

Picking up the Tab and Taking Officials for a Ride

Being a Lobbyist is Easier Than You Think

Houston Bar Association – Environmental Section
Luncheon – March 8, 2006

Robert L. Theriot
Liskow & Lewis
333 Clay Street, Suite 3485
Houston TX 77002
(713) 651-2957
rltheriot@liskow.com

LISKOW & LEWIS
A PROFESSIONAL LAW CORPORATION

TEXAS LOBBYING LAW & RULES

I. Texas Rules and Laws Governing Lobbying and Influence of Public Officials

- Texas Government Code, ch. 305 (Lobby law)
- Texas Ethics Commission Rules, Tex. Admin. Code, ch. 34
- Texas Penal Code, ch. 36 (Bribery & Corrupt Influence Abuse of Office)
- Texas Election Code, title 15 (Campaign finance law)

The Lobby law comprehensively governs lobbying of state public officials in the executive and legislative branches. It defines lobbying, imposes registration requirements, and sets forth the allowed and disallowed activities of those engaged in lobbying. The Texas Ethics Commission is charged with administration and enforcement of the lobby law, as well as other pertinent ethical laws applicable to state officials. Its rules implementing the lobby law are located in Chapter 34 of the Texas Administrative Code. The general penal laws of Texas prohibit bribery of public officials, as well as place certain limits on the giving and acceptance of certain gifts, honoraria, and other things of value to and by public officials. These laws may be applicable, even if the individual is not subject to the lobby law. Certain activities, such as contributions that would otherwise be impermissible under the lobbying law, may be allowed under the campaign finance law when dealing with elected officials. Of course, when dealing with elected officials, one must ensure to comply with the campaign finance law as well as other applicable laws relating to lobbying. The Texas Ethics Commission maintains a website at <http://www.ethics.state.tx.us>. This site is very informative. All of the pertinent statutory and administrative provisions can be found at this site, as well as various guides, publications, forms, instructions, and the past Advisory Opinions of the Texas Ethical Commission.

II. Registration of Lobbyists

A. What is Lobbying?

Lobbying is (1) direct communication with (2) members of the legislative or executive branch of state government (3) to influence legislation or administrative action. *See* Tex. Gov't Code § § 305.001, 305.003(a).

The definition is quite broad. "Direct communication" includes any contact, whether in person, by mail, telephone, e-mail, or the like. Tex. Gov't Code § 305.002(2). It excludes, however, communication that is only indirect, such as a letter or article that is written for publication in a newsletter or paper, that is read by public officials. *See* Ethics Advisory Opinion No. 85 (1992). It covers contact with all "members" of the legislative and executive branch, included elected and appointed officials, candidates for, and employees of the legislature or any executive branch. The law does not, however, cover communications to the judicial branch of government, nor communications to local government officials. Finally, the term "to influence" legislation or administrative action is given a broad meaning: it covers any matter that *may be* subject to current or future legislative or administrative action, Tex. Gov't Code § 305.002(1), including general communications intended to foster goodwill for the purpose of influencing potential future actions. Ethics Advisory Opinion Nos. 4, 34, 89, 90, 94 (1992).

B. Who must register as a lobbyist?

1. The Compensation & Expenditure thresholds

Essentially, if one *receives* more than \$1000/quarter to lobby *or spends* more than \$500/quarter on certain *benefits* for state officials to lobby, then that person must register as a lobbyist. These are alternative thresholds – if either is met, the person must register. There are, however, numerous exceptions and limitations, such that many activities that would otherwise constitute lobbying do not invoke the lobbying law and registration requirements.

2. Compensation threshold

Receipt of more than \$1000 per calendar quarter as compensation or reimbursement for lobbying requires one to register as a lobbyist. 1 Tex. Admin. Code § 34.43. Compensation received for lobbying includes any received for preparatory activities, such as strategy sessions with the client, research, and the like. 1 T.A.C. § 34.3.

3. Exclusions from the Compensation threshold

- **Incidental lobbying:** a person whose lobbying constitutes less than 5% of their compensated time per quarter does not meet the compensation threshold, regardless of how much they are compensated. 1 T.A.C. § 34.43(b).
- **Certain excluded activities:** compensation from certain, specified, activities under 1. T.A.C. § 34.5, are not counted toward the compensation threshold; e.g.:
 - Responses for information required or requested by state officials;
 - Communications required to demonstrate or achieve compliance with state laws or rules or to show qualification for exceptions of general applicability;
 - Communications to state counsel or hearing officer regarding adjudicative proceedings (see also Tex. Gov't Code § 305.003);
 - Public testimony or submissions on the public record in public hearings, rule making proceedings, or other open proceedings;
 - Communications or negotiations concerning government purchasing decisions.
- **Reimbursement for personal out-of-pocket expenses:** reimbursement received for one's own out-of-pocket expenses incurred while lobbying are not counted toward the threshold; e.g., one's own lodging, transportation, food, postage, copies.

4. Expenditure threshold

A lobby expenditure is any expenditure (1) made for the benefit of a member of the legislative or executive branches (or their immediate family), (2) that are made to communicate

with a state officer or employee to influence legislative or administrative action and (3) fall into one of the following categories:

- transportation and lodging;
- food and beverages;
- entertainment;
- gifts
- awards and mementos
- expenditures made for the attendance of members of the legislative or executive branch at political fund-raisers or charity events.

Tex Gov't Code § 305.003(a)(1); § 305.006(b).

5. Exclusions from Expenditure threshold

The following expenditures do not count toward the expenditure threshold:

- Taxes and tips
- Lobbyist's own expenses
- Payments of less than \$200 that are reimbursed by the state officer. 1 T.A.C. § 34.1
- Gifts directly to a state agency (as opposed to an individual). Ethics Advisory Opinion No. 130 (193).

6. General Exclusions

The following persons are excluded from the registration requirement regardless of whether they would otherwise meet the compensation or expenditure thresholds:

- Lobbyist's employer or client – need not register if only activity is to pay registered lobbyist to lobby on the person's behalf. Tex. Gov't Code § 305.004(4)
- Public officials who "lobby" in their official capacity
- News media. Tex. Gov't Code § 305.004(1).
- Persons whose only lobbying activity is attendance at meetings or entertainment events attended by state officials or employees, if the cost of the event is paid by a business entity or association. Tex. Gov't Code § 305.004(5).

7. Entity reporting

Generally, the lobbying law places the onus on *individuals* to register as lobbyists. An entity may register. However, a person (or entity) whose sole lobbying activity is to compensate a registered lobbyist need not register. Moreover, an entity that otherwise meets the threshold requirements may avoid registration if all activity otherwise reportable is reported by one or more individual registrants. 1 T.A.C. §§ 34.45. Conversely, an entity that registers does not

relieve any individual, hired by that entity, from registering if he, separately, meets the threshold requirements.

C. Registration and Reporting Requirement

Within five days of making the communication that triggers the threshold, a lobbyist must register with the Texas Ethics Commission upon the forms provided. Initial registration, as well as the require periodic reports, require fairly detailed information including:

- Identity of employers or clients
- Compensation for lobbying
- Lobbying subject matters
- Identity of “assistants”
- Expenditures by category
- Category of persons who benefit
- Detailed reporting on individuals lobbied for certain spending levels

III. Allowed and Prohibited Activities

A. Applicable to all persons

No person, lobbyist or otherwise, may undertake the following activities:

- **Bribery:** It is a felony to confer a “benefit” on a public official as consideration for his decision, vote, or exercise of discretion in an official matter. Tex. Penal Code § 36.02 (Bribery).
- **Honorarium:** A public servant cannot accept an “honorarium” (i.e. speaking fee) for services that he would not have been requested to provide but for his official position. Tex. Penal Code § 36.07. Exceptions, exist however, for acceptance of transportation, lodging and meals in connection with conferences and similar events, as well as certain “awards” and “mementos” given by registered lobbyists (see below).
- **Gifts:** The penal code, Tex. Penal Code § 36.08 & 36.09 provides a broad prohibition against providing gifts (anything of benefit) to public officials by persons subject to their jurisdiction, subject to numerous exceptions. The following are among some of the exceptions to this prohibition:
 - Gifts conferred on account of kinship or prior independent relationship;
 - Gifts, awards & mementos given by a registered lobbyist and allowed under the lobbying law;
 - Political contributions:
 - note that corporations and labor unions cannot make political contributions in Texas;

- If an expenditure is required to be reported under the lobby law, it will deemed, by definition, to *not be* a political contribution. Tex. Ethics Advisory Op. No. 46 (1992).
 - An item (other than cash) worth less than \$50;
 - Food, lodging, transportation, or entertainment accepted as a “guest” – i.e., the donor is present – and properly reported, if reporting is required.
 - Payments received as legitimate consideration for goods or services provided by the public official in his private capacity.
- **Contingent Fees:** A person cannot pay another to lobby a public official, when the payment is contingent on the outcome of the official action. Tex. Gov’t Code § 305.022. Exceptions exist for attorneys in contested proceedings and sales employees who are paid on commission for sales to the government.

B. Special rules for registered lobbyists

Generally, the rules for registered lobbyists are stricter than those who are not required to register. In some case, however, such as application of the bribery statute and as regards gifts, awards, and mementos, registered lobbyists are given somewhat more leeway. Below are some of the specific different rules for registered lobbyists.

- **Bribery:** An expenditure made and reported under the lobbying law will not be considered a bribe unless there is an “express agreement” to act in exchange for the benefit. Tex. Penal Code § 36.02(a)(4) & (e).
- **Gifts to friends and kin:** loans and gifts may *not* be given on account of kinship or prior relationship, unless the lobbyist is related within the second degree to the recipient. Tex. Gov’t Code § 305.025. Absent the necessary relationship, all gifts given by a lobbyist are subject to a \$500 cap (see below).
- **Food, Entertainment, Transportation & Lodging:**
 - **Food & Beverages** – *See* Tex. Gov’t Code § 305.024 & 0.25 – *see also* § 305.006(f) (lobbyist must be present at event for certain benefits)
 - Allowed only if the lobbyist is present at the event (unless given as a “gift” for a value of less than \$50 and is delivered by mail or common carrier outside the capitol complex).
 - No annual maximum on amount of food & beverages that can be spent on any individual per year.
 - **Entertainment**
 - Similar to food & beverage – lobbyist must be present at the event.

- Annual cap of \$500 per individual
 - **Transportation & Lodging** – *See* Tex. Gov’t Code §§ 305.024(a)(2)A; 305.025(3)-(4)
 - Generally *not allowed*, except
 - to explore matters directly related to officials duties, such as fact-finding trip, educational seminars, and informational conferences
 - in connection with a conference or similar event where the official provides services, such as giving a speech or participating in a panel, that are more than “merely perfunctory.”
 - “Incidental” transportation – such as short car or taxi ride is allowable.
 - The lobbyist must also be present on the trip or the event.
 - The statute and rules make clear that transportation and lodging cannot be provided for mere ceremonial or pleasure trips.
- **Gifts** *see* Tex. Gov’t Code § 305.024(a)(2)(C)
 - Registered lobbyist may give gifts of up to \$500 per year to an individual state official, immediate family member, or their guests.
 - Benefits that fall within other categories – such as food & beverage provided when then the lobbyist is present – are not treated as gifts.
 - Note that the lobbying law allows a lobbyist to give gifts in a greater amount than the public in general (which is limited to \$50).
- **Awards & Mementos:** Tex. Gov’t Code § 305.024(a)(2)(D)
 - These types of “gifts” may be given, so long as each individual award or memento is not valued at more than \$500.
 - There is in annual limit on the number or value of the total awards or mementos that may be given to a single state official or employee.
- **Political Fundraisers & Charity Events:** Tex. Gov’t Code §§ 305.006(b)(6); 305.024(a)(2)(E)
 - A lobbyist may pay for attendance of a state officer or employee at a political fundraiser or charity event only if the lobbyist is present at the event.
- **Lobbying at the Capitol:** a registered lobbyist may not go onto the floor of either house of the legislature while in session, unless invited by that house. Tex. Gov’t Code § 305.023.