



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 5

April 23, 1992

*Whether certain activities of a lawyer in representing a client before the Office of the Comptroller of Public Accounts and in tax refund suits against the state require the lawyer to register as a lobbyist.
(AOR-6)*

The Texas Ethics Commission has been asked to consider if four specified activities require a lawyer to register under chapter 305 of the Government Code. In one situation, the lawyer represents a taxpayer in a hearing before the Office of the Comptroller of Public Accounts. In the second situation, the lawyer represents a taxpayer in a suit against the state for tax refunds. In the third situation, the lawyer makes inquiries of the Comptroller's Office on behalf of the lawyer's clients. In the fourth situation, the lawyer requests a written response and refers the Comptroller's Office to statutory, case law, and other law in support of a legal argument.

Under chapter 305 of the Government Code a person must register as a lobbyist if that person expends more than \$200 in a calendar quarter on certain activities to communicate directly with members of the legislative or executive branch to influence legislation or administrative action. *See* Gov't Code §§ 305.003(a)(1) (expenditure threshold), 305.006(b) (listing types of expenditures that must be reported). Registration is also required if a person receives compensation or reimbursement of more than \$200 in a calendar quarter, excluding reimbursement for certain types of expenses, to communicate directly with members of the legislative or executive branch to influence legislation or administrative action. *Id.* § 305.003(a)(2) (compensation threshold).

We assume the lawyer in each described situation has met the compensation or reimbursement registration threshold. This advisory opinion will focus on the lawyer's communications and activities in each situation to determine if they would require the lawyer to register with the commission as a lobbyist.

Question No. 1 - Taxpayer Hearings

The first question is whether a lawyer who represents a taxpayer in a hearing before the Office of the Comptroller of Public Accounts on a redetermination petition or claim for refund must register as a lobbyist. The first issue is whether the representation would be a direct communication "with a member of the legislative or executive branch to influence legislation or administrative action." Gov't Code § 305.003(a)(2). The Office of the Comptroller of Public Accounts is part of the executive branch for purposes of chapter 305 of the Government Code. *Id.* § 305.002(4). Therefore, representation of a client before the Comptroller's Office is a direct communication with a member of the executive branch. Because the attorney is attempting to obtain a favorable result for the client, the attorney's representation of a taxpayer in a hearing before the Comptroller's Office for redetermination or refund is a communication to influence administrative action.

The next step is to determine whether the lawyer's representation is within an exception to the registration requirements.¹ Certain types of legal representation are excepted² under title 1, section 10.5(a), of the Texas Administrative Code, which provides:

For purposes of the compensation threshold of the Government Code, § 305.003(a)(2), direct communication to influence administrative action does not include testimony or appearance in a public hearing or other communication made by the party, or a party's representative of record, in a

proceeding of an adjudicative nature of the type authorized by or subject to the Administrative Procedure and Texas Register Act (Texas Revised Civil Statutes, Article 6252-13a) (APTRA). Examples of these exclusions include appearances and communications by a representative of record in a *contested case* where the appearance is documented as part of the public record for that particular *contested case*, whether or not the proceeding is subject to APTRA.³

Tex. Ethics Comm'n, 17 Tex. Reg. 358 (1992) (emergency rule to be codified at title 1, section 10.5(a), of the Texas Administrative Code) (emphasis added). The comptroller has adopted rules providing that the rules of evidence set forth in APTRA apply to requests for redeterminations and refunds. 34 T.A.C. §§ 1.3, 1.4, 1.22. Thus, representation of a client in a request for refund or redetermination is a proceeding within the exception set out above.

In summary, a lawyer who is compensated or reimbursed more than \$200 in a calendar quarter for representing a taxpayer in a redetermination or refund hearing before the Office of the Comptroller of Public Accounts is not engaging in a type of activity that would require registration as a lobbyist.

Question No. 2 - Suits against the State

The second question is whether a lawyer who represents a taxpayer in a tax refund suit is engaging in the type of activity or communication that would require registration as a lobbyist. Since the lawyer in this situation is representing a client in a lawsuit that involves a state agency, the lawyer's communications with the legal representatives of that agency would likely be attempts to influence administrative action. Someone who meets the compensation or reimbursement threshold for lobby registration and who makes "direct communication to the legal representative of a state agency" about litigation to which the agency is a party is not engaged in activity that would require registration. Tex. Ethics Comm'n, 17 Tex. Reg. 358 (1992) (emergency rule to be codified at title 1, section 10.7(a)(5), of the Texas Administrative Code). This exception does not apply to someone who meets the expenditure threshold for lobby registration. *Id.* (emergency rule to be codified at title 1, section 10.7(a), of the Texas Administrative Code). Thus a lawyer who meets the compensation or reimbursement threshold representing a taxpayer in litigation to which the Comptroller's Office is a party can communicate about the litigation to the legal representative of the Comptroller's Office without being required to register as a lobbyist.

Question No. 3 - Inquiries

The third question is whether a lawyer who contacts the Comptroller's Office to make inquiries on behalf of a client is engaging in the type of activity or communication that would require registration as a lobbyist. The issue is whether contacting the Comptroller's Office to make inquiries on behalf of a client is direct communication with a member of the executive branch to influence administrative action. Gov't Code § 305.003(a)(2).

Since the Comptroller's Office is part of the executive branch, inquiries directed to that office would be direct communication with a member of the executive branch. A straightforward request for information, such as the attorney's request on behalf of his client for the agency's official interpretation of a statute, does not, however, trigger the registration requirement since it is not communication to influence administrative action. Tex. Ethics Comm'n, 17 Tex. Reg. 358 (1992) (emergency rule to be codified at title 1, section 10.7(a)(2), of the Texas Administrative Code). Again, this rule is applicable only to those who meet the compensation or reimbursement threshold for registration. It is not applicable to those who would be required to register because they had met the expenditure requirements. *Id.* (emergency rule to be codified at title 1, section 10.7(a), of the Texas Administrative Code). The lawyer would have to register as a lobbyist if he is communicating to influence administrative action and otherwise meets the requirements of Government Code section 305.003. Whether a particular communication is to influence administrative action is a question of fact.

Question No. 4 - Supporting a Legal Position

In the fourth situation, the lawyer requests a written response from the Comptroller's Office in regard to a question about a client's tax status. The lawyer supports his position by citing case law, statutory law, and other law that is favorable to his legal argument. This communication would be a request for a written opinion interpreting the law as it applies to the lawyer's client, with the lawyer directing the Comptroller's Office to take note of law that could be applicable to the taxpayer's situation. The communication would be exempt activity under title 1, section 10.7(a)(10), of the Texas Administrative Code. Tex. Ethics Comm'n, 17 Tex. Reg. 358 (1992) (emergency rule).

SUMMARY

A lawyer who has met the compensation or reimbursement threshold and who represents a taxpayer in a hearing before the Office of the Comptroller of Public Accounts for redetermination or refund is not engaging in an activity or communication that would require the lawyer to register as a lobbyist.

A lawyer who has met the compensation or reimbursement threshold and who communicates with the legal representative of a state agency concerning litigation to which the agency is a party is not engaging in activity or communication that requires registration as a lobbyist.

A lawyer who has met the compensation or reimbursement threshold and who makes a request for information is not engaging in activity or communication that would require the lawyer to register.

A lawyer who has met the compensation or reimbursement threshold and who requests a written opinion from the agency, which cites statutory and other law in support of a particular viewpoint, is not thereby engaging in activity or communication that would require the lawyer to register.

¹ Government Code section 305.003(c) provides an exemption, under certain circumstances, for a person who is an attorney of record or pro se. This exemption would not apply in the situations being considered by this opinion.

² It would be possible for an attorney to be engaging in several different types of activities, each of which individually would fall under an exception, and not have to be registered as a lobbyist.

³ An appearance could be documented even though the hearing is closed to the public.