



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 126

April 1, 1993

*Whether a lawyer's representation of a client in certain proceedings under Board of Pharmacy rules and certain proceedings under Board of Nurse Examiner rules may require lobby registration.
(AOR-123)*

A lawyer has asked whether representation of clients before certain administrative proceedings constitutes "communication to influence administrative action" and therefore requires lobby registration.

A person who receives compensation or reimbursement of more than \$200 in a calendar quarter¹ for communicating directly with a member of the executive branch to influence administrative action is required to register as a lobbyist. Gov't Code § 305.003(a)(2). The Ethics Commission has adopted the following exception to that requirement:

For purposes of the compensation threshold of the Government Code, § 305.003(a)(2), testimony, an appearance, or any other type of communication in a proceeding of an adjudicative nature of the type authorized by or subject to Texas Civil Statutes, Article 6252-13a (the Administrative Procedure and Texas Register Act or APTRA) is not direct communication to influence administrative action and is not required to be reported on the registration forms or activity reports if the communication is by a party to the proceeding, a party's representative of record, or a witness.

Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992) (to be codified at title 1, section 40.5(a), of the Texas Administrative Code). Under that rule, a lawyer's representation of a client in an adjudicative proceeding authorized by APTRA or a proceeding *of the type authorized by APTRA* does not constitute communication to influence administrative action. *See generally Ethics Advisory Opinion No. 5* (1992). The issue raised here is whether certain proceedings established under rules of the Board of Nurse Examiners and certain proceedings established under rules of the Board of Pharmacy are adjudicative proceedings of the type authorized by APTRA.

The Board of Nurse Examiners has adopted a rule providing for an informal hearing before the board's executive secretary (or a designee) after a complaint against a board licensee has been filed but before formal charges are brought. Evidence may be presented at that hearing. If disposition is made by stipulation, agreed settlement or consent order, the Board of Nurse Examiners may vote to accept the order. If the complaint is not resolved or the board rejects the proposed order, the board may institute a formal hearing. 22 TAC § 213.15.

The first question is whether this hearing is "a proceeding of an adjudicative nature." Administrative action is "adjudicatory" when it culminates in a final determination affecting personal or property rights. BLACK'S LAW DICTIONARY 26 (6TH ED. 1991). Because the hearing in question may culminate in a determination of a licensee's rights, it is adjudicative in nature.

The remaining question is whether this hearing is "of the type authorized by" APTRA. Section 13(e) of APTRA authorizes the informal disposition of a contested case:²

Unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

V.T.C.S. art. 6252-13a, § 13. Therefore, the hearing in question is an adjudicative proceeding of the type authorized by APTRA.³

Another rule of the Board of Nurse Examiners provides for a prehearing conference--after charges have been filed but before a formal hearing--to simplify the issues and proceedings.⁴ 22 TAC §§ 213.16 (prehearing conferences). Such a conference is part of a proceeding of an adjudicative nature of the type authorized by APTRA. Therefore, a lawyer's representation of a client who is a party to a proceeding under section 213.15 or section 213.16 is not subject to lobby registration and reporting requirements.

The request letter also raises questions about two Board of Pharmacy rules that have to do with "non-contested" cases. *See* 22 TAC §§ 281.18, 281.19. The Board of Pharmacy rules contain no definition of "non-contested" case; but they do define "contested case" in the same way APTRA does: as a case "in which the legal rights, duties, or privileges of a party are to be determined." APTRA authorizes adjudicatory proceedings in "contested cases." APTRA does not authorize *adjudicatory* proceedings in any other type of case. Thus, a proceeding that is not within the definition of "contested case" is not an adjudicatory proceeding of the type authorized by APTRA.⁵ Thus, a lawyer who represents a client in such a proceeding is not covered by the exemption from lobby registration set out in rule 40.5(a).

SUMMARY

Informal hearings and preconference hearings under rules of the Board of Nurse Examiners, 22 T.A.C. §§ 213.15, 213.16, are "adjudicative proceedings of the type authorized by" APTRA for purposes of the Ethics Commission rules regarding lobby registration. Proceedings of the Board of Pharmacy that are not adjudicatory are not "adjudicatory proceedings of the type authorized by" APTRA.

¹ This does not include reimbursement for the person's own travel, food, or lodging expenses or the person's own membership dues.

² APTRA defines a "contested case" as one "in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing." V.T.C.S. art. 6252-13a, § 3(2).

³ Similarly, a proceeding leading to informal disposition of a contested case in accordance with Board of Pharmacy Rule, 22 T.A.C. § 281.48, would be an adjudicative proceeding of the type authorized by APTRA.

⁴ The prehearing conference, like a pre-trial conference, is apparently designed to dispose of certain issues and aid in settlement of the case. *See* Texas Rules of Civil Procedure, Rule 166.

⁵ We note, however, that "contested case," for purposes of APTRA includes a case in which a party's legal rights are determined, regardless of whether that party actually disputes the other party's position.