SUBJECT: Prohibiting lobbyist conflicts of interest among clients

COMMITTEE: State Affairs — favorable, with amendment

VOTE: 9 ayes — Wolens, S. Turner, Alvarado, Brimer, Counts, Danburg, Longoria, McCall, Merritt

0 nays

6 absent — Bailey, Craddick, Hilbert, Hunter, D. Jones, Marchant

WITNESSES: For — Tom "Smitty" Smith, Public Citizen

Against — Robert Floyd, Texas Society of Association Executives

BACKGROUND: Lobbyists are required to register with the Texas Ethics Commission. That registration must include the name of each person or organization that retains or employs the lobbyist, the subject matter of the legislation or the administrative action that is the subject of the lobbyist's direct communication with a member of the Legislature or executive branch, and the range of compensation paid by each client. Lobbyists also must file activity reports on expenditures. If a lobbyist must file a supplemental report, those reports must be filed monthly.

DIGEST: HB 845, as amended, would prohibit registered lobbyists from representing opposing parties on the same piece of legislation or administrative action when communicating directly with a member of the legislative or executive branch.

A lobbyist would be prohibited from representing a client if that representation:

- involved a substantially related matter in which a client's interests were "material and directly adverse" to the interests of another client, the entity that employed the lobbyist, or a partner or associate of the lobbyist;
- reasonably appeared to be or became adversely limited by the interests of another client or third party represented by the lobbyist, the entity employing the lobbyist, or a partner or associate of the lobbyist; or

- reasonably appeared to be or became adversely limited by the interests of the lobbyist, the entity employing the lobbyist, or a partner or associate of the lobbyist.

A lobbyist could represent multiple clients with a potential conflict if the lobbyist reasonably believed that the representation of each client would not be materially affected and each client consented in writing to the lobbyist's representation after full disclosure of the existence, nature, implication, and adverse consequences of the common representation.

If a lobbyist accepted a conflicting representation or if multiple representations became improper, the lobbyist would have to withdraw to the extent necessary to avoid a conflict. If a lobbyist could not represent a client, the entity or organization that employed the lobbyist or a partner or associate of the lobbyist also could not represent that client.

A lobbyist who represented multiple clients over the same matter could not represent any of the clients in a dispute among the clients arising out of the matter without prior written consent of all parties.

Lobbyists would have to affirm, under oath, compliance with this legislation in each report filed with the Texas Ethics Commission.

HB 845, as amended, also would require all lobbyists to file a report with the commission detailing each bill or resolution for which a client retained the lobbyist to influence legislative action. Reports would have to be filed within three days after the legislative document was filed with the legislative body or within three days after the lobbyist was retained, if the document already had been filed. The lobbyist would have to notify all clients of the contents of these reports when they were filed with the commission and also would have to include when the lobbyist had been retained and the client's purpose in retaining the lobbyist.

If the Ethics Commission determined that a violation of this law had occurred, the commission would be allowed to impose any penalty allowed under other laws and would be required to rescind the lobbyist's registration for two years. Penalties only could be imposed after an appropriate hearing.

HB 845 would take effect September 1, 1999, and would apply to communications with a member of the legislative or executive branch after that date.

SUPPORTERS SAY:

Many registered lobbyists work for multiple clients, and the clients may not be aware of the potential conflict of interest that could arise when the interests of two clients of the same lobbyist become adverse over the course of the legislative or administrative process. Many corporate clients have little knowledge of how the Legislature and the lobby works and often are confused when actions in which they thought their interests were represented turn out adversely for them. This legislation would allow clients to become better informed about what their lobbyist is doing and make lobbyists more aware of the potential for conflicts among their clients.

This legislation would require lobbyists to obtain each client's written permission, after a full disclosure of the possible conflict, in order to continue to represent that client. It also would prohibit the representation of a two clients who were opposing parties on a particular piece of legislation or an administrative action. These prohibitions would be enforced with stiff penalties — barring the lobbyist for two years — in order to protect the interests of all clients.

Attorneys and other professionals who represent clients already are prohibited from representing clients with conflicting interests. The only way for an attorney to represent two clients with possible adverse interests is to obtain permission from the clients after full disclosure of the possible conflict. This legislation mirrors that requirement and would allow dual representation only when the clients were made fully aware of the possible adverse effects of any conflict.

When a lobbyist represents two adverse clients, not only do the clients lose out, but also the process itself. The lobbyist must decide at some point which client's interests to favor over the other's. The resulting lack of representation of one point of view can hurt the quality of the eventual decision or compromise reached on the governmental matter.

This legislation would not adversely affect ethical lobbyists. Most lobbyists already notify their clients of potentially adverse positions of other clients and many would likely withdraw from representation when there is a direct

conflict of two parties represented by that lobbyist. This law would have the greatest impact on lobbyists who operate in gray areas by failing to inform clients of possible adverse representation. Some unscrupulous bargainers might even seek out adverse clients so that when push comes to shove at the end of the legislative session, that lobbyist could sell out the interests of one client to better the position of another.

Requiring lobbyists to report on each bill or resolution for which the lobbyist has been retained would allow clients, and eventually the ethics commission, to determine whether a potential conflict of interest may exist. Such a filing was a requirement under Texas law before 1995, and re-enacting this requirement would provide better disclosure of lobbyists' activities.

OPPONENTS SAY:

Representation of multiple clients is normal procedure for lobbyists and conflicting interests often are inevitable. This bill, however, would be overly burdensome on lobbyists by requiring them to disclose in detail the potential effects of the conflict to each client. It also would be too harsh by suspending the ability of lobbyists to perform their job for two years if they make an innocent mistake in failing to disclose a potential conflict in time.

It often is difficult to tell ahead of time when the interests of two clients may become adverse. When negotiating on particular bills, interests that previously were unrelated may become conflicting. It would be very difficult for the lobbyist to stop the negotiations to inform both clients of the new adverse interest and obtain written permission before continuing with the negotiations. Positions of clients on particular bills also may change with time, making it even harder to tell when a client would be in favor or opposed to particular actions.

The likely result of this legislation could be inclusion of broad waivers of any potential conflict in representation contracts. Such waivers would have to be included to protect lobbyists from losing their ability to lobby for two years if an adverse interest ever arose.

This legislation could be interpreted to prohibit lobbyists from representing organizations that may have conflicting positions within the organization on particular matters. Even when the organization has a consensus majority of which position to take, if the lobbyist represented all members of the

organization, a complaint against the lobbyist could be filed by a member who did not agree with the position of the majority.

The filing of each bill or resolution a lobbyist was retained to influence would be administratively burdensome. Prior law, which was repealed in 1995 by SB 452 by Rosson, required the listing by number of the bills for which lobbyists were retained to be updated monthly. Requiring reports to be sent within three days of representation would require potentially dozens of registrations per lobbyist to be filed with the Ethics Commission and with each of the lobbyist's clients. The sheer volume of these registrations would render them useless.

NOTES: The committee amendment would require reporting of each bill or resolution for which a lobbyist was retained.