

ADVISORY OPINION NO. 2005-23

Issued on January 5, 2006 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Trade Association** asks the following questions:

- (1) Must employees of companies who contact legislators to express their opinions on issues of interest to their trade association register as lobbyists?
- (2) If the employees of the companies are not required to register as lobbyists and file expense reports, must the lobbyist for the trade association report expenditures which the employees make on public officials?
- (3) What further advice regarding the actions described in the statement of facts may the Commission provide to the trade association and member companies to aid and promote conformance with the Ethics Act?

FACTS RELIED UPON BY THE COMMISSION

A trade association is comprised of various companies from the same industry. One of the functions of the trade association is to lobby the Legislature on issues of interest to the industry.

From time to time, the trade association will urge employees of the member companies to contact their legislators to discuss issues of interest to the trade association. The employees may on occasion travel to the State Capitol. The main form of contact between the employees and his or her legislator is via emails, letters and phone calls. From time to time an employee may take a legislator to lunch or dinner. Communications between the employees and legislators may occur both during and after work hours.

The primary job duties of the employees do not involve lobbying. The trade association employs a lobbyist. Some of the member companies employ lobbyists. Others may not.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-3-1(6) reads:

"Lobbying" or "lobbying activity" means the act of communicating with a government officer or employee to promote, advocate or oppose or otherwise attempt to influence:

- (i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state; or

(ii) The adoption or rejection of any rule, regulation, legislative rule, standard, rate, fee or other delegated legislative or quasilegislative action to be taken or withheld by any executive department.

W.Va. Code § 6B-3-1(8) reads in relevant part:

(8)(A) "Lobbyist" means any individual employed by a lobbying firm or who is otherwise employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his or her agents with any elective state official, agency official or legislative official for the purpose of promoting, advocating, opposing or otherwise attempting to influence:

(i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state; or

(ii) The adoption or rejection of any rule, legislative rule, standard, rate, fee or other delegated legislative or quasilegislative action to be taken or withheld by any executive department.

(B) The term "lobbyist" does not include the following persons, who are exempt from the registration and reporting requirements set forth in this article, unless they engage in activities which would otherwise subject them to the registration and reporting requirements:

(i) Persons who limit their lobbying activities to appearing before public sessions of committees of the Legislature, or public hearings of state agencies, are exempt.

(ii) Persons who limit their lobbying activities to attending receptions, dinners, parties or other group functions and make no expenditure in connection with such lobbying are exempt.

...

(iv) Persons who lobby without compensation or other consideration, other than reimbursement for reasonable travel expenses, for acting as lobbyists, who are not employed by a lobbying firm or lobbyist employer, and whose total expenditures in connection with lobbying activities do not exceed **one hundred fifty dollars** during any calendar year, are exempt. The exemptions contained in this subparagraph and in subparagraph (ii) are intended to permit and encourage citizens of this state to exercise their constitutional rights to assemble in a peaceable manner, consult for the common good, instruct their representatives, and apply for a redress of grievances. Accordingly, such persons may lobby without incurring any registration or reporting obligation under this article. Any person exempt under this subparagraph or subparagraph (ii) may at his or her option register and report under this article.

...

W.Va. Code § 6B-3-4(c) reads in part:

Except as otherwise provided in this section, each report filed by a lobbyist shall show the total amount of all expenditures for lobbying activities made or incurred by [or] on behalf of the lobbyist during the period covered by the report....

ADVISORY OPINION

(1) Must employees of companies who contact legislators to express their opinions on issues of interest to their trade association register as lobbyists?

The facts presented are substantially similar to the facts presented in advisory opinion 2005-21. As set forth in that opinion, the employees in question are not required to register as lobbyists.

(2) If the employees of the companies are not required to register as lobbyists and file expense reports, must the lobbyist for the trade association report expenditures which the employees make on public officials?

It is clear that expenditures made on public officials by the registered lobbyist for a trade association must be reported. Further, it is the opinion of the Commission that if the officers or board members of an association make expenditures on public officials, then the trade association lobbyist should report those expenditures as well. Expenditures must also be reported by the trade association lobbyist if trade association funds are used or if the trade association lobbyist is present when a member company or its employees make an expenditure on a public official.

The issue which must next be addressed is whether the trade association lobbyist must report expenditures made on public officials by employees of member companies. Pursuant to the Ethics Act, expenditures made on behalf of a lobbyist are reportable expenses. (W.Va. Code § 6B-3-4(c)(1).

If the trade association generally encourages its members to contact their legislators, the Commission finds that this general communication to the association membership does not rise to a level which would constitute a trade association lobbyist encouraging or directing that expenditures be made on his or her behalf. As such there is no attendant duty by the trade association lobbyist to report any expenditures made by trade association members. However, if the trade association lobbyist directs its member companies to make expenditures on public officials, then this communication rises to a level of the trade association lobbyist coordinating expenditures on his or her behalf. In this situation, the expenditure is required to be reported by the trade association lobbyist.

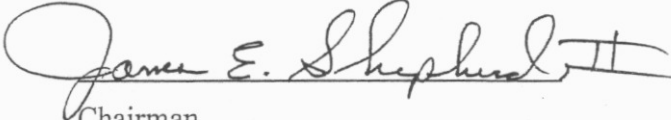
If an individual company has a registered lobbyist, then the lobbyist should report any expenditures made by the company's employees on public officials. If an individual company does not have a lobbyist, the company should examine the contact of its employees with legislators and related expenditures to determine if a representative of the company should be registered as a lobbyist to report expenditures or if in the company needs to retain a lobbyist. To avoid the appearance of impropriety, it is recommended that the trade association lobbyist inform the membership that if a company or its employees communicate with public officials or make reportable expenditures on public officials, then they may be subject to lobbyist registration and reporting requirements.

(3) What further advice regarding the actions described in the statement of facts may the Commission provide to the trade association and member companies to aid and promote conformance with the Ethics Act?

It is difficult to anticipate all questions which may arise in regards to who must register as a lobbyist and which expenditures must be reported. One of the primary functions of the Ethics Commission and its staff is to provide advice . If any lobbyist or company has questions regarding whether an employee should register as a lobbyist, or if an expenditure is reportable, he or she should call the Ethics Commission.

To promote conformance with the Ethics Act within their industry, the Commission would also encourage lobbyists to educate trade association members about the general requirements and restrictions of the Ethics Act. As a baseline, they may want to recommend that members visit the Ethics Commission website. At times private business owners may fail to realize that different rules govern their interaction with the public sector. For instance they may be unaware that there are restrictions on gift giving or that in certain instances expenditures made on public officials may need to be reported.

This advisory opinion is limited to questions arising under the Ethics Act, W.Va. Code § 6B-1-1, *et. seq.*, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.


Chairman