



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION – EDITED FOR PUBLICATION

February 8, 2013

Re: Law Firm Contracting with Employee of State Board to Provide Non-Lobbying Consulting Services to the Board upon Retirement
AO-L-13-001

Dear Requestor:

You have requested a formal opinion from the State Ethics Commission (Commission) as to whether the State Ethics Act, Chapter 138A of the North Carolina General Statutes (N.C.G.S.) or the Lobbying Law, N.C.G.S. Chapter 120C, prohibits your law firm from contracting with an employee of a State Board upon retirement from employment with the Board. Further, you ask whether either the Ethics Act or the Lobbying Law would limit this individual's involvement in the firm's representation of the Board before the 2013 General Assembly. This formal advisory opinion was adopted by the Commission at its February 8, 2013, meeting.¹

I. Brief Conclusion.

The Ethics Act will not prohibit or affect your law firm's future non-lobbying contractual relationship with this state employee after this individual retires. In addition, the Lobbying Law will not prohibit or limit your firm from contracting with this state employee to provide the described non-lobbying consulting services to its clients, including the Board, after retirement.

II. The Facts.

A state employee has announced their intention to retire from a position with a state board. After retirement, your law firm wishes to hire this state employee as a consultant to provide administrative services to its clients, including the State Board. The state employee is neither a certified paralegal nor an attorney; and will not be providing legal services.

The Board is a state licensing board that is covered under the Ethics Act. The Board has employed a state employee in some capacity since 2002. Among the duties handled by this state

¹ Please see the enclosure entitled "Formal Advisory Opinions Issued by the State Ethics Commission" for further information regarding the protections offered to individuals receiving those opinions.

employee are the responsibilities associated with serving as the legislative liaison pursuant to N.C.G.S. 120C-500. This individual is also the ethics liaison for the Board.

You state that your firm presently has a retainer agreement with the Board to provide legal services to the Board. You attached a copy of the Services Agreement as Exhibit A to your request. Although the term of this Service Agreement has expired, you stated that your firm continues to provide the legal services described in the Agreement. Among the legal services provided are: (1) providing legal review and advice on proposed regulatory initiatives and bills in the General Assembly that have potential impact on the Board; (2) responding to inquiries from the General Assembly when so requested by the Board; and (3) monitoring pending law changes directly impacting the regulation of the professionals covered by the Board or the operations of occupational licensing boards. In your letter, you have concluded that your firm's appearance before the General Assembly for the Board is "allowed by N.C.G.S. 120C-700(4)." You did not provide the specific facts regarding your firm's appearance nor did your written inquiry seek guidance as to the application of N.C.G.S. 120C-700(4). Therefore, the Commission has not addressed such in this formal opinion.

You have stated that the Board has not sought any legislation from the General Assembly since your firm has represented the Board. However, you anticipate that your firm will appear as the Board's attorney before the General Assembly regarding legislation that the Board will seek from the 2013 General Assembly. The firm's representation and appearance will not include advocating for this legislation or for any other legislative action, or for any executive action. You have specifically stated that your firm does not "lobby" for or otherwise advocate for legislative or executive action on behalf of any of its clients.

In the contractual role with your firm, this former state employee will provide the following limited services to all of the firm's clients, including the Board: 1) monitoring legislation at the House and Senate committee level; 2) assisting with and drafting reports pertaining to legislative and executive action that your firm sends to its clients; and 3) contacting the state budget office to obtain specific information requested by board officers. You clarified that the former state employee will not be operating under the terms of the Services Agreement and will not be providing the services described in the Services Agreement. However, your firm would like this former state employee to assist in its representation of the Board regarding its 2013 legislative efforts, if possible.

III. Applicable Statutory Provisions.

The Lobbying Law requires a staffed state board to designate "liaison personnel" to lobby for legislative action. N.C.G.S. 120C-500(a). "Liaison personnel" is defined as any State employee, counsel employed under G.S. 147-17, or officer whose principal duties, in practice or as set forth in that individual's job description, include lobbying legislators or legislative employees. N.C.G.S. 120C-100(a)(8). Designated liaison personnel are required to register and report with the Secretary of State, and they are prohibited from giving gifts to legislators and legislative employees unless a gift ban exception allows the gift. N.C.G.S. 120C-501(b), -(c), and -(d). The Lobbying Law also prohibits all state employees from registering as a lobbyist to lobby the State agency that previously employed the former employee within six months after voluntary separation or separation for cause from the State agency. N.C.G.S. 120C-304(c).

Article 7 of the Lobbying Law sets forth specific circumstance under which certain persons are exempted from the Lobbying Law. The application of each of these exemptions depends on the specific facts and circumstances and will be determined on a case-by-case basis. Pursuant to N.C.G.S. 120C-

700(4), a person performing professional services in drafting bills, or in advising or rendering opinions to clients, or to designated individuals on behalf of clients, as to the construction and effect of proposed or pending legislative or executive action where the professional services are not otherwise connected with the legislative or executive action is exempted from the Lobbying Law. N.C.G.S. 120C-700(4). Whether a person has performed “professional services” in drafting proposed legislative or executive action is determined on a case-by-case basis.

In addition, when a person is advising and rendering opinions to designated individuals as to the construction and effect of proposed or pending legislative or executive action as allowed by N.C.G.S. 120C-700(4), the person cannot attempt to advocate for a specific position or influence the designated individual with regard to the proposed or pending action, or seek specific legislative or executive action during that discussion. To do so would result in the professional services being used to directly lobby that designated individual and the N.C.G.S. 120C-700(4) exemption would no longer apply.

IV. Application of the Lobbying Law to Your Question.

Your first inquiry is whether either the Ethics Act or the Lobbying Law prohibits or otherwise restricts your firm from contracting with this state employee to provide certain administrative services to the firm’s clients, including the State Board, after retirement from state employment with the Board. The Ethics Act currently does not apply to this individual, personally or in the capacity of an employee of a state board; nor does it apply to your firm. In addition, after the employee retires from the current position, the Ethics Act will not apply as long as the employee is not a public servant, legislator, legislative employee, or judicial officer; nor will it apply to your firm. Accordingly, the Ethics Act will have no application to and will not prohibit the law firm from contracting with the employee upon their retirement from the Board.

The Board employee is under the jurisdiction of the Lobbying Law while a state employee and the registered legislative liaison personnel for the Board. Once state employment ends and the individual ceases to be the Board’s registered legislative liaison, the requirements and restrictions of N.C.G.S. 120C-501 will no longer apply.

The “revolving door” restrictions of Section 304(c) of the Lobbying Law prohibit a former state employee from being paid to lobby the former employer for six months from the date of resignation or termination. Based on the fact that this individual’s contractual services for the firm will not include advocating or lobbying for any legislative or executive action, the “revolving door” restrictions of Section 304(c) of the Lobbying Law will not apply to this contractual relationship. If at some future point in time, the firm expands this individual’s contractual duties to include lobbying for its clients, the Lobbying Law would pertain to the retired employee and the client on whose behalf lobbying occurs.

You have also asked whether the Ethics Act or Lobbying Law prohibits or otherwise limits this state employee from assisting the firm in representing the Board before the 2013 General Assembly after retiring from state employment with the Board. As discussed above, the Ethics Act does not apply to this state employee or your firm. Based on the presented facts that your firm’s representation of the Board will not include lobbying or otherwise advocating for legislative or executive action and that the employee’s contractual services for your firm will also exclude lobbying, the Commission finds that the Lobbying Law will not pertain to your law firm’s contractual relationship with this former state employee. However, based on this individual’s current employment relationship with the Board and designation as the Board’s legislative liaison, the firm should be mindful of any efforts by the Board to try and utilize or rely upon its former employee to advocate for its legislative interests (i.e., “lobby” for it) and seek further guidance from the Commission if this individual’s role changes in this manner.

Based on the presented facts, the Commission has determined that the Ethics Act and Lobbying Law do not prohibit or otherwise limit your law firm from having a contractual relationship with this state employee after the individual's retirement from employment with the Board.