April 15, 1992

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Advisory Opinion No. 04-1992

Dear Mr. Hogan:

The Commission has directed me to issue this response to your recent request for an advisory opinion. You have asked two questions concerning reporting under the "Legislative Activities Disclosure Act of 1971," N.J.S.A. 52:l3C-l9 et seq., as amended by chapters 243 and 244 of the Laws of 1991 (hereafter, the "Lobbying Act").

You write that Porzio, Bromberg & Newman (hereafter, "the law firm"), and yourself as an attorney in that firm, represent clients in environmental matters. For the purpose of this opinion, the Commission infers from your inquiry that you specifically undertake and are compensated for activities in regard to influencing environmental regulations on behalf of your clients, but for some trade association clients your lobbying activity is undertaken on a pro bono basis.

Question No. 1

You have asked whether you must file a Notice of Representation pursuant to N.J.S.A. 52:13C-21 for those trade association clients for whom you serve as a legislative agent on a pro bono basis.

The Latin term "pro bono" is used to describe legal services performed free of charge; see Black's Law Dictionary, p. 1082 (5th ed. 1979). Therefore, the Commission infers from your use of the term "pro bono" that no fees or expense reimbursements are being billed or generated for lobbying representation of these trade association clients. However, no information has been provided on whether

the trade association clients, or their member entities, are billed for or paying any fees or reimbursements to the firm for any other legal services, or whether the firm has any financial interest in any of the trade association clients, or member entity.

The Lobbying Act prescribes at N.J.S.A. 52:l3C-2la, as amended by Chapters 243 and 244 of the Laws of 1991, which persons must file Notices of Representation, and what information the Notices must contain. There is some ambiguity in the statutory language concerning the filing obligation of a legislative agent-attorney who is not receiving a fee. Arguably, an attorney not receiving a fee "engages himself" to conduct lobbying within the meaning of those words as they appear in the above-cited statute. However, an examination of the actual information that the statute requires to be disclosed on the Notice itself leads to the conclusion that in the absence of some "compensation" from the client to the agent, no information needs to be provided. For example, the agent reports the name "... of the person from whom he receives compensation for acting as a legislative agent;" see paragraph (2) of Section 2la. No parallel requirement to list the name of the person engaging the agent without a fee appears. Similarly, all other information about the client that must be provided is predicated on the element of "compensation;" see paragraphs (3), (4), (5), (6), and (7) of Section 2la.

The term "compensation" is defined in Commission Regulations N.J.A.C. 19:25-20.2 as a "receipt," which in turn is defined as follows:

> "Receipt" includes every loan, gift, contribution, fee, subscription, salary, advance or transfer of money or other thing of value, including any item of real property or personal property, tangible or intangible, and paid personal services (but not including voluntary services provided without compensation) made to any legislative agent or lobbyist and any pledge or other commitment or assumption of liability to make such transfer. Any such commitment or assumption shall be deemed to have been a receipt upon the date when such commitment is made or liability assumed.
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> 1. For the purposes of this subchapter, the term "receipt" shall include, but not be limited to, compensation by way of salary, fees, allowances, retainers, reimbursement of expenses, or other similar compensation, when received by a legislative agent. For purposes of this subchapter, the term "receipt" shall also include, but not be limited to, contributions by way of fees, dues, gifts or other similar contributions when received by a lobbyist.

The above-quoted regulation contemplates that an intangible thing of value can be viewed as "compensation" to a legislative agent. The Commission submits that an opportunity to provide legal services to a fee-paying client could be viewed as such an intangible thing of value to an attorney. Therefore, before the Commission could conclude that an attorney received no "compensation" for providing pro bono lobbying services to a trade association client, the Commission would have to be advised whether the trade association, or any of its member entities, were being billed or paying fees to the attorney for legal services other than lobbying, or if there was some other financial interest of the attorney or firm that might constitute an intangible thing of value. However, if no "compensation" as described herein is received, a legislative agent is not required to file a Notice of Representation pursuant to N.J.S.A. 52:l3C-2la.

Question No. 2

You have also asked whether an attorney who prepares comments on proposed or existing regulations for a client must file a Notice of Representation as a legislative agent for that client if the attorney makes no oral testimony.

The statutory definition of the term "legislative agent" contemplates a person who undertakes for compensation activities ". . . to influence legislation, or to influence regulation, or both, by direct or indirect communication with ... (a State legislative or regulatory official covered under the 'Lobbying Act');" see N.J.S.A. 52:l3C-20(g), as amended by Section 3 of chapter 243, of the Laws of 1991. Therefore, even if an attorney receives compensation for consulting with a client in regard to a potential lobbying communication, that attorney does not become a "legislative agent" on behalf of that client within the meaning of the above-cited statutory definition unless the attorney also undertakes to make or deliver a lobbying communication for the client.

In the absence of any agreement or understanding that the attorney undertake some lobbying communication by written, oral, or other means, exclusive control over the delivery of the potential lobbying communication remains with the client alone. It is conceivable that after the consultation or preparation of testimony by the attorney, the client may choose never to deliver that communication. However, if the client authorizes the attorney to deliver any communication, or deliver any benefit, to a State official covered by the "Lobbying Act," the attorney would meet the statutory definition of a "legislative agent" and a Notice of Representation for that client would be required.

Thank you for this inquiry.

Very truly yours,

ELECTION LAW ENFORCEMENT COMMISSION

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By: GREGORY E. NAGY
Legal Director

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