

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2015-EC-001 Issued May 15, 2015

The Arkansas Ethics Commission has received a written advisory opinion request from Max Brantley of Little Rock, Arkansas. Therein, he raises the following series of questions:

- 1. If a political party establishes a special committee for an event hosted by the political party and attended by legislators, may lobbyists solicit and make contributions to that special committee?*
- 2. Are there any restrictions on a political party providing free entertainment to legislators?*
- 3. Are employees of a political party who are paid more than \$400 in a calendar quarter and deal regularly with legislators on legislative matters required to register as lobbyists?*
- 4. Is there any restriction against multiple planned activities being held at the same time making-it unlikely that all members of a specific governmental body will actually attend a particular event?*

Before addressing these questions, relevant statutory provisions concerning lobbying and gifts will be set forth. With respect to lobbying, there are two (2) statutes, Ark. Code Ann. §§ 21-8-402 and 21-8-601, which have a bearing on the questions presented. The first of these statutes, Ark. Code Ann. § 21-8-402, contains definitions of significant terms and provides, in pertinent part, as follows:

(1) (A) "Administrative action" means any decision on, or proposal, consideration, or making of any rule, regulation, ratemaking proceeding, or policy action by a governmental body.

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(8) "Legislative action" means introduction, sponsorship, consideration, debate, amendment, passage, defeat, approval, veto, or any other official action or nonaction on any bill, ordinance, law, resolution, amendment, nomination, appointment, report, or other matter pending or proposed before a committee or

house of the General Assembly, a quorum court, or a city council or board of directors of a municipality;

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(10) "Lobbying" means communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action;

(11) "Lobbyist" means a person<sup>1</sup> who:

(A) Receives income or reimbursement in a combined amount of four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies;

(B) Expends four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies, excluding the cost of personal travel, lodging, meals, or dues; or

(C) Expends four hundred dollars (\$400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with any public servant to influence any legislative action or administrative action of one (1) or more governmental bodies unless the communication has been filed with the Secretary of State or the communication has been published in the news media. If the communication is filed with the Secretary of State, the filing shall include the approximate number of recipients;

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The second such statute, Ark. Code Ann. § 21-8-601, sets forth exceptions to the lobbyist registration requirements. It provides, in pertinent part, as follows:

(3) A lobbyist shall not be required to register if he or she engages in no lobbying other than the following activities:

(A) The publishing or broadcasting, by news media executives or their employees or agents, in the ordinary course of business, of news items, editorials, or other comments or paid advertisements which directly or indirectly urge legislative action or administrative action;

(B) Engaging in lobbying exclusively on behalf of an Arkansas church which qualifies as a tax exempt organization under § 501(c)(3) of the Internal Revenue Code when lobbying solely for the purpose of protecting the rights of members or adherents to practice the religious doctrines of the church;

(C) (i) Action in a person's official capacity as a public servant.

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<sup>1</sup> 21-8-402 (14) "Person" means a business, individual, corporation, union, association, firm, partnership, committee, club, or other organization or group of persons.

(ii) However, a public servant shall be required to register as a lobbyist if he or she:

(a) Receives income from a nongovernmental person in excess of four hundred dollars (\$400) in a quarter for lobbying; or

(b) Expends or is reimbursed in excess of four hundred dollars (\$400), regardless of the source, in a quarter for lobbying, excluding the cost of informational material and personal travel, lodging, meals, and dues;

(D) Drafting legislation;

(E) Appearing in:

(i) A judicial proceeding;

(ii) A proceeding or hearing if the appearance is a matter of public record; or

(iii) Any hearing or appeal proceeding conducted pursuant to the Arkansas Administrative Procedure Act, § 25-15-201 et seq.;

(F) Assisting an executive agency, at the written request of the agency, in drafting administrative regulations or in publicizing or assisting in the implementation of final administrative actions;

(G) Testifying as an individual at a public hearing in support of or in opposition to legislation or administrative action, testifying on behalf of a corporation, partnership, association, or other organization with which the person is regularly associated as an employee, officer, member, or partner, or testifying at the request of a legislative committee; or

(H) Actions by contractors or employees of contractors while engaged in selling to a governmental body by demonstrating or describing commodities or services or inquiring as to specifications or terms and conditions of a particular purchase unless such contractor or its employees expend in excess of four hundred dollars (\$ 400) in a calendar quarter for food, lodging, travel, or gifts to benefit public servants who purchase commodities or services on behalf of a governmental body.

Turning to gifts, there are also two (2) statutes, Ark. Code Ann. §§ 21-8-801 and 21-8-402, which have a bearing on the questions presented. The first of these statutes, Ark. Code Ann. § 21-8-801, provides, in pertinent part, as follows:

(a) No public servant<sup>2</sup> shall:

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<sup>2</sup> Ark. Code Ann. § 21-8-402(18) defines "Public servant" to mean all public officials, public employees, and public appointees. Ark. Code Ann. § 21-8-402(17) defines "Public official" to mean a legislator or any other person holding

(1) Receive a gift or compensation as defined in § 21-8-401 et seq., other than income and benefits from the governmental body to which he or she is duly entitled, for the performance of the duties and responsibilities of his or her office or position; or

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(b) (1) No person shall confer a gift or compensation as defined in § 21-8-401 et seq. to any public servant, the receipt of which is prohibited by subdivision (a)(1) of this section.

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The second such statute, Ark. Code Ann. § 21-8-402 (5), defines "Gift" to mean "any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor." It goes on to provide that:

(B) The term "gift" does not include:

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(vii) (a) Anything with a value of one hundred dollars (\$100) or less.

(b) The value of an item shall be considered to be less than one hundred dollars (\$100) if the public servant reimburses the person from whom the item was received any amount over one hundred dollars (\$100) and the reimbursement occurs within ten (10) days from the date the item was received;

Finally, it bears mentioning that in the 2015 general election, Issue 3 (now "Constitutional Amendment No. 94") was passed by the voters of Arkansas. During the 90<sup>th</sup> General Assembly, the Arkansas Legislature passed SB 967, which became Act 1280, amending the language of Amendment 94 to add additional provisions. That Act provided, in pertinent part, as follows:

#### §30 Gifts from lobbyist.

(a) Persons elected or appointed to the following officers shall not knowingly or willfully solicit or accept a gift from a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist:

- (1) Governor;
- (2) Lieutenant Governor;
- (3) Secretary of State;
- (4) Treasurer of State;
- (5) Auditor of State;
- (6) Attorney General;

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an elective office of any governmental body, whether elected or appointed to the office, and shall include such persons during the time period between the date they were elected and the date they took office;

- (7) Commissioner of State Lands;
- (8) Member of the General Assembly;
- (9) Chief Justice of the Supreme Court;
- (10) Justice of the Supreme Court;
- (11) Chief Judge of the Court of Appeals;
- (12) Judge of the Court of Appeals;
- (13) Circuit court judge;
- (14) District court judge;
- (15) Prosecuting attorney; and
- (16) Member of the independent citizens commission for the purpose of setting salaries of elected constitutional officers of the executive department, members of the General Assembly, justices, and judges under Article 19, § 31, of this Constitution.

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(2)(A) "Gift" means any payment, entertainment, advance, services, or anything of value, unless consideration of equal or greater value has been given therefor.

(B) "Gift" does not include:

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(ii) Gifts that are not used and which, within thirty (30) days after receipt, are returned to the donor;

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(iv) Anything of value that is readily available to the general public at no cost;

(v) (a)(1) Food or drink available at a planned activity to which a specific governmental body is invited, including without limitation a governmental body to which a person elected or appointed to an office under subsection (a) of this section is not a member.

(2) If a committee of the General Assembly is invited to a planned activity under subdivision (b)(2)(B)(v)(a)(1) of this section, only members of the committee of the General Assembly may accept food or drink at the planned activity.

(b)(1) As used in this subdivision (b)(2)(B)(v), "planned activity" means an event for which a written invitation is distributed electronically or by other means by the lobbyist, person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist to the members of the specific governmental body at least twenty-four (24) hours before the event.

(2) As used in this subdivision (b)(2)(B)(v), "planned activity" does not include food or drink available at a meeting of a specific governmental body for which the person elected or appointed to an office under subsection (a) of this section is entitled to receive per diem for attendance at the meeting.

(c) A lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist shall not offer or pay for food or drink at more than one (1) planned activity in a seven-day period;

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**First Question Presented:**

*If a political party establishes a special committee for an event hosted by the political party and attended by legislators, may lobbyist solicit and make contributions to that special committee?*

The Commission notes that there is no specific prohibition against a lobbyist contributing to a special committee set up by a political party<sup>3</sup> to host an event for legislators. If the lobbyist was soliciting contributions for the event, however, then the political party could be viewed as "a person acting on behalf of the lobbyist" with respect to such event, because the party would nominally be hosting an event that is actually planned and paid for by the lobbyist. Under that scenario, the event would fall within the scope of the basic prohibition in Amendment 94 against gifts from lobbyist.

In that regard, the Commission notes that there is still a potentially applicable exception to the "gift prohibition" found in Amendment 94 (as amended by Act 1280). If the event is a "planned activity", i.e., "an event for which a written invitation is distributed electronically or by other means by the lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist to the members of the specific governmental body at least twenty-four (24) hours before the event," then any "food or drink available at that planned activity to which a specific governmental body is invited" would be excepted from the Amendment 94 lobbyist gift prohibition.

**Second Question Presented:**

*Are there any restrictions on a political party providing free entertainment to legislators?*

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<sup>3</sup> Ark. Code Annotated § 7-1-101(21) provides (A) "Political party" means any group of voters that at the last preceding general election polled for its candidate for Governor in the state or nominees for presidential electors at least three percent (3%) of the entire vote cast for the office.

(B) A group of electors shall not assume a name or designation that is so similar in the opinion of the Secretary of State to that of an existing political party as to confuse or mislead the voters at an election.

(C) When any political party fails to obtain three percent (3%) of the total votes cast at an election for the office of Governor or nominees for presidential electors, it shall cease to be a political party;

As stated above, Amendment 94 contains a prohibition against public officials and public appointees included within the scope of the prohibition (which includes members of the General Assembly) from accepting a gift from “a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist.” If the political party met the definition of a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, then there would be a prohibition on a political party providing free entertainment to legislators. In that regard, it is noted that “entertainment” is specifically listed in the Amendment 94 definition of “gift.”

As previously stated, "lobbying" means communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action, and a "lobbyist" is a person who: receives income or reimbursement in a combined amount of four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies; expends four hundred dollars (\$400) or more in a calendar quarter for lobbying one (1) or more governmental bodies, excluding the cost of personal travel, lodging, meals, or dues; or expends four hundred dollars (\$400) or more in a calendar quarter, including postage, for the express purpose of soliciting others to communicate with any public servant to influence any legislative action or administrative action of one (1) or more governmental bodies unless the communication has been filed with the Secretary of State or the communication has been published in the news media. If the communication is filed with the Secretary of State, the filing shall include the approximate number of recipients.

It would be a factual determination for the Commission to decide if anyone employed by the political party communicates directly or solicits others to communicate with any public servant with the purpose of influencing legislative action or administrative action. If it were determined that the political party employee was engaged in “lobbying”, then the question would become whether the \$400 threshold had been met with respect to those lobbying activities. In the event someone employed by the political party communicates directly or solicits others to communicate with any public servant with the purpose of influencing legislative action or administrative action and the \$400 threshold was met, then the political party would meet the definition of a lobbyist and legislators would be prohibited from soliciting or accepting entertainment from the political party.

If, on the other hand, the political party did not meet the definition of a lobbyist, a person acting on behalf of a lobbyist, or a person employing or contracting with a lobbyist, then the traditional gift prohibition outlined in Ark. Code Ann. §§ 21-8-402 and 21-8-801 would apply. Under that scenario, the political party could provide entertainment to a legislator if the value of the entertainment was \$100 or less, or if the public servant reimburses the person from whom the item was received any amount over one hundred dollars (\$100) and the reimbursement occurs within ten (10) days from the date the item was received.

**Third Question Presented:**

*Are employees of a political party who are paid more than \$400 in a calendar quarter and deal regularly with legislators on legislative matters required to register as lobbyist?*

Lobbying is defined as “communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action.” If a person employed by a political party was paid more than \$400 in a calendar quarter and a person was communicating directly or soliciting others to communicate with any public servant with the purpose of influencing legislative action or administrative action, then such person would trigger registration as a lobbyist. However, if an employee of a political party was interacting with the legislator for some other purpose, perhaps to coordinate a unified message on pending legislation, then it does not appear the activity would meet the definition of lobbying and, therefore, such activity would not require registration as a lobbyist.

Again, it would be a factual determination for the Commission to decide if a person working for the political party communicates directly or solicits others to communicate with any public servant with the purpose of influencing legislative action or administrative action. If it were determined that the political party employee was engaged in “lobbying”, then the question would become whether the \$400 threshold had been met with respect to those lobbying activities. If someone who is working for a political party communicates directly or solicits others to communicate with any public servant with the purpose of influencing legislative action or administrative action and the \$400 threshold is met, then the political party and its employee would be required to register as lobbyist.

In Attorney General Advisory Opinion No. 89-E-22, the Attorney General issued an opinion stating, all members of an organization who engage in lobbying activities as defined by Initiated Act 1 of 1988 must register within 5 days of beginning lobbying. It noted that the organization itself is a "person" as defined by the Act, and the organizational entity would be required to register as a lobbyist if the organization, through its members, was engaged in lobbying activities. The registration for the organizational entity would be performed by a particular member of that organization.

It also noted that Ark. Code Ann. §21-8-601(a)(3) provides "a person whose only act of lobbying is to compensate or reimburse a registered lobbyist in the person's behalf shall not be required to register as a lobbyist". Each individual situation should be analyzed to determine if the organization's only act of lobbying is to reimburse another registered lobbyist and, if so, registration would not be pursuant to this section. If the organizational entity is engaged in acts other than reimbursement of a registered lobbyist then, of course, registration would be required pursuant to Ark. Code Ann. §21-8-601(a)(3).

The Ethics Commission has issued several advisory opinions in the past concerning the topic of lobbying. In Advisory Opinion No. 92-EC-001, the Ethics Commission noted that every business or professional contact with or discussion with a government servant is not lobbying. That Opinion drew a distinction between employees that are compensated in excess of the threshold amount per calendar quarter and periodic lobbying is required and an inherent part of their job (a lobbyist that is required register as a lobbyist) versus those who earn in excess of the threshold amount and may have occasion to attempt to influence administrative or legislative action as an incident to his or her job or profession (must register within 5 days of beginning lobbying<sup>4</sup>). Therein, it was noted

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<sup>4</sup> Rules on Lobbyist Registration and Reporting §502 (b)

that it is not the mere possibility that one could have cause to attempt to influence public servants which makes one a lobbyist, but instead the statute requires only those person who are actively engaged in attempts to influence to register as lobbyist.

In Advisory Opinion No. 91-EC-009, the Ethics Commission accepted as controlling two Attorney General Opinions, 89-E-7 and 89-E-26, which stated that any employees whose duties require him to occasionally or frequently lobby public officials must register as lobbyist. It further added that whether particular contact between business and government official is considered a “lobbying act” will vary depending on the circumstances of the contact. The presumption would be that in any contact between a lobbyist and a public official wherein the lobbyist paid the cost of meals, that the contact was a lobbying act.

More recently, in Advisory Opinion No. 2009-EC-003, the Ethics Commission again looked at what circumstances might trigger lobbyist registration and reporting. In that opinion, the Commission noted that persons who contribute \$400 or more in a calendar quarter to hosting a special event could logically/ would likely (*both phrases are used*) meet the definition of a lobbyist, because hosting special events is a core lobbying activity. It should be noted that “special event” is a term that predates Amendment 94, which employs the term “planned activity” and has a slightly different definition.

**Fourth Question Presented:**

*Is there any restriction against multiple planned activities being held at the same time making it unlikely that all members of a specific governmental body will actually attend a particular event?*

There is no restriction in the laws under the Ethics Commission’s jurisdiction on the number of planned activities that can be held at the same time. Under Amendment 94 (as amended by Act 1280), only one lobbyist may pay for a single planned activity (which is a change from the old law governing special events), and a lobbyist may only pay for one planned activity in a seven-day period (which is also a change from previous law).

In conclusion, it should be noted that the advisory opinion process is not a vehicle designed to make factual findings regarding events that have already occurred. An advisory opinion, by its very nature, is intended to provide guidance related to future conduct—not past events—and is prospective in its application. Accordingly, the Commission cannot opine regarding the permissibility of a specific past event.

This advisory opinion is issued by the Commission pursuant to Ark. Code. Ann. § 7-6-217(g)(2).

ARKANSAS ETHICS COMMISSION

By: *Jill Rogers Barham*  
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