

Bill exempts some lawyers from lobbyist registration

A change in Georgia's laws meant to clarify who is exempt from registering as a lobbyist could make it easier for some lawyers to avoid registering, according to some lawmakers and government transparency proponents.

Under House Bill 142, attorneys don't have to register as long as they are "not compensated for the specific purpose of lobbying."

The current law exempts "any licensed attorney appearing on behalf of a client in any adversarial proceeding before an agency of this state or any political subdivision of this state."

Lawyer-lawmakers who supported the bill have dismissed worries about the new lawyer exemption provision as overblown. But they also said they expect the law to be edited next year.

HB 142 passed the General Assembly on the last day after contentious debates between the House and Senate as well as with taxpayer and open government advocates. The final version is a mash-up of a bill proposed by House Speaker David Ralston and rules adopted by the Senate in January.

The bill restricts lobbyists from spending more than \$75 on a lawmaker at one time, but there is no aggregate limit. It also tightens lobbyist registration requirements to net more people who appear before the Legislature to influence bills.

After the House and Senate unanimously passed the conference committee's version of the bill, it is now on the desk of Governor Nathan Deal. Deal's spokesman told the Associated Press last week that the governor thinks the bill is "a good first step."

Sen. Josh McKoon, a Republican lawyer from Columbus who has aligned himself with Tea Party conservatives on ethics reform, said the bill is not clear about whether an attorney hired to work with a client on legislation among myriad other duties is required to register.

"If I have an engagement letter with an attorney that says I want you to draft legislation and do three or four other things that are strictly legal functions, then is that person able to escape lobbying laws?," he said.

"There's a gray area that could be exploited, and I don't know how you answer that with the language that we've got."

William Perry, executive director of Common Cause Georgia, which monitored the bill and advocated for stricter registration requirements, expressed concern that lawyers who counsel legislators on purely legal matters could skirt transparency when the lawyers give advice on bills.

"I could easily see a legislator having an attorney-client relationship with somebody and getting advice [on legislation]. If they're offering that person to a caucus meeting or committee discussion or closed-door meeting, that would essentially turn that attorney into a lobbyist," Perry said.

"If I go to the Capitol to advise a client and that expands into a circle of four or five more legislators ... I'm lobbying. But if you're an attorney, who is protected by attorney-client privilege, are you exempt?"

House Majority Whip Edward Lindsey, R-Atlanta, who co-sponsored the bill with the House speaker, said he doesn't think the change will reduce the number of lawyers currently registered as lobbyists.

"Quite frankly, it's much ado about nothing," said Lindsey, who is a partner at Goodman McGuffey Lindsey & Johnson. "All it does is recognize that a licensed attorney representing a client and doing legal work for a client may be engaged with the state in legal activities."

Lindsey said the bill's definition of lobbyist, which includes anyone who receives more than \$250 a year for promoting or opposing legislation or who spends more than \$1,000 in a calendar year on a lawmaker, would actually result in more people, including lawyers, having to register.

McKoon and Perry said they don't read the bill that way. In their interpretation, the lawyer exemption provision would supersede the lobbyist triggers that Lindsey referenced..

"One thing we want to ask the ethics commission for immediately is an opinion about whether the triggers catch attorneys, as well," Perry said.

HB 142 restores the ethics commission's rule-making authority, which the Legislature removed in 2009, but it wouldn't go into effect until January.

Josh Belinfante, a partner at **Robbins Ross Alloy Belinfante Littlefield** and a former ethics commissioner, said he expects the commission will be more involved in deciding questions about who has to register when it has rule-making authority.

HB 142 strikes a portion of current law that requires lawyers who are not specifically retained to lobby but who spend more than 10 percent of their working hours engaged in lobbying activities to register. Belinfante said the deleted provision was intended to identify companies' general counsel and chief financial officers as lobbyists.

Belinfante was registered as a lobbyist from 2007 to 2011. He said he spends less than 10 percent of his time on lobbying.

To determine whether someone is specifically compensated for lobbying, the commission could look at engagement letters for contracted private attorneys or job descriptions for in-house counsel, he said.

"If you happen to go down [to the General Assembly] and explain how ERISA [the federal Employee Retirement Income Security Act] affects your business one day, you shouldn't have to register," said Belinfante, whose practice includes health care and government law. "And there are folks who just draft legislation and never advocate for legislation. I would suggest they are not engaged in lobbying.

"I'll take it one step further," he added. "I can draft legislation and analyze amendments, but as long as I'm not down talking to legislators about it or assisting others in terms of strategy, to me, that is nuts and bolts

practice of law and not lobbying."

The current law's exemption of lawyers involved in adversarial proceedings also has been the source of stress and uncertainty about whether lawyers must register. Because the ethics commission does not have rule-making authority, the board could not clarify the exemption for the legal community, Belinfante said.

Belinfante, who handled certificate-of-need work that required him to appear before the state Department of Community Health, said he registered as a lobbyist while on the ethics commission, even though he believed his work was adversarial and exempted him from the requirement.

McKoon said he's worried that lobbying firms may use attorneys to evade expenditure restrictions.

"If I've got a lobbying firm full of nonlawyers and I want to get around the gift cap, then perhaps I hire an attorney and that attorney does all the entertaining," he said.

McKoon said he chalks up the provision's murkiness not to drafters' intentionally creating a loophole but to the rush to pass legislation, which yielded a chaotic and messy process.

"The real problem is ... that we should not, in the final 48 hours of the legislative session, be furiously making changes to these areas of the law," he said. "They are complicated; they are nuanced. There are a lot of questions I think [the bill] raises that couldn't possibly have been fully contemplated in a seven-hour conference committee session."

Perry said he also doesn't suspect sneaky intent by the bill's sponsors and drafters but was surprised by the provision's appearance.

"It just kind of popped up in the last version of the bill we saw," he said.

None of the lawmakers or stakeholders interviewed by the *Daily Report* said they knew where the new exemption language came from or who suggested it.

State Bar of Georgia President Robin Frazer Clark said the bar did not request the lawyer exemption provision, nor was it asked to vet it.

"We didn't take any position on it. We didn't know about it until the end of the session," she said.

The bar's lobbyists, some of whom are attorneys, reviewed it and found that it would not affect their obligation to register, Clark said.

"My sense is that the provision in question was an attempt by staff under very challenging time constraints to consolidate and simplify that provision to align it with the intent of that provision: lawyers didn't have to register unless they were lobbying as defined in the bill," said House Judiciary Non-Civil Committee Chairman Rich Golick, R-Smyrna, via email. Golick was on the conference committee that hammered out the final version of the bill.

"It appears conceivable that a lawyer could find a way around the registration requirement, and it is also very likely that the same lawyer would find himself the subject of an ethics complaint as well as a bar complaint, thereby seriously damaging his personal reputation and credibility—and it's very hard to unring that bell," Golick added. "So, the hyperventilating on this issue may be a bit misplaced."

Lawmakers are likely to continue working on cleaning up the legislation next year, after the ethics commission has had time to study the practical implications of the new law, Golick said.