MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

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The Honorable John F. Kelly
State Capitol Building
P.O. Box 30036
Lansing, Michigan 48909

Dear Senator Kelly:

This is in response to your request for an interpretive statement regarding the applicability of the lobby act (the "Act"), 1978 PA 472, to a number of hypothetical situations involving attorneys.

Before addressing your individual inquiries, it is noted that your hypotheticals, one way or another, all seem to relate to the "practice of law" and the impact of the Act upon those who engage in the law business in Michigan. That being the case, a few initial comments are in order concerning the extent to which the Act was designed to govern the practice of law.

The Act, in its title, affords significant guidance with regard to the legislative intent and purpose on this point. The title indicates that the Act is designed to regulate lobbying activities, lobbyists, and lobbyist agents and to require registration and reporting from lobbyists and their agents. No mention is made of attorneys or the regulation of their law practices. Moreover, the body of the Act makes no mention of lawyers, attorneys, legal counsel, or the practice of law. There is an indication in section 2(1) of the Act (MCL 4.412) that activities which occur in the context of quasi-judicial determinations do not fall within the Act's purview, but this is the only instance where the Legislature may have had lawyers specifically in mind. From all this, there appears a legislative intent to refrain from regulating attorneys per se and a corresponding intent to treat attorneys on the same footing as other citizens engaged in lobbying.

This conclusion is buttressed by the recent decision of the Michigan Court of Appeals in Pletz v Secretary of State, 125 Mich App 335 (1983). In

holding that the Act does not violate the title-body, one-object doctrine of the state constitution (Const 1963, art 4, §24), the Court held:

> "Likewise, 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, Secretary of State Austin submitted an affidavit which indicated in relevant part that:

> "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."

As you may know, following the submission of the above-described affidavit, certain practitioners concluded that a broad exclusion or "exemption by interpretation" for attorneys had been added to the Act by the Secretary of State. In the interests of clarity, it must be indicated that that was neither the intent nor the case. The Secretary of State has an ongoing obligation to interpret all laws under his enforcement jurisdiction in a constitutional manner. During the litigation, the Secretary of State recognized the potential for debate with regard to activities commonly viewed within the traditional concept of the practice of law on the one hand and the emerging legal concept of "lobbying" under the Act on the other. Thus, through the affidavit, there was official acknowledgment of those situations where a person might be engaged in an activity which only a lawyer could perform and was therefore outside the scope of the Act, but which might otherwise be considered lobbying. It is expected that such situations will be few in number. However, as is noted later in this document, your inquiry does touch upon certain of these circumstances.

Your hypotheticals and questions are set out and answered below.

> "1. An attorney conducts legal research and prepares a memorandum of law and legal opinion for his or her client for the purpose of attaching the memorandum to a letter from the client, a trade union executive, to a legislator opposing action on legislation. Clearly the lawyer's activities involved providing analysis in connection with a communication with a public official that would not have been incurred but for the activity of communicating directly. The question is whether the expenditure for the lawyer's effort must be reported as a lobbying expenditure, and if so, whether the lawyer, having received more than $250, must register as a lobbyist agent notwithstanding that the lawyer did not engage in the direct communication personally?"

In order to answer your initial inquiry, certain statutory and other definitions pertaining to the meaning of the term "lobbying expenditure" must be noted. The term "lobbying" is defined in section 5(2) of the Act (MCL 4.415) as ". . . communicating directly with . . . an official in the legislative branch of state government for the purpose of influencing legislative . . . action." Section 5(3) of the Act (MCL 4.415) indicates in relevant part that "influencing" connotes ". . opposing . . . by any means, including the providing of or use of information, statistics, studies, or analysis." Section 3(2) of the Act (MCL 4.413) states that "expenditure" includes "compensation for labor". Further, rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act (1981 AACS, R 4.411) indicates that "expenditures for lobbying" include an "expediture 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."

In your hypothetical, you state that an attorney has conducted legal research and has prepared a "memorandum of law and legal opinion" which will be conveyed to a legislator by a trade union executive and you ask whether the payment for this effort must be reported as a lobbying expenditure. Based on the definitions just set forth, it would appear that the payment for the "memorandum" is in fact a lobbying expenditure since the memorandum was prepared to be a part of the executive's direct communication. Section 8(1) of the Act (MCL 4.418) requires the filing of periodic reports which disclose by category all expenditures made or incurred by a lobbyist or lobbyist agent. Thus, the expenditure must be reported, but it is reportable by the person who made it, not the person who received the payment. It is the payor executive who reports the expenditure. The lawyer reports nothing.

You also ask whether the lawyer is required to register under the Act by virtue of having received more than $250.00? That query is answered in the negative. Sections 5(5) and 7(2) of the Act (MCL 4.415 and 4.417) require

lobbyist agent registration only when an agent has received $250.00 or more in any 12-month period for lobbying, as opposed to assisting lobbying. As noted above, lobbying entails direct communication with a public official. The lawyer need not register because he or she is not communicating directly. That is, the attorney did not mail the memorandum to the legislator. To the contrary, the lawyer provided the document only to the union official. What happens from that point relative to use and reporting is up to the union executive. In this case then, because there has been no direct attorney/legislator contact, there is no requirement for the lawyer to register.

> "2. In connection with rules proposed by a state agency pursuant to the Administrative Procedures Act ('APA'), a lawyer prepares an analysis of the rules and gives his or her legal opinion as to whether the rules are consistent with the underlying statute, constitutional requirements and other legal requirements. The lawyer's document outlines the legal problems facing persons required to comply with the rules. The analysis is prepared for the dual purpose of advising the lawyer's client and preparing the lawyer to attend a public hearing on the proposed rules. At the request of the lawyer's client, the lawyer attends the public hearing on the proposed rules, and as an attorney for the client, presents the views of the organization as the legal advocate of the client. Because the client is not trained in law, the client has asked the licensed attorney to represent the views of the client with respect to both legal issues and policy issues involved in consideration of the rules. Assuming the legal fees exceed $250, must the lawyer register as a lobbyist agent and, if so, what aspects of the lawyers services must be reported?"

At the outset, the facts of your hypothetical must be expanded somewhat in order to answer it properly. Under the definitions provided in the Act, it must be recalled that there can be no lobbying unless there is direct communication with an official in the legislative or executive branch of state government. Thus, if no public official is on the panel holding the public hearing, there is no direct communication with a public official and consequently there can be no lobbying. In many and perhaps most state departments, public hearings concerning proposed rules are conducted by civil servants rather than by public officials. Representation of a client's views to civil servants will not give rise to any obligation on the part of lawyers to register or report under the Act.

Assuming the panel does include at least one public official, the attorney, when addressing the entire panel relative to both policy and legal issues, is definitely lobbying since at that point in time he or she is attempting to influence administrative action. Section 2(1) of the Act (MCL 4.412)

indicates that administrative action means, among other things, "the proposal, drafting, development, consideration, amendment, enactment or defeat of a . . . rule by an executive agency or an official in the executive branch of state government." The fees received for participation at the rules hearing count toward the attorney's $250.00 lobbyist agent threshold. Once the threshold is passed, the attorney is under an obligation to register as a lobbyist agent and to report compensation or reimbursement received for lobbying, money spent on food and beverage for public officials, etc.

Preparation of an analysis of the rules may or may not be lobbying depending on several factors. Again, if there will be no direct communication because no public official is on the panel, this preparation cannot be lobbying. Assuming there is a potential for lobbying (for example, the hearing is before the Natural Resources Commission), then the purpose of preparing the analysis is important. If the client has not decided whether to lobby for or against the rules prior to requesting the legal analysis, the analysis is being prepared for purposes other than lobbying, for instance, to assist the client in deciding whether to lobby. In other words, preparation of the legal analysis may not meet the "but for" test mentioned in question 1. The legal fee for the analysis would not be reported by the client or the lawyer. If, after reading the legal analysis, the client decides to oppose or support the rules and mails or gives the analysis to a public official who will decide whether to change or approve the rules, the cost of retyping or copying the analysis (including the wages of the typist or copy machine operator) are expenditures for lobbying which must be reported by the client. The legal fees are still not reportable.

On the other hand, assume the client reads the proposed rules, decides they are unacceptable and should be opposed, engages the attorney to analyze the rules "for the dual purpose of advising the lawyer's client and preparing the lawyer to attend the public hearing on the rules", and has the attorney attend the public hearing and directly communicate with a public official. This example meets the "but for" test. The attorney's fee for the analysis is an expenditure for lobbying by the client (the lobbyist) and compensation received for lobbying by the attorney (the lobbyist agent). The client must report this fee. If the attorney has not previously registered as a lobbyist agent, the attorney must now register because the fee is in excess of $250.00.

> "3. The Department of Social Services denies a medicaid payment to an indigent hospital patient. An attorney is retained by the family of the indigent patient who calls the Department Director and asks her to intervene in the matter and to reverse the decision of Department employees. In preparation for contacting the Director, the lawyer spends two hours, for which he charges the family of the patient $130 per hour, reviewing medicaid rules and statutes relative to the power of the Director of Social Services to intervene. Over a three-week period, the attorney spends two hours discussing the

> matter with the Director of Social Services. Must the lawyer register as a lobbyist agent on behalf of the family of the indigent patient and must the family members paying for the lawyer's services register as lobbyists?"

Section 5(2) of the Act (MCL 4.415) includes within the definition of lobbying all direct communications with an official in the executive branch of state government intended to influence "administrative action". Administrative action is a term defined in section 2(1) of the Act (MCL 4.415) as follows:

> "(1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment of a nonministerial action or rule by an executive agency or an official in the executive branch of state government."

The section goes on to state that administrative actions do not include quasi-judicial determinations authorized by law.

In order to fully understand the meaning of the term administrative action, it is necessary to review at least one additional definition found in the Act. Section 6(3) of the Act (MCL 4.416) indicates that:

> "(3) 'Nonministerial action' means an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action."

By reading these definitions together, it becomes apparent that the types of executive actions which may be influenced by reportable lobbying are activities such as policy making and programmatic administrative decisions not mandated by law, whereas attempting to influence other activities which may be described as ministerial in nature will not give rise to reporting obligations under the Act.

In your hypothetical number 3, you indicated firstly, that the Department of Social Services (DSS) denied a medicaid payment to an indigent hospital patient and secondly, that an attorney requested the DSS director to intervene. Thus, your initial inquiry is whether such intervention constitutes administrative action.

On that point, section 105 of the Social Welfare Act (MCL 400.105) provides as follows:

> "The state department (of social services) shall establish and administer a program for medical assistance for the medically indigent under title XIX of the federal social security act, as amended, and shall be responsible for determining eligibility under this act."

This section, on its face, requires DSS (and its director) to do a prescribed activity (make eligibility determinations) in a prescribed manner (under title XIX of the federal social security act) under prescribed circumstances (of medical indigency) without the exercise of personal judgment (i.e. the law must be followed). That being the case, the attorney in your hypothetical was actually attempting to influence the performance of a ministerial duty, rather than an administrative action, and therefore neither the lawyer nor the family members need register under the Act.

Now, the Secretary of State recognizes that it is the proper function of the Director of Social Services, and in some instances the Attorney General, to interpret, administer, and enforce the social welfare laws of Michigan. Those individuals, rather than this agency, have the expertise and experience to do so. It is possible that one or both of them might have a different view from the one stated above and to the contrary conclude that the attorney in question was in fact attempting to influence discretionary matters. In that event, the "attorney" exemption noted in section 2(1) of the Act becomes relevant.

Section 2(1) indicates, among other things, that whenever an attorney attempts to affect a "quasi-judicial determination as authorized by law", the attorney is not influencing administrative action, nor is the attorney lobbying. As noted by the Court of Appeals in Pletz:

> "The design of this exemption is to remove from the act's coverage communications made and activities undertaken by attorneys during the course of contested administrative matters." 125 Mich App 351

The Court also stated:

> "We consider that the exemption removes contested matters before administrative officers, such as referees, hearing officers and commissioners, from the scope of the lobby law." 125 Mich App 352

Under the facts of your hypothetical, it would seem that if the "indigent hospital patient" in actuality had a grievance requiring resolution by DSS, the quasi-judicial process could have been instituted and the quasi-judicial exemption invoked. Section 9 of the Social Welfare Act (MCL 400.9) specifically allows individuals who are dissatisfied with the amount of their federally-funded assistance to institute contested case proceedings.

Moreover, under this set of circumstances, the appeal need not necessarily be resolved by means of an administrative hearing. Section 78 of the APA (MCL 24.278) provides for the disposition of contested cases by stipulation, agreed settlement, consent order, or other mutually acceptable methods. Thus, the attorney could conduct negotiations with the DSS Director without the necessity of registering under the Act.

Finally, it is noted that in your hypothetical, the attorney in question was hired to act as the legal representative of the indigent hospital patient. In that regard, the attorney conducted two hours' of legal research at a cost of $260.00 and performed two hours' of negotiations for a total billing of $520.00. An unstated but implied question from your correspondence is whether this activity constitutes the "practice of law" and if so, whether the fees received by the attorney must still be reported either by the lawyer or the indigent's family.

Michigan courts have long grappled with the meaning of the concept of "practice of law" and have met with only limited success. In fact, in State Bar v Cramer, 399 Mich 116 (1976), the Supreme Court said:

> "We are still of the mind that any attempt to formulate a lasting, all encompassing definition of 'practice of law' is doomed to failure 'for the reason that under our system of jurisprudence such practice must necessarily change with the everchanging business and social order'." Cramer, 399 Mich at 133

However, the fact that one all-encompassing definition may remain an ever elusive goal does not necessarily mean that a working definition is unobtainable for Lobby Act purposes. Indeed, the State Bar has already issued an Informal Ethics Opinion (CI-985, December 31, 1983) concerning some of the interrelationships between the Act and the practice of law. Among other things, this opinion indicates that it would be unethical for a law firm "to employ a non-lawyer to do that which has been called 'lobbying' for the law firm's clients."

Although this issue is relatively new to Michigan, the matter of the interworking of a lobby law and the practice of law has been addressed in other jurisdictions. 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:

> ". . . '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

The Court went on to state:

> "For illustrative purposes, we indicate that an attorney representing a client before a city board or commission which is holding a hearing to reach a quasi-judicial decision on a matter involving factual and legal questions need not register under the ordinance; on the other hand, an attorney authorized by a client to appear at hearings considering local legislation in order to argue for or against the adoption of that legislation would be within the legitimate thrust of the (lobbyist) ordinance." 469 P2d at 359

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.

At the risk of invading the province of the Michigan State Bar and recognizing fully that it is the proper function of the State Bar to make determinations as to what does and does not constitute the unauthorized pratice of law, it would appear that the attorney in hypothetical 3, who was attempting the safeguard the legal rights of an individual, was engaged in the practice of law such that neither the attorney nor the family is required to register or report under the Act.

> "4. An indigent patient in a nursing home has been subjected to possible abuse and mistreatment. The family of the patient hires an attorney to attempt to correct the situation. In investigating the matter, the attorney discovers that the problem may be caused by the failure of the Department of Public Health to properly regulate the facility and that there might be possible corrupt conduct between the nursing home adminstrator and a Department official. The attorney meets with the patient and the patient's family in a confidential meeting pursuant to the attorney/client privilege. The attorney agrees to meet with the Director of Public Health and urge the Director to conduct an investigation and agrees not to reveal the name of the patient or the family paying for the attorney because of the fear for the personal safety of the patient. The lawyer is paid more than $1,000 for communicating directly with the Director of Public Health and the unclassified deputies in the Department urging an investigation. In addition, the lawyer talks with an unclassified member of the Governor's staff and with the Attorney General to urge action to prevent the corrupt conduct in the department. Must the family register as a lobbyist and list the lawyer as having received fees for lobbying?"

In order to respond to your fourth hypothetical, it is once again necessary to refer to the definitions found in the Act concerning administrative action. Those definitions clearly indicate that whenever an individual communicates with a public official to affect a ministerial action, as opposed to an administrative action, there will be no lobbying as that term is used in the Act.

Your hypothetical states that the attorney in question is paid more than $1,000 for communicating directly with the director of the Department of Public Health (DPH) and certain unclassified deputies urging an investigation. If conducting an investigation is an administrative action, then of course there may be reason to believe that reportable lobbying is taking place. However, although it is generally acknowledged that administrators with law enforcement responsibilities have discretion to decide whether or not to institute investigations, your hypothetical seems to suggest that the basic "problem may be caused by the failure of DPH to properly regulate the facility . . . ." That is, although the attorney is on one level requesting an investigation, he or she really seems to be asking DPH to properly enforce the law.

There is recent case law in Michigan which tends to suggest that law enforcement officials, executives, and administrators do not have the discretion to refrain from enforcing valid laws. For example, in Young v City of Ann Arbor, 119 Mich App 512 (1982), the Court of Appeals ruled:

> "As chief of police this defendant was responsible for overseeing and enforcing all policies and practices in the Ann Arbor (Police Station jail) facility. His testimony at trial indicated that he did not require his staff to enforce the pertinent department (of Corrections) regulations. Since we find that the Ann Arbor facility was required to follow the department's rules, it was incumbent upon defendant Krasny to enforce the regulations. This was a ministerial duty of his office . . . ." 119 Mich App at 519

In your hypothetical, the attorney is really doing no more than asking the DPH director to properly enforce the law. Since the proper enforcement of law is a ministerial act or duty, the attorney in question has not engaged in lobbying. Thus, the family need not register as a lobbyist.

In inquiry 4, you also indicated that the attorney spoke with the Attorney General (AG) and with an unclassified member of the Governor's staff to urge action to prevent corrupt practices in DPH. However, while you specifically mentioned that the lawyer was paid to contact DPH staff, you did not assert any payment to the attorney for contacting the AG and the Governor's representative.

Section 5(5) of the Act (MCL 4.415) provides that a lobbyist agent means a person who receives compensation in excess of $250 in any 12-month period for lobbying. Under your scenario, the attorney did not receive any compen-

sation to contact the AG and the Governor's office. It is noted that attorneys licensed to practice in Michigan are "officers of the court". Thus, the lawyer's voluntary action in communicating with the above-named public officials does not give rise to reporting obligations under the Act.

> "5. In 1982, the Michigan Legislature passed a law to encourage alien, i.e. non-United States, insurance companies to be licensed in the State of Michigan as an economic development and job creation program. In-house counsel and a Michigan attorney representing a French insurance company meet with the Insurance Commissioner to discuss procedures for handling an application to be licensed under the new law. In addition, the lawyers, as counsel for the French company, meet with the Director of the Department of Commerce and with unclassified members of the Governor's staff, to discuss possible state programs which would provide economic incentives to the foreign company locating its U.S. subsidiary to the State of Michigan. Both the in-house counsel and the Michigan attorney are paid in excess of $1,000 for the meetings with public officials during a one-week visit to Michigan. Must the French in-house counsel register within three days as a lobbyist agent for the French company? Must the Michigan attorney register within three days of the visit as a lobbyist agent or may he or she wait until three days after receiving the fees for the legal services before registering as a lobbyist agent of the French company?"

In hypothetical number 5, you have posited that a Michigan attorney and out-of-state counsel for a French corporation meet with the Insurance Commissioner "to discuss procedures for handling an application to be licensed" in Michigan as an insurance company and you also hypothesize that both lawyers meet with unclassified officials in both the Commerce Department and the Governor's Office "to discuss possible state programs which would provide economic incentives to the foreign company" to locate in Michigan.

Again, section 2(1) of the Act (MCL 4.412) indicates that lobbying occurs vis a vis the executive branch only when an individual is attempting to influence some form of administrative action. Under the facts of the hypothetical under discussion, the two attorneys are merely asking for information about, and are discussing, state programs. There is no attempt to influence administrative action. Consequently, there is no lobbying and no need for either attorney to register or report his or her activities.

> "6. A citizen wakes up one morning to find a bulldozer outside his house. The bulldozer operator indicates that he has been directed by the Michigan Department of Transportation to remove the house for a new freeway which will come through the site. The citizen calls his

> attorney, and asks the attorney to stop the destruction of the citizen's house. The attorney calls the Director of the Michigan Department of Transportation who says that there is nothing that he can do since the matter has been determined by the Transportation Commission. The attorney then spends the weekend contacting several of the Commissioners of the Michigan Transportation Commission in an effort to stop the destruction of the house. While it turns out that the department made a mistake, the attorney is too late and the house is destroyed. The citizen pays his attorney $1,200 for his efforts. Is the attorney required to register as a lobbyist agent of the citizen within three days of receiving his fee?"

Under the facts postulated in hypothetical 6, the attorney is not required to register as a lobbyist agent. This conclusion is mandated by the fact that the attorney in question was retained to act on the homeowner's behalf to deal with a legal problem, namely, the pending destruction of the owner's house. Obviously, only an attorney licensed to practice in Michigan can represent the aggrieved citizen relative to the legal rights which were at issue. The fact that the lawyer chose to approach administrators rather than pursue some specific legal remedy, e.g. obtaining an injunction, does not change the nature of the attorney/client relationship. The attorney, of course, may have been guilty of using an improper (as well as ineffective) strategy, but the exercise of professional judgment in the election of remedies does not determine whether or not a relationship falls within the "practice of law" for purposes of the Act.

Inasmuch as your inquiry was presented as a series of "hypotheticals", this response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

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