ETHICS ADVISORY OPINION NO. ___

June 1, 2016

Whether the contingent fee prohibition, as amended by House Bill 3517 adopted by the 84th Legislature, prohibits a certain agreement with a lobbyist that was effective before September 1, 2015. ***(AOR-612)***

The Texas Ethics Commission ("commission") has been asked questions regarding the permissibility of an agreement between a lobby entity and a client under the state lobby law contingent fee prohibition as amended by House Bill 3517 ("HB 3517") by the 84th Legislature.[1]

Background

The requestor of this opinion states that the lobby entity is an entity composed of lobbyists registered under chapter 305 of the Government Code. The lobby entity's client provides education and training products that are delivered electronically to individuals ("licensees") who have received a license by a state agency to conduct a particular business activity or occupation in Texas.[2] The education and training products are materials provided by each agency for online training, education, testing, and compliance for the agency's licensees, who may be required to receive continuing education to obtain or maintain their applicable licenses. Initial agency approval of the client's products was required for the licensees to receive the applicable required educational or training credit for using the products. The client also provides services to licensees by delivering the materials to them and a "help desk" to assist them in accessing the materials.

On September 1, 2005, the lobby entity entered into an agreement with the client to communicate with state agency officials to gain their approval of the client's products and services for use by licensees of those agencies. An addendum to the agreement was entered into on January 24, 2007. The lobby entity is not continuing to communicate with agency officials to gain approval of the client's products and services. The lobby entity does not communicate with the licensees to sell the client's products and services, but the client communicates with the licensees by providing the "help desk."

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[1] Act of May 29, 2015, 84th Leg., R.S., ch. 815, 2015 Tex. Gen. Laws 2457.

[2] The requestor states that almost any regulated business activity where a state agency issues a license to an individual to engage in a particular profession could be an example. The requestor also states that if a licensee were also a member of the legislative or executive branch, the licensee would be treated no differently from all other licensees of the agency and that members are not identified in any way and receive no special treatment.

The client pays the lobby entity a percentage fee for each licensee who pays for and uses the products. Upon reaching certain benchmarks, compensation in the form of bonuses could also be paid to the lobby entity. The requestor states that amendment, extension, or renewal of the contract is not required in order for the lobby entity to continue receiving income pursuant to the agreement.

The requestor's questions are whether the agreement is permissible under the contingent fee prohibition in section 305.022 of the Government Code and whether the lobby entity may continue to receive income produced within the scope of the existing agreement. Additionally, the requestor asks whether the agreement, if entered into now, would violate the contingent fee prohibition.

Contingent Fee Prohibition

Section 305.022 of the Government Code prohibits a payment of contingent fees for certain communications made directly with members of the executive branch or legislative branch to influence legislation or administrative action. Gov't Code § 305.022. A member of the executive branch means an officer, officer-elect, candidate for, or employee of any state agency, department, or office in the executive branch of state government. *Id.* § 305.002(4). Administrative action means rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office, including a matter relating to the purchase of products or services by the agency or office. *Id.* § 305.002(1). The term includes the proposal, consideration, or approval of the matter or negotiations concerning the matter. *Id.*

HB 3517 amended section 305.022 and included a transition provision that stated, "This Act takes effect September 1, 2015."[3] In order to address the requestor's questions, it is necessary to outline the law in effect at the time the agreement at issue was entered into and the effects of HB 3517's amendments.

As of September 1, 2005, section 305.022 of the Government Code stated:

> (a) A person may not retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.
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> (b) A person may not accept any employment or render any service to influence legislation or administrative action for compensation contingent

[3] Act of May 29, 2015, 84th Leg., R.S., ch. 815, § 4, 2015 Tex. Gen. Laws 2457.

on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

(c) For purposes of this section, a sales commission payable to an employee of a vendor of a product is not considered compensation contingent on the outcome of administrative action.

(d) This section does not prohibit the payment or acceptance of contingent fees:

(1) expressly authorized by other law; or

(2) for legal representation before state administrative agencies in contested hearings or similar adversarial proceedings prescribed by law or administrative rules.

Acts 1991, 72nd Leg., ch. 304, Sec. 2.13, eff. Jan. 1, 1992. Subsequently, in 2009, the legislature enacted House Bill 3445 ("HB 3445"),[4] which amended section 305.022(c) and added additional subsections, which stated, in relevant part:

(c) For purposes of this chapter:

(1) A sales commission payable to an employee of a vendor of a product or service is not considered compensation contingent on the outcome of administrative action if the amount of the state agency purchasing decision does not exceed 10 million dollars.

(2) A quarterly or annual compensation performance bonus payable to an employee of a vendor of a product or service is not considered compensation contingent on the outcome of administrative action.

(c-1) For purposes of this chapter, a sales commission or other such fee payable to an independent contractor of a vendor of a product or service is not considered compensation contingent on the outcome of an administrative action if:

(1) the independent contractor is a registrant who reports the vendor as a client under this chapter;

[4] Act of June 3, 2009, 81st Leg., R.S., ch. 1174, 2009 Tex. Gen. Laws 3722.

> (2) the independent contractor reports the full amount of the commission or fee in the manner required by commission rule; and
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> (3) the amount of the state agency purchasing decision does not exceed 10 million dollars.

(c-2) For purposes of this chapter, a commission or fee paid to a person by a state agency is not considered compensation contingent on the outcome of an administrative action if the person paid a commission or a fee by a state agency:

> (1) is a registrant who reports the state agency as a client under this chapter; and
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> (2) reports the full amount of the commission or fee in the manner required by commission rule.

(c-3) If the amount of compensation or fee is not known at the time of the disclosure required under Subsection (c-1), the registrant must disclose:

> (1) a reasonable estimate of the maximum amount of the compensation or fee;
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> (2) the method under which the compensation or fee will be computed; and
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> (3) such other factors as may be required by the commission by rule.

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(e) For purposes of this section, the term "employee" means a person employed full-time by an employer to perform services for compensation. The term does not include an independent contractor or consultant.

Act of June 3, 2009, 81st Leg., R.S., ch. 1174, § 4, 2009 Tex. Gen. Laws 3722.

In 2015, HB 3517 repealed sections 305.022(c-1) and (c-3), which were both added in 2009. Section 305.022(c-1) permitted contingent fees to an independent contractor of a vendor of a product or service if the contractor registered and reported certain information and if the amount of the state agency purchasing decision did not exceed 10

million dollars. That exception was only in effect from September 1, 2009, to September 1, 2015. As a result of the repeal, section 305.022 now prohibits contingent fees to independent contractors, except as provided by section 305.022(d) or other law, which do not apply in this case.[5]

Application of Contingent Fee Prohibition to a Permissible, Legally Binding Agreement

The requestor's first question is whether the agreement continues in full force and effect and is legally enforceable after the effective date of HB 3517. This question also relates to the second question, which is whether the lobby entity, if the agreement is legally enforceable, may receive income produced within the scope of the agreement from the client. The issue is whether the effects of HB 3517, specifically the repeal of section 305.022(c-1), invalidates an otherwise enforceable contract that predates the bill's effective date.

As an initial matter, we note that the amendments made by HB 3517 do not appear to impact the enforceability of the agreement because the date of the original agreement, as well as the date the agreement was amended, predates the period of time in which the repealed sections were in effect. Additionally, it does not appear that the communications made by the lobby entity related to a state agency purchasing decision, as the state agencies were not requested to purchase the client's products or services, based on the requestor's facts. However, solely for the purpose of addressing the concerns raised by the first two questions, we first address the effects of HB 3517 on a permissible, legally binding contract without addressing the legality of the specific agreement at issue in this request.

In Ethics Advisory Opinion No. 486, we considered whether the amendments made by HB 3445 prohibited a sales commission that was paid under a lobby contingency fee contract related to agency purchasing decisions that exceed 10 million dollars if the contract was legally valid, binding, in force, and signed before the bill's effective date. Ethics Advisory Opinion No. 486 (2009) ("EAO 486"). In that opinion, we recognized the general rule that an act is intended to operate prospectively and not retroactively. *Id.* (citing *Ex parte Abell,* 613 S.W.2d 255 (Tex. 1981)). We also acknowledged the provision in the Texas Constitution stating that no retroactive law or any law impairing the obligation of contracts shall be made. EAO 486 (citing Tex. Const. art. 1 § 16; also citing Gov't Code §§ 311.021(1)(2) (a statute is presumed to comply with the constitutions of this state and the United States and that the entire statute is intended to be effective). We concluded that the contingent fee prohibition, as amended, did not prohibit a person from retaining, employing, or compensating another or rendering services if the

[5] There is no indication that any other exception in section 305.022 would apply to the agreement under current law.

person is obligated to perform such activity pursuant to a contract that was legally binding before the effective date of the amendment.[6] *Id.*

We apply the same reasoning here and find no indication that the legislature intended the law, as amended by HB 3517, to prohibit payments made before September 1, 2015, the effective date of the amendment. Thus, in our opinion, section 305.022, as amended, applies prospectively to payments made only on or after September 1, 2015. The transition provision in HB 3517 also does not explicitly state that the law, as amended, applies to obligations made pursuant to legally binding contracts that predate the act, and an application of the law that would impair such obligations would appear to be contrary to the Texas Constitution. Thus, we conclude that section 305.022, as amended, does not prohibit a person from receiving compensation if the person is entitled to the compensation pursuant to a contractual obligation that was legally binding prior to September 1, 2015.

Application of Contingent Fee Prohibition to the Existing Agreement

An additional issue that arises in this request is whether the terms of the specific agreement are permissible under the contingent fee prohibition, regardless of the effects of HB 3517. As defined, administrative action would include a decision made by state agency members to grant approval of the use of the client's products and services by the agency's licensees for purposes of obtaining or maintaining occupational licenses. Gov't Code § 305.002(1). Thus, the communications made by the lobby entity, or by individual registrants communicating on behalf of the entity, to state agency officers or employees would be subject to chapter 305.

Section 305.022(a) prohibits, in relevant part, a person from retaining or employing another person to influence administrative action for compensation that is totally or partially contingent on the outcome of any administrative action. Gov't Code § 305.022(a). For purposes of that prohibition, the critical factor in the permissibility of the agreement is whether the compensation is "totally or partially contingent" on the outcome of administrative action.

The requestor states that the lobby entity's compensation under the agreement was contingent upon the actions of the licensees who chose to purchase and use the client's products. The implication is that the compensation is not contingent on a decision made by a member of a state agency to approve the use of the client's products and services. However, the requestor also states that if the state agencies had not originally provided approval of the client's products, then, in all likelihood, the products would not have been used by the licensees, and no compensation would have flowed from the licensees to the client and, ultimately, to the lobby entity. Based on the facts as provided by the requestor,

[6] Whether a contractual obligation is legally enforceable depends upon the terms of the contract and the application of then-existing law. *See* Langever v. Miller, 124 Tex. 80, 94 (1934) (stating that the obligation of a contract is the means the law afforded for its enforcement at the time of its creation).

compensation paid by the client to the lobby entity pursuant to the agreement would be partially contingent on decisions made by state agency members to approve their licensees' use of the client's products and services, and thus would be covered by the prohibition. *See* Ethics Advisory Opinion No. 98 (1992) (stating that the prohibition applies if a business retains or employs a broker to obtain a bank loan guarantee from a state agency and the broker's payment is made contingent on the successful completion of a larger transaction that includes administrative action by the agency). Section 305.022(b) prohibits, in relevant part, a person from accepting any employment or rendering any service to influence administrative action for compensation contingent on the outcome of any administrative action. Gov't Code § 305.022(b). In our opinion, that prohibition equally applies to the situation at hand and, therefore, based on the facts provided, the terms of the agreement at issue are not permissible under the law prior to and after HB 3517.[7]

Application of Contingent Fee Prohibition to a New Agreement

The requestor's third question is whether the agreement, if entered into under the current law, would violate the contingent fee prohibition. As previously discussed, the requestor's facts, as provided, indicate that the services to be rendered by the lobby entity under the agreement would be for compensation contingent on the outcome of administrative action. Thus, the agreement would violate section 305.022 of the Government Code.

SUMMARY

Based on the facts as provided in this opinion, the terms of the specific agreement at issue are not permissible under section 305.022 of the Government Code, either as amended by House Bill 3517 of the 84th Legislature or in effect at the time the agreement was executed. Section 305.022, as amended, does not prohibit a person from receiving compensation if the person is entitled to the compensation pursuant to a contractual obligation that was legally binding prior to September 1, 2015.

[7] In previous advisory opinions, we considered the application of section 305.022(b) to compensation paid to attorneys who were specifically hired for legal representation under certain circumstances. *See* Ethics Advisory Opinion Nos. 455 (2004), 352 (1996). In each opinion, we noted that the attorneys who sought legislative changes, for different reasons, could potentially receive compensation for their services regardless of the actual outcome of the legislation that they sought to influence. Those determinations are distinguishable from the requestor's circumstances because, in part, it appears that under the terms of the agreement as described, the lobby entity was specifically hired to influence administrative action and would receive no compensation without a favorable outcome of that action.