawyers are not required to register as lobbyists even though some of their services fall under the statutory definition of "lobbying."

Ultimately, the issue of whether any statute unconstitutionally authorizes the practice of law without a license must be determined by the Tennessee Supreme Court. The Court extensively discussed the definition of "practice of law" in *In re Petition of Charles W. Burson,* 909 S.W.2d 768 (Tenn. 1995). In that case, representatives of this Office and the State Board of Equalization challenged a statute permitting non-attorney agents to represent taxpayers contesting property assessments before the Board of Equalization. This Office and the Board asked the Court to determine whether this statute violated the separation of powers provisions of the Tennessee Constitution by sanctioning the unauthorized practice of law, thereby infringing on the Supreme Court's authority to regulate the practice of law. The Court appointed a Special Master to develop a factual record and make findings of fact and conclusions of law with regard to the process of contesting a property assessment before the Board of Equalization.

The Special Master analyzed the various steps in the process and determined that none of the actions required the exercise of a lawyer's professional judgment. The Special Master noted, for example, that filling in the appeals form only required property to be identified. The Special Master's report described the different types of conferences and hearings involved in the appeal, and found that each was informal, involved many officials who were not attorneys, and did not requite elaborate written briefs, compliance with elaborate rules of evidence or procedure, or application of statutes and cases. The Special Master concluded, therefore, that the General Assembly could constitutionally authorize non-attorney agents to represent individuals in contesting property assessments.

In examining whether a particular activity constitutes the unauthorized practice of law, the Court adopted as a "general standard" the following passage from Ethical Consideration 3-5, Supreme Court Rule 8, now no longer in effect:

> It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law. Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas.

> But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

909 S.W.2d at 775. Although Supreme Court Rule 8 has since replaced the Code of Professional Responsibility with the Rules of Professional Conduct, which do not contain the passage cited above, it is likely that the Court would continue to rely on this standard. The Court declined to adopt the definition in Supreme Court Rule 9, Section 20.2(e). Supreme Court Rule 9 governs the disciplinary process for attorneys. Under Rule 9, Section 20.1, attorneys are required to pay an annual fee to the Board of Professional Responsibility. Section 20.2 exempts from the fee, among others, attorneys not engaged in the practice of law. The Rule provides:

> The term, "the practice of law" shall be defined as any service rendered involving legal knowledge or legal advice, whether of representation, counsel or advocacy, in or out of court, rendered in respect to the rights, duties, regulations, liabilities or business relations of one requiring the services. It shall encompass all public and private positions in which the attorney may be called upon to examine the law or pass upon the legal effect of any act, document or law.

S.Ct.R. 9, § 20.2(e). The Court found that that definition was not intended to regulate the unauthorized practice of law but, instead, regulated persons who had already been admitted to practice law. The Court also found that Supreme Court Rule 7, Section 1.01, prohibiting the practice of law without a license, to be inapplicable. The Court noted that the term "practice of law" for purposes of admission "is necessarily broader than 'practice of law' for purposes of unauthorized practice." 909 S.W.2d at 776, *quoting* Tennessee Board of Law Examiners' Statement of Policy Concerning the Meaning of "Practice of Law," Sept. 25, 1984, *adopted* by the Tennessee Supreme Court in 267 Tenn. at XXXI. The Court also acknowledged that the Tennessee statutes contain a definition of the practice of law at Tenn. Code Ann. § 23-3-101(2). That statute now provides:

> (2) "Practice of law" means the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court, commissioner, referee or any body, board, committee or commission constituted by law or having authority to settle controversies, or the soliciting of clients directly or indirectly to provide such services.

Tenn. Code Ann. § 23-3-101(1) defines the "law business" as follows:

> "Law business" means the advising or counseling for a valuable consideration of any person, firm, association, or corporation, as to any secular law, or the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or

> instrument affecting or relating to secular rights, or the doing of any act for a valuable consideration in a representative capacity, obtaining or tending to secure for any person, firm, association or corporation any property or property rights whatsoever, or the soliciting of clients directly or indirectly to provide such services.[1]

Under Tenn. Code Ann. § 23-3-103, no person may engage in the practice of law or the law business without a license to do so. The Court noted that these statutes provided a penalty for the unauthorized practice of law and represented an aid to the inherent power of the Court. But the Court found that it was not bound by either statutory definition. The Court then adopted the Special Master's findings of fact and affirmed his conclusion that the statute did not sanction the unauthorized practice of law.

The Tennessee Court of Appeals, in an unpublished opinion, has concluded that preparing divorce papers and related documents for third parties is the unauthorized practice of law. *Fifteenth Judicial District Unified Bar Association v. Glasgow*, 1999 WL 1128847 (Tenn. Ct. App. 1999). In that case, the Court acknowledged that "[c]ases involving the unauthorized practice of law are heavily fact-dependent. They require the courts to focus specifically on the conduct of the person alleged to be practicing law without a license." 1999 WL 1128847 at 3. The Tennessee Supreme Court has concluded that allowing the non-lawyer president of a corporation to make the affirmations required to certify pleadings by signing a complaint on behalf of the corporation would constitute the unauthorized practice of law. *Old Hickory Engineering & Machine Company, Inc. v. Henry,* 937 S.W.2d 782 (Tenn. 1996). *See also* Op. Tenn. Att'y Gen. 05-076 (May 10, 2005) (a non-lawyer public adjuster acting independently may be engaged in the unauthorized practice of law if his or her conduct, such as advising clients as to their rights and negotiating settlements for consideration, requires the professional judgment of a lawyer); Op. Tenn. Att'y Gen. 04-160 (Nov. 10, 2004) (initiating a contested case hearing by filing an initial pleading such as an appeal or petition for a declaratory order is the practice of law when performed in a representative capacity); Op. Tenn. Att'y Gen. 02-78 (July 3, 2002) (filling in the blanks of a form contract for the sale, financing or leasing of tangible personal property does not constitute the practice of law, assuming the decision concerning what information to place on the form does not require the exercise of legal training, skill, or judgment).

As discussed above, under state law, "lobbying" means to communicate for pay with an official in the legislative or executive branch to influence legislative or administrative action. Under *In Re Petition of Burson,* the Supreme Court concluded that "[f]unctionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer." Thus, a lobbyist who is not licensed as an attorney is engaged in the unauthorized practice of law only if he or she, in the course of lobbying, is rendering services that call for the professional

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[1] In 1995, when *In Re Petition of Burson* was decided, neither the definition of "practice of law" nor the definition of "law business" contained the phrase "or the soliciting of clients directly or indirectly to provide such services."

judgment of a lawyer. The issue of whether any particular conduct is the practice of law depends on the particular facts and circumstances.

2. No Requirement that Lobbyists be Attorneys

The second question is whether anyone who lobbies within the meaning of state law is required to be a licensed attorney. As discussed above, while some lobbying activities may involve the practice of law, others do not. For this reason, there is no requirement that a lobbyist be a licensed attorney, unless he or she is performing services that require the professional judgment of a lawyer.

3. Unauthorized Practice of Law

The last question is whether licensed attorneys have an obligation to turn in lobbyists who are not licensed attorneys because these individuals are illegally engaged in the practice of law. As discussed above, lobbying is not *per se* the practice of law. Some lobbying activities may constitute the practice of law. Under Supreme Court Rule 8, Rule 5.5(b) of the Rules of Professional Conduct, a lawyer may not assist a person in the performance of activity that constitutes the unauthorized practice of law. The Tennessee Supreme Court concluded that, under former Supreme Court Rule 8, DR 3-101(a), prohibiting an attorney from aiding a non-lawyer in the unauthorized practice of law, an attorney had a "permissive," but not a "mandatory" ethical duty to report the unauthorized practice of law by the person supervising her. *Crews v. Buckman Laboratories International, Inc.*, 78 S.W.3d 852 (Tenn. 2002), *rehearing denied* (2002). Whether a lawyer is required to report an individual engaged in the unauthorized practice of law under the present Rules of Professional Conduct requires an interpretation of those rules, which are administered and interpreted by the Tennessee Board of Professional Responsibility.

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