SUBJECT: Providing a penalty for lobbying conflicts of interest

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 13 ayes — Wolens, S. Turner, Bailey, Brimer, Counts, Craddick, Danburg, Hunter, Longoria, Marchant, McCall, McClendon, Merritt

0 nays

2 absent — Hilbert, D. Jones

WITNESSES: For — *Registered but did not testify:* Tom "Smitty" Smith, Public Citizen; Suzy Woodford, Common Cause of Texas

Against — None

BACKGROUND: Government Code, ch. 305 sets forth registration guidelines, prohibited activities, and sanctions for lobbying in the state of Texas. Lobbyists are required to register with the Texas Ethics Commission (TEC). 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.

Government Code, sec. 305.0011 sets forth a Code of Conduct for lobbyists who represent multiple clients. Sec. 305.022 deals with contingent fees, which are fees that are contingent upon passage or defeat of a certain piece of legislation. A contingent fee violation is a third-degree felony (two to 10 years in prison and an optional fine of up to $10,000). A violation of any provision of ch. 305 other than secs. 305.0011 or 305.022 is a class A misdemeanor (up to one year in jail and/or a maximum fine of $4,000).

DIGEST: CSHB 1168 would prohibit a registered lobbyist from representing opposing clients 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 the represented person's interests were "material and directly adverse" to the interests of another client, the employer or concern that employed the lobbyist, another client of a partner or other person associated with the lobbyist; or
- reasonably appeared to be or potentially was adversely limited by the lobbyist's, employer's, or partner's or other associated person's responsibilities to another client or a third person, or to their own interests.

A lobbyist could represent multiple clients with a potential conflict if:

- the registered lobbyist reasonably believed that the representation of each client would not be materially affected;
- within two days of becoming aware of an actual or potential conflict of interest, a lobbyist provided written notice of the conflict to each affected client in the manner required by the TEC; and
- within 10 days, the lobbyist filed a statement with the TEC that there was a conflict and that the lobbyist had notified each affected client.

A lobbyist who accepted a conflicting representation or who learned that multiple representations had become improper 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.

Lobbyists would have to affirm, under oath, compliance with this legislation in each report filed with the TEC. If the TEC determined that a violation had occurred, it could impose any penalty allowed under other laws and rescind the lobbyist's registration for two years. Penalties only could be imposed after an appropriate hearing.

Persons would commit class B misdemeanor (up to 180 days in jail and/or a maximum fine of $2,000) if they knowingly violated provisions of this legislation.

CSHB 1168 would take effect September 1, 2001, and would apply to communications with a member of the legislative or executive branch after that date.

SUPPORTERS SAY:

HB 1168 would allow clients to become better informed about their lobbyist's activities and would make lobbyists more aware of the potential for conflicts of interest among clients. Many registered lobbyists work for multiple clients, and 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 require lobbyists to disclose fully a possible conflict among clients, in order to continue to represent the clients. It also would prohibit the representation of two clients who were opposing parties on a particular piece of legislation or an administrative action. These prohibitions would be enforced with appropriate penalties — barring the lobbyist's registration for two years and imposing a Class B misdemeanor offense — in order to protect the interests of all clients.

HB 1168 would establish conflict of interest requirements on lobbyists similar to those for attorneys and other professionals. 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 bill 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, both clients and the process lose out. 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 was a direct

conflict of two parties that lobbyist represented. This law would have the greatest impact on lobbyists who operated unethically or in gray areas by failing to inform clients of possible adverse representation.

OPPONENTS SAY:

Representation of multiple clients is normal procedure for many 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 create too harsh a penalty by suspending the ability of lobbyists to perform their job for two years if they made 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 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.

NOTES:

The substitute differs from the original bill by allowing a lobbyist to represent clients with opposing interests on the same legislation or administrative action if certain conditions were met.

The substitute would not require the lobbyist to obtain the written consent of clients who would be adversely affected by a conflict of interest. However,

the substitute would require the lobbyist to notify the potentially adversely affected clients and Ethics Commission.

The substitute eliminated a provision in the original bill that would have prohibited a lobbyist who had represented multiple parties in a matter relating to the same legislation or administrative action from representing any of the parties in a dispute arising out of the matter without prior written consent. It eliminated a requirement that the lobbyist file a report describing the legislation that the lobbyist tried to influence.

The substitute also differs from the original bill by making it a Class B misdemeanor offense to knowingly violate provisions of the bill.

A similar bill, HB 845 by Wilson, passed the House during the 76th legislative session in 1999, but died in the Senate Economic Development Committee.