MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

November 8, 1984

Ralph R. Safford
Meyer and Kirk
100 W. Long Lake Road, Suite 100
Bloomfield Hills, Michigan 48013

Dear Mr. Safford:

This is in response to your request for a declaratory ruling concerning the applicability of the lobby act (the Act), 1978 PA 472, to certain activities of your law firm.

You indicate that in 1977 your firm (Meyer and Kirk) was hired by The Southland Corporation (Southland) to actively participate "in public hearings on the adoption by the Liquor Control Commission of Licensing Qualification Rules, including Rules 29 and 35 (the so-called 'Gas Rules')." Following adoption of the rules, Southland, through Meyer and Kirk, filed suit against the Liquor Control Commission (the Commission) in June, 1978, to declare the rules invalid. The case is currently pending in circuit court.

After the effective date of the lobby act, the Commission scheduled a public hearing to consider proposed amendments to the same rules which are the subject of Southland's pending suit. You indicate that at that point:

> "Southland requested Meyer and Kirk to prepare an analysis of the amendments and a recommendation of what action, if any, to take. Meyer and Kirk did legal research, gathered statistical and other facts concerning current gasoline regulation in other states, analyzed the amendments and alternatives (as well as the current Gas Rules and exceptions) and recommended that Southland actively oppose the amendments.
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> Southland then instructed Meyer and Kirk to oppose the amendments at the public hearing. Ralph Safford, a partner in Meyer and Kirk, attended and participated in the hearing on May 23. The hearing was conducted by the Commission itself, the members of which are 'public officials' under the Lobby Law."

Southland paid Meyer and Kirk approximately $1,650 for its research and analysis, and approximately $350 for "the actual 'lobbying' at the hearing."

You recognize that an attorney who communicates with members of a state commission for the purpose of influencing its action on proposed rules is "lobbying" as defined in section 5(2) of the Act (MCL 4.415). However, you ask whether Meyer and Kirk's participation at the May 23, 1984, public hearing falls within the narrow "practice of law" reporting exemption recognized by the Secretary of State and the Court of Appeals in Pletz v Secretary of State, 125 Mich App 335 (1983), and discussed at length in an interpretive statement issued to Senator John F. Kelly, dated April 25, 1984. A copy of the Kelly letter is attached for your convenience.

According to section 5(2), "lobbying" includes "communicating directly with an official in the executive branch of state government . . . for the purpose of influencing . . . administrative action." "Administrative action" is defined in section 2(1) of the Act (MCL 4.412) as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law."

In holding that the lobby act does not violate the title-body, one-object doctrine of the state constitution (Const 1963, art 4, §24), the Court of Appeals in Pletz, supra, stated:

> " . . . we do not find that the act attempts to regulate the practice of law. The act treats attorneys who lobby in an identical manner as non-lawyers, except the act, in §2(1), specifically does not govern attorneys' communications with officials in administrative agencies. Attorneys whose activities relate to the practice of law, for example involvement in a quasi-judicial determination (administrative law), do not fall under the ambit of the act." 125 Mich App 335, 348

During the proceedings which led to the issuance of the Court of Appeals decision, the Secretary of State was called upon to explain how he intended to interpret and enforce the Act. With regard to the practice of law question, an affidavit was submitted which indicated in relevant part:

> "I interpret the 1978 lobbying law as follows, and will administer, and enforce this law consistent with these interpretations:
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> * * *
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> "5, The 1978 Lobbying Law does not intrude into the 'practice of law' or to 'engage in the law business', for which a person must be regularly licensed and authorized to practice law in Michigan."

In the interpretive statement to Senator Kelly, the Department, in response to a series of hypotheticals, examined the extent to which persons engaged in the practice of law are excluded from the Act's registration and reporting requirements. While the response in Kelly does not specifically address the unique circumstances described in your letter, it does afford significant guidance.

Particularly noteworthy is the discussion found at pages 8 and 9 of the Kelly letter. While recognizing that the "practice of law" is an elusive concept, the Department found that a working definition of the phrase was obtainable for lobby act purposes. Relying upon those jurisdictions which had previously addressed "the matter of the inter-working of the lobby law and the practice of law," the Department noted:

> " . . . In the case of Baron v City of Los Angeles, 469 P2d 353 (1970), a California Court reasoned that while in a pragmatic sense the practice of law encompasses all of the activities performed by attorneys in a representative capacity (including legislative advocacy), for lobby law purposes the practice of law occurs only if difficult or doubtful legal questions are involved which, to safeguard the public, reasonably demand the application of a trained legal mind. The Court went on to hold that the lobbying ordinance under discussion did not apply to attorneys when:
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> > ". . . 'acting on behalf of others in the performance of a duty or service, which duty or service lawfully can be performed for such other only by an attorney licensed to practice law in the State of California" 469 P2d at 358
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> * * *
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> The rule set out in the Baron case would seem appropriate for implementation in the context of Michigan's Lobby Act. That is to say, where an attorney is engaged in an activity which only an attorney licensed in Michigan can perform, then the Act will not require the attorney to register with regard to that activity." (emphasis added)

Before turning to the specific issue you raise, it should be noted that, prior to Meyer and Kirk's analysis of the proposed amendments, Southland had not made a decision to lobby at the public hearing. Under the Act and rule 1(1)(d)(iv), 1981 AACS R4.411, a person must account for "expenditures for lobbying", including any "expenditure for providing or using information, statistics, studies or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

The Department has previously indicated that where a decision to lobby has not been made prior to requesting an analysis of an issue or proposed rule, the analysis is prepared for purposes other than lobbying and generally is not reportable under the Act. Consequently, resolution of the practice of law issue has

no effect upon Meyer and Kirk's activities before Southland decided to lobby the Commission, and the $1650 paid to the firm for its analysis is not subject to the Act's provisions.

However, it is clear that Meyer and Kirk's communication with the Commission regarding the proposed rule amendments was lobbying as defined in section 5(2). The question that remains is whether the lobbying activity was within the practice of law, and therefore outside the parameters of the Act, because the proposed amendments dealt with "[a]dministrative [r]ules which the attorney is also seeking to declare invalid in pending litigation on behalf of the same client."

As indicated in the letter to Senator Kelly, discussed above, for lobby act purposes the practice of law encompasses those activities "which only an attorney licensed in Michigan can perform." According to the facts you have provided, after conducting its analysis Meyer and Kirk recommended that Southland actively oppose the proposed rule amendments by communicating with the Liquor Control Commission at its May 23 hearing. At that point, Southland could have designated an officer or director of the company to present its views to the Commission, or it could have retained a professional lobbyist for that purpose. However, Southland chose to be represented at the hearing by Meyer and Kirk.

Given the options available to Southland, it must be concluded that communicating with the Liquor Control Commission for the purpose of influencing its action on proposed rule amendments was not an activity which could only be performed by an attorney licensed in Michigan. Thus, Meyer and Kirk's attendance and participation at the May 23 hearing was not within the practice of law for lobby act purposes. While Meyer and Kirk may have had an interest in the outcome of the rules hearing, an attorney from the firm could have attended as an observer to insure that Southland's interests in the pending lawsuit were not jeopardized in some manner. Any direct communication with the Commission, however, was subject to the Act's registration and reporting requirements.

As a consequence, Meyer and Kirk is required to register as a lobbyist agent because the $350 it received for participating at the hearing exceeds the $250 compensation or reimbursement threshold established in section 5(5) of the Act. In addition, Southland must register as a lobbyist if it surpassed the $1,000 expenditure threshold found in section 5(4) by paying Meyer and Kirk $350 for its lobbying effort.

This response is a declaratory ruling concerning the specific facts and question presented.

Very truly yours,

Richard H. Austin
Secretary of State