



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 535

*April 8, 2016*

*Application of chapter 305 of the Government Code to an attorney's activities in response to certain invitations from members of the legislative branch to discuss pending legislation on behalf of the attorney's clients. (AOR-596, AOR-597)*

The Texas Ethics Commission ("commission") has been asked about two scenarios in which an attorney is invited by a member of the legislative branch to discuss pending legislation on behalf of the attorney's clients. In each scenario, the attorney's clients are opposed to four specific bills pending before the legislator's committee. The question is whether the attorney would be required to register as a lobbyist under chapter 305 of the Government Code, the state lobby law, in order to accept either invitation.

A person is required to register as a lobbyist if the person is compensated or reimbursed more than \$1,000 in a calendar quarter, excluding reimbursement for certain types of expenses, to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action. Gov't Code § 305.003(a)(2); 1 Tex. Admin. Code § 34.43(a).<sup>1</sup> A person is also required to register if the person's compensation exceeds the amount triggering registration and the person, as part of his regular employment, has communicated directly with a member of the legislative or executive branch to influence legislation or administrative action on behalf of the person by whom he is compensated or reimbursed, whether or not the person receives any compensation for the communication in addition to the salary for that regular employment. Gov't Code § 305.003(b). A person is not required to register if the person does not receive any compensation or reimbursement, and does not make any expenditures, to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action.

In each scenario,<sup>2</sup> the requestor of this opinion, who is an attorney, states that he has testified before a legislative committee in opposition to pending legislation on behalf of clients. The attorney states, in relevant part:

Given that [...] I am retained by the clients for which I testified, in an amount in excess of the limit found in Commission Rule § 34.43, and attending a meeting with [a legislator] would be a direct communication with a legislator to influence his decision on the pending legislation, would I be required to register?

Based on these circumstances, the attorney would be required to register as a lobbyist by receiving compensation from others in excess of the registration threshold to communicate directly with members of the legislative branch to influence legislation, unless his activities are within one of the exceptions to required registration and reporting.

The lobby law and commission rules exempt certain activities from the requirement to register. *See* Gov't Code §§ 305.003, .004, .0041; 1 Tex. Admin. Code § 34.43. Section 34.5 of the commission rules also provides that compensation received for certain activities is not included for purposes of calculating the registration threshold under section 305.003(a)(2) of the Government Code and chapter 34 of the commission's rules. 1 Tex. Admin. Code § 34.5.<sup>3</sup> Thus, compensation received for an activity covered by rule 34.5 would not require a person to register.<sup>4</sup>

One activity covered by rule 34.5 is receiving compensation or reimbursement for “providing to a member of the legislative or executive branch information consisting of facts or data that the member requested in writing regarding legislation or administrative action, when the request was not solicited by or on behalf of the person providing the information.” *Id.* § 34.5(a)(5).<sup>5</sup> The question is whether, in either scenario, the attorney would be providing facts or data to a member in response to the member’s written request that the attorney did not solicit.<sup>6</sup>

### Scenario 1

In the first scenario, a legislator asked the attorney, during his testimony, if the attorney had come to the legislator’s office to talk about the bills. The attorney responded that he had not and that he believed that doing so, without a specific request, would require him to register as a lobbyist. In response to his statements, the legislator delivered a written invitation to the attorney that stated:

You are welcome to discuss [bill number] or any other legislation in my office at any time. I invite your input. If you need help bring anyone you need.

By its plain language, the invitation is a blanket invitation to discuss any legislation with a legislator and does not request facts or data. Accordingly, any compensation received by the attorney for accepting the invitation and communicating with the legislator to influence legislation would be included in calculating whether the attorney exceeded the compensation and reimbursement threshold. Additionally, if the attorney’s compensation exceeds the amount triggering registration and the attorney communicates with the legislator to influence legislation as part of his regular employment, then the attorney would be required to register. Of course, if an individual is acting as a resource for a member of the legislative or executive branch without any expectation of compensation or reimbursement, no such calculation would be necessary. However, considering the specific facts presented, including the amount of compensation paid by the attorney’s clients and assuming that no other exception applies, the attorney would be required to register as a lobbyist by accepting such an invitation from the legislator to discuss pending legislation with the intent to influence legislation.

### Scenario 2

In the second scenario, an attorney testified at a legislative committee hearing on behalf of clients in opposition to four specific bills pending before the committee. After the hearing, the attorney received a written invitation from a member of the committee inviting the attorney to the member’s office to discuss the same four bills. The letter is addressed to the attorney and states, in part, that it was a “personal, formal invitation to gather your advice on these bills.”

In these circumstances, the invitation was made by a member of a legislative committee to an individual who communicated with the committee at a public hearing regarding four specific bills pending before the committee. The invitation is a request for “advice” on bills and does not request facts or data. Accordingly, any compensation received by the attorney for accepting the invitation and communicating with the legislator to influence legislation would be included in calculating whether the attorney exceeded the compensation and reimbursement threshold. Similar to the first scenario, if the attorney’s compensation exceeds the amount triggering registration and the attorney communicates with the legislator to influence legislation as part of his regular employment, then the attorney would be required to register. Assuming that no other exception applies, the attorney would be required to register as a lobbyist by accepting such an invitation from the legislator to discuss pending legislation with the intent to influence legislation.

## SUMMARY

Under the facts as described in this opinion, an attorney who accepts an invitation from a member of the legislative branch to discuss pending legislation with the intent to influence legislation, and who receives compensation in excess of \$1,000 in a calendar quarter, would be required to register as a lobbyist under chapter 305 of the Government Code.

**1** A person is also required to register if the person makes total expenditures of more than \$500 in a calendar quarter for certain activities to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action. Gov't Code § 305.003(a)(1); 1 Tex. Admin. Code § 34.41(a). Because the requests for this opinion do not describe any expenditures, we do not consider the application of the expenditure threshold in this opinion.

**2** The requests for this opinion were submitted by two separate individuals who present the same question with different facts.

**3** The exemptions to the requirement to register are distinct from exemptions that apply to the contents of a registration that is actually filed. Once a person actually registers or is required to register, the registration exemptions no longer apply to the person's lobby activity within the same calendar year. The registrant must then include in the registration certain information pertaining to any person who reimburses, retains, or employs the person for the purpose of communicating directly with a member of the legislative or executive branch, as provided by section 305.005 of the Government Code. However, the lobby law provides a few exceptions regarding the actual contents of a registration. *See, e.g.*, Gov't Code § 305.0041(b) (a registrant who performs certain activities is not required to provide certain information in the registrant's registration related to those activities). There are no facts indicating that any of the exemptions to the disclosure requirements are applicable in the circumstances presented by the requestors of this opinion.

**4** This rule only exempts compensation that is received for the activities specifically covered by the rule and only for purposes of determining whether a person has exceeded the compensation threshold that requires registration. The rule does not exempt compensation or reimbursement that is received by a person who has already registered or who is otherwise required to register because the person has exceeded either the expenditure or compensation thresholds. A person would exceed the compensation threshold by, for example, receiving compensation over the \$1,000 threshold in a calendar quarter to engage in other lobby activity that is not covered by an exemption, including such activity that the person engages in as part of the person's regular employment. We anticipate future rulemaking action to clarify the application of rule 34.5 in this regard.

**5** There are no facts indicating that any other exception to the registration requirements applies..

**6** Neither requestor provided any facts indicating that the invitations at issue were solicited by him or on his behalf. Whether any particular request for information is solicited by or on behalf of the person providing the information is a question of fact.