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Opinion No. 01-083

"Consulting Services" under Senate Bill 239/House Bill 344

QUESTIONS

Two different sets of amendments have been adopted or proposed to Senate Bill 239/House Bill 344. The House adopted 3 amendments to House Bill 344 (the "House Version"). The Senate has proposed two amendments to Senate Bill 239 (the "Senate Version").

1. Does either the House Version or the Senate Version require a lawyer to disclose his clients and the fees that he receives from them?

2. Is the practice of law sufficiently defined and distinguished from consulting to require the disclosure of consulting fees as opposed to fees for practicing law as an attorney?

OPINIONS

1. Under the Senate Version, a state or local official to whom the bill applies and who is engaged in the private practice of law must disclose information regarding legal clients who fall within the group of persons or entities — and their subsidiaries — who do business with the state, city, or county the official represents or who do business with state, city, or county contractors. Under the House Version, officials would not be required to disclose this information it if would violate the Code of Professional Responsibility, Rule 8 of the Rules of the Tennessee Supreme Court. This Office does not interpret the Code of Professional Responsibility, and only the Tennessee Supreme Court could provide a definitive ruling on whether compliance with the disclosure requirements would violate an attorney's ethical duty to preserve the confidences of his or her client. But research regarding interpretation of the duty and the corresponding testimonial privilege by Tennessee and other courts indicates that information such as the identity of the client, attorney's fees, and the general nature of the service performed are not usually subject to the privilege. The only exception to this rule is where revealing the identity of the client or other information would be probative or relevant to a criminal charge against the client. For this reason, both versions would probably require the disclosure of this information unless this exception applies.

2. We have found no statute that would sufficiently define and distinguish the practice of law from providing "consulting services" so as to exempt attorneys from the disclosure requirements otherwise

applicable under the proposed bills.

ANALYSIS

1. Requirements of the Proposed Bills

You have asked this Office to interpret two different versions of Senate Bill 239/House Bill 344. Research indicates that the House has adopted three amendments to the bill as originally filed. These amendments are House Amendments 0275, 0276, and 0370 (the "House Version"). The Senate has proposed, but has not adopted, two amendments to Senate Bill 239 as originally filed. These amendments are Senate Amendments 374 and 375 (the "Senate Version").

The House Version and the Senate Version are identical with two exceptions, only one of which is material to your question. The House Version adds four new sections to the disclosure requirements at Tenn. Code Ann. §§ 2-10-101, *et seq.* In that version, section 2-10-122 would impose new disclosure requirements on various entities that do business with the State. Subsection (a)(1) provides:

> If any person or other entity that does business with the state of Tennessee in any capacity, any subsidiary of such person or entity, any entity that contracts with such person or entity or any entity that contracts with an entity that contracts with such person or entity, pays a fee, *including a retainer*, commission or any other form of compensation to an official in the legislative branch, an official in the executive branch, or the immediate family of either type of official, for consulting services, then such person or entity, or subsidiary or contractor of such person or entity shall disclose the following to the registry of election finance:
>
> (A) The person to whom the fee was paid;
>
> (B) The position of the person to whom the fee was paid;
>
> (C) The amount of the fee;
>
> (D) The date the services were rendered; and
>
> (E) A description of the services rendered.

Proposed 2-10-122(a)(1) (emphasis added). Subsection (a)(2) requires entities that do business with a city or county, subsidiaries of those entities, and entities that contract with contractors of those entities to disclose similar fees paid to city or county officials or their immediate families.

The new section 2-10-123 provides in relevant part:

> (a)(1) Any member of the general assembly or member elect of the general assembly who receives a fee, commission or any other form of compensation for consulting services from a person or entity doing business with the state, any subsidiary of such person or entity, any entity that contracts with such person or entity or any entity that contracts with an entity that contracts with such person or entity, shall be required to make the same disclosure required by § 2-10-122.

Subsection (a)(2) requires members and members-elect of city and county legislative bodies to disclose similar fees they receive from entities that do business with the city or county, subsidiaries of those entities, and entities that contract with contractors of those entities. An official who accepts a fee covered by the statute and knowingly fails to disclose it commits a Class A misdemeanor. With respect to state officials, the term "consulting services" includes

> services for influencing legislative or administrative action as such term is defined in § 3-6-102(10) *or providing consulting services for any purpose*, including services to advise or assist such person or entity in maintaining, applying for, soliciting or entering into a contract with the state.

Proposed 2-10-121(1) (emphasis added). With respect to city or county officials, the term "consulting services" includes:

> services for influencing legislative or administrative action *or providing consulting services for any purpose*, including services to advise or assist such person or entity in maintaining, applying for, soliciting or entering into a contract with the municipality or county represented by such official. For purposes of this subdivision, the term "influencing legislative or administrative action" includes promoting, supporting, influencing, modifying, opposing or delaying any action of the county or municipality which the official represents by any means, including, but not limited to, the provision or use of information, statistics, studies, or analyses, but not including the furnishing of information, statistics, studies, or analyses requested by a municipal or county official to such official or the giving of testimony by an individual testifying at an official hearing conducted by officials of the county or municipality.

Proposed 2-10-121(2) (emphasis added).

Under the House Version, a new section 2-10-124(c) would provide:

> Nothing in this act shall be construed to require an attorney to violate in any manner the Code of Professional Responsibility, Rule 8 of the Supreme Court of the State of Tennessee.

The Senate Version is identical to the House Version with two exceptions: first, the Senate Version imposes civil rather than criminal penalties for disclosure violations. Second, the Senate version does not contain section 2-10-124(c) quoted above.

a. Legal Advice as "Consulting Services"

Both the House Version and the Senate Version contain identical definitions of "consulting services." The first issue, then, is whether these definitions would include legal services provided by a lawyer. If these definitions include those services, then the Senate Version would require legal clients of a state or local official who do business with the state or the local government, or who do business with state or local government contractors, to disclose fees paid to the official, the date the fees were paid, to whom the fees were paid, and a description of the services the client received as well as the other information. The official would be required to make the same disclosure. Under the House Version, if these definitions include legal services, an official would not be required to disclose this information with regard to his or her legal services if that disclosure violates the Code of Professional Responsibility, Rule 8 of the Tennessee Supreme Court.

Words of a statute are to be given their ordinary meaning. *State v. Williams*, 690 S.W.2d 517, 529 (Tenn. 1985). Under the definitions quoted above, the term "consulting services" includes "providing consulting services for any purpose." The verb "consult" is defined as follows:

> --*tr.* 1.a. To seek advice or information of: *consult an attorney*. b. to refer to: *consult a directory*. 2. To have an eye to; consider: *consult one's bank book before making a major purchase*. --*intr.* 1. To exchange views; confer. 2. To give expert advice as a professional.

American Heritage Dictionary 315 (2nd college ed. 1982) (emphasis in original). As noted above, the bill also expressly refers to any fee ". . . *including a retainer*, commission or any other form of compensation" paid to a legislative or executive state official or a member of a city or county legislative body. (Emphasis added). The dictionary defines "retainer" in relevant part as:

> 1. The act of retaining a professional adviser, *as a lawyer*. 2. The fee paid to engage the services of a professional adviser.

American Heritage Dictionary 1055 (2nd college ed. 1982) (emphasis added). For this reason, we think

a court would conclude that the disclosure requirements would require a state or local official to whom they apply to disclose information regarding his or her legal clients. Under the Senate Version, therefore, a state or local official to whom the bill applies must disclose information regarding legal clients who fall within the group of persons or entities — and their subsidiaries — who do business with the state or who do business with state contractors. Under the House Version, these officials would not be required to disclose this information if such disclosure would violate the Code of Professional Responsibility contained in Rule 8 of the Rules of the Tennessee Supreme Court.

b. Ethical Duty to Preserve the Confidences of a Client

The question, then, becomes whether the Code of Professional Responsibility would prohibit attorneys from disclosing the identity of their clients, the fees they receive from them, and the services performed for them. We assume the House Version proviso refers to the duty of a lawyer to preserve the confidences and secrets of a client, which appears in Canon 4 of the Code of Professional Responsibility. To the extent this responsibility coincides with the attorney-client privilege, it is also codified at Tenn. Code Ann. § 23-3-105, which is essentially a codification of the common law principle. Under the attorney-client privilege, matters disclosed by a client to an attorney within the attorney-client relationship are confidential.

The Tennessee Supreme Court has original and exclusive jurisdiction to promulgate its own rules, and its rule-making authority embraces the admission and supervision of members of the Bar of the State of Tennessee. *Petition of Tennessee Bar Association*, 539 S.W.2d 805, 807 (Tenn. 1976). The Tennessee Supreme Court has stated that the Legislature is without authority to enact laws that impair an attorney's ability to fulfill ethical duties as an officer of the court. *Smith County Education Association v. Anderson*, 676 S.W.2d 328, 334 (Tenn. 1984). This Office does not provide interpretations of the Code of Professional Responsibility. That authority is accorded to the Tennessee Board of Professional Responsibility. Our research on the subject, however, indicates that a public officer would not necessarily violate Canon 4 by disclosing the information required to be disclosed under the proposed statute.

The attorney-client privilege only extends to communications from the client to the attorney. *Smith County Education Association v. Anderson, supra* at 33. In interpreting the codification of the attorney-client privilege, the language of which was identical to Tenn. Code Ann. § 23-3-105, the Tennessee Supreme Court noted:

> This language excludes all communications, and all facts that come to the attorney in the confidence of the relationship. But there are many transactions between attorney and client that have no element of confidence in them, of which he is competent to testify. For instance, he may prove his client's handwriting, may prove what money was collected by him, when paid over, and to whom paid.

Johnson v. Patterson, 81 Tenn. 626, 649(1884) (attorney was permitted to testify regarding his

administration of an estate). Other courts interpreting the scope of the attorney-client privilege have concluded that, as a general matter, information such as the name of the client, attorney's fees, and the scope and nature of the employment is not covered by the attorney-client privilege. *Humphreys, Hutcheson & Moseley v. Donovan*, 568 F. Supp. 161, 175 (M.D. Tenn. 1983), *aff'd* 755 F.2d 1211 (6th Cir. 1985); *Clarke v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992), *rehearing denied*, 977 F.2d 1533 (9th Cir. 1992) (attorney billing statements from outside counsel to a regulated bank were not protected from disclosure to the regulating agency by the federal common law attorney-client privilege, where the statements merely contained information on the identity of the client, the case name for which payment was made, the amount of the fee, and the general nature of the services performed and did not reveal specific research or litigation strategy). *See also, Dietz v. Doe*, 131 Wash.2d 835, 845, 935 P.2d 611, 616 (1997) (the identity of the client is usually not privileged under the state's attorney-client privilege law). The only exception to this rule is where revealing the identity of the client or other information would be probative or relevant to a criminal charge against the client. *See, e.g., United States v. Robinson*, 121 F.3d 971 (5th Cir. 1997), *cert. denied*, 522 U.S. 1065, 118 S.Ct. 731 (1998). In a somewhat different context, the Tennessee Court of Criminal Appeals recently found that public inspection of the summary sheets showing legal fees charged by an indigent defendant's attorney would not prejudice the defendant's right to a fair trial. *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359 (Tenn.Crim.App. 1998), *p.t.a. denied* (Tenn. 2000). The Court also expressly found that revelation of these documents would not compromise the attorney-client privilege. For this reason, we think that a public official practicing law would probably be required to disclose the information required under either the Senate Version or the House Version of the proposed bill.

2. Distinction between the Practice of Law and Provision of Consulting Services

The second question is whether the practice of law is sufficiently defined and distinguished from consulting to require the disclosure of consulting fees as opposed to fees for practicing law as an attorney. We assume your question is whether other provisions of state law would make it clear that the disclosure requirements under the proposed bills do not apply to the practice of law because such practice is not the provision of "consulting services." Neither the House Version nor the Senate Version references other code sections that might clarify this distinction. Both versions state that:

> The provisions of §§ 2-10-121, 2-10-122, and 2-10-123 do not apply to the services or actions of a person to whom this act would otherwise apply, if such person, with respect to such service or action, files a disclosure in accordance with the provisions of Tennessee Code Annotated, Title 3, Chapter 6, Part 1.

Under Tenn. Code Ann. §§ 3-6-101, *et seq.*, a paid lobbyist must register with the Registry of Election Finance and disclose his or her lobbying activities, including business arrangements with any candidate for public office and any official in the legislative or executive branch. Tenn. Code Ann. § 3-6-106. An attorney who represents a client before an official in the executive branch for the purpose of

determining the client's legal rights and obligations is not required to register as a lobbyist. Tenn. Code Ann. § 3-6-104(d)(2). But the activities to which the proposed bill would apply, and the individuals who must make the required disclosures, are much broader than those to which the state lobbying laws apply. The fact that an attorney need not register as a lobbyist does not prevent that individual from being subject to the proposed bill. Other statutes regulating the "practice of law", similarly, define the business of law but nowhere indicate that such business cannot be classified as the provision of consulting services under the proposed bill.

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