

OPINION NO. 95-4

A lobbyist requested an advisory opinion concerning the Hawaii Revised Statutes (HRS) chapter 97, the Lobbyists Law. The lobbyist asked for answers to two questions. His first question concerned the reporting requirement of the Lobbyists Law. He first asked whether money paid to a lobbyist for the lobbyist's time spent waiting to testify had to be reported as a lobbying expenditure. His second question concerned the registration requirement of the Lobbyists Law. He asked whether the time spent waiting to testify counted towards the five-hour threshold requirement for registering as a lobbyist.

A. Must Money Paid to a Lobbyist for His Time Spent Waiting to Testify Be Reported as a Lobbying Expenditure?

This question concerned the situation in which a lobbyist attends a hearing and must spend time waiting before he is called upon to testify. For purposes of answering this question, the State Ethics Commission assumed that the lobbyist was not performing other work while he was waiting to testify and that the lobbyist billed his client for the time that he spent waiting. The issue was whether the client had to report the money that he paid his lobbyist to wait to testify.

The Commission observed that the Hawaii Lobbyists Law defines "lobbying" as:

communicating directly or through an agent, or soliciting others to communicate, with any official in the legislative or executive branch, for the purpose of attempting to influence legislative or administrative action or a ballot issue.

The Commission noted that all of the states with lobbying laws, as well as the federal government, define "lobbying" almost identically. The Commission stated that there is good reason for this. Lobbying laws seek to regulate speech, print, and the petitioning of the government. These are all First Amendment rights. Lobbying laws thus raise constitutional issues. The Commission remarked that in United States v. Harriss, 347 U.S. 612 (1953), the Supreme Court upheld the federal lobbying law. The court construed the term "lobbying" as referring to "lobbying in its commonly accepted sense - to direct communication with members of Congress on pending or proposed federal legislation."¹ The Commission noted that this basic definition has been adopted by every other jurisdiction.

The Commission observed that the Hawaii Lobbyists Law is typical in that it basically requires two things. First, it requires the registration of lobbyists. Second, it requires the reporting of lobbying expenditures and contributions. There are also several exceptions to the Lobbyists Law.

The lobbyist's initial question concerned the reporting requirement of the Lobbyists Law. HRS section 97-3 requires certain persons to report lobbying contributions and expenses on an expenditures statement. Expenditures statements must be filed with the State Ethics Commission on March 31, May 31 and January 31 of each year. HRS 97-3 requires the following persons to file:

- 1) Each lobbyist

¹ Id., at 620. In an earlier case, the Supreme Court remarked that, because of First Amendment prohibitions, lobbying did not refer to "all the efforts of private individuals to influence public opinion," United States v. Rumely, 345 U.S. 41,46 (1952). "Soliciting others to communicate" was later added to the definition of lobbying. This addition was allowable with the caveat that "soliciting others to communicate with an official for the purpose of influencing legislative or administrative action must be interpreted to mean express and direct requests to so communicate." Otherwise it impermissibly infringed on First Amendment freedoms. Pletz v. Secretary of State, 336 N.W.2d 789, 794-5 (1983).

- 2) Each person who spends \$750 or more of the person's or any other person's money in any six-month period for the purpose of attempting to influence legislative or administrative action or a ballot issue by communicating or urging others to communicate with public officials; provided that any amounts expended for travel costs, including incidental meals and lodging, shall not be included in the tallying of the \$750.
- 3) Each person who employs or contracts for the services of one or more lobbyists, whether independently or jointly with other persons. If the person is an industry, trade, or professional association, only the association is the employer of the lobbyist.

Section 97-3(c) requires that expenditures statements contain certain information on contributions and expenditures. This section states:

(c) The statement shall contain the following information:

- 1) The name and address of each person with respect to whom expenditures for the purpose of lobbying in the total sum of \$25 or more per day was made by the person filing the statement during the statement period and the amount and value of such expenditure;
- 2) The name and address of each person with respect to whom expenditures for the purpose of lobbying in the aggregate of \$150 or more was made by the person filing the statement during the statement period and the amount or value of such expenditures;
- 3) The total sum or value of all expenditures for the purpose of lobbying made by the person filing the statement during the statement period in excess of \$750 during the statement period;
- 4) The name and address of each person making contributions to the person filing the statement for the purpose of lobbying in the total sum of \$25 or more during the statement period and the amount or value of such contributions; and
- 5) The subject area of the legislative and administrative action which was supported or opposed by the person filing the statement during the statement period.

This section requires filers to report information and contributions received and expenditures made "for the purpose of lobbying." Section 97-1(4) defines an expenditure as:

a payment, distribution, forgiveness of a loan, advance, deposit, or gift of money, or anything of value and includes a contract, promise, or agreement, whether or not enforceable, to make an expenditure. "Expenditure" also includes compensation or other consideration paid to a lobbyist for the performance of lobbying services. "Expenditure" excludes the expenses of preparing written testimony and exhibits for a hearing before the legislature or an administrative agency. (Emphasis added.)

Compensation paid to a lobbyist for his services is considered an expenditure.

The Commission explained that an employer of a lobbyist is required to file an expenditures report with the State Ethics Commission. The report must contain information concerning expenditures made for the purpose of lobbying. The question the Commission was

faced with was whether money paid to the lobbyist to compensate him for waiting to testify was an expenditure for the purpose of lobbying. The Commission believed that it was.

The Commission believed that clearly money spent on direct communication with a legislator, or money spent soliciting others to communicate with a legislator, were reportable expenses. For example, if a firm paid for a newspaper ad that told people to call their legislator and support a certain bill, then the money paid for that ad would be reportable. The Commission believed that more questionable situations would arise, however, when money was spent on activities that were remote from, or very preparatory to, direct communication or soliciting others to communicate. The Commission noted that constitutional questions would be involved in requiring the disclosure of information regarding activities that are very remote from the actual lobbying.

In this case, the activity in question was waiting to testify at a hearing. The State Ethics Commission believed that money spent to pay for a lobbyist's time waiting is money spent for the purpose of lobbying. The Commission believed that waiting to testify is not remote from direct lobbying. The lobbyist would not be waiting at a hearing but for the fact that he is lobbying. The Commission noted that lobbyists generally bill their clients for this time and consider it part of their lobbying services. For these reasons, the Commission believed that money paid to a lobbyist to cover the time he spends waiting to testify should be reported as a lobbying expenditure.

The State Ethics Commission believed that in some situations this money may not be reportable. If, while waiting to testify, a lobbyist performs other work for his client, is paid for this work, and yet the money paid for this work is not a lobbying expenditure, then the money need not be reported. For example, the Commission noted that the law specifically excludes the expenses of preparing exhibits for a hearing from the definition of an expenditure. Thus, a lobbyist's expenses for preparing an exhibit need not be reported by his client. If, while waiting, the lobbyist prepares an exhibit and bills his client for the time that he spends doing this, then the payment to the lobbyist is not a reportable expenditure. Similarly, if a lobbyist is an employee of an organization and performs other work while waiting to testify, then, the Commission stated, it would likely view the money paid to the lobbyist as compensation for performing this other work. For example, if an employee of a corporation is responsible for lobbying as well as other duties, and the employee spends his time reviewing corporate reports while waiting to testify, then the salary he receives that covers that time would not be viewed as money spent for the purpose of lobbying. This person would appear to be merely receiving a salary for performing his job duties, albeit in a different setting.

B. Does Time Spent Waiting to Testify Count Towards the Five-Hour Threshold Requirement for Registering as a Lobbyist?

The lobbyist's second question concerned the same situation as in his first question. Again, a lobbyist attends a hearing and must spend time waiting before testifying. The lobbyist asked if the time spent waiting counts in tallying the five-hour threshold requirement for registering as a lobbyist.

The Commission noted that section 97-2 of the Lobbyists Law requires all lobbyists to register with the State Ethics Commission. Section 97-1(6) defines a "lobbyist" as:

any individual who for pay or other compensation engages in lobbying in excess of five hours in any month of any reporting period described in section 97-3 or spends more than \$750 lobbying during any reporting period described in section 97-3.

An individual must meet two requirements before he is required to register as a lobbyist. First, he must be compensated to lobby. Second, he must either spend five hours in any month of a reporting period lobbying, or spend \$750 in any reporting period lobbying. The Commission observed that there are three reporting periods. The first runs from January first to the last day of February. The second runs from March 1 through April 30. The third runs from May 1 through December 31.

The Lobbyists Law originally required everyone who lobbied to register as a lobbyist. This resulted in a flood of registrants, perhaps as many as 2000. The need to register hundreds of lobbyists who were involved only in occasional lobbying seemed dubious. In 1980, the legislature amended the law to require registration only if the individual was compensated to lobby and either spent more than five hours in any month or more than \$275 in any six-month period for the purpose of lobbying. At the time that it amended the law, the legislature indicated that it was only interested in registering those individuals who spent "substantial amounts of money or time to influence legislative or administrative action or ballot issues in this State."² The Lobbyists Law is only concerned with those who devote a significant portion of their resources to lobbying efforts.

The former Lobbyists Law required individuals to register as lobbyists if they were compensated to lobby and if they either spent five hours or \$275 "for the purpose of lobbying." This language was altered in the 1995 legislative session to require registration if the individual was compensated and spent five hours or \$750 "lobbying." The time and money thresholds were specifically amended to apply to "lobbying," that is to direct communication or soliciting others to communicate, rather than to apply to activities "for the purpose of lobbying." The five-hour threshold requirement was intended to cover the time actually spent in direct communication or in soliciting others to communicate.

The Commission noted that the issue of waiting to testify was specifically discussed in legislative hearings on the new Lobbyists Law. The consensus among the committee members and the participants at the hearings was that time spent waiting did not count towards the five-hour threshold. The State Ethics Commission believed that the legislature has made its intent clear. The Commission believed that time spent waiting to testify does not count in tallying the five-hour threshold requirement for registration as a lobbyist.

In sum, the State Ethics Commission believed that, under the 1995 amendments to the Lobbyists Law, if a lobbyist is paid for the time he spends waiting to testify at a hearing, then his employer must report that payment as a lobbying expenditure. However, the time a lobbyist spends waiting to testify does not count towards the five-hour threshold requirement for registration as a lobbyist. The Commission believed that this result was dictated by the language of the Lobbyists Law.

The State Ethics Commission informed the lobbyist who requested this opinion that it appreciated this opportunity to clarify the requirements of the Lobbyists Law. The Commission also appreciated the lobbyist's patience during its review of this matter.

Dated: Honolulu, Hawaii, November 29, 1995.

STATE ETHICS COMMISSION
Carl T. Sakata, Chairperson
Cassandra J.L. Abdul, Vice Chairperson
Sharon "Shay" Bintliff, Commissioner
Bernard E. LaPorte, Commissioner

² Senate Committee on Judiciary, SC Report No. 692, 10th Leg. (1980).

NOTE: Commissioner Arlene Kim Ellis was not present during the discussion and consideration of this opinion.