THOU SHALT NOT TALK TO THY LEGISLATOR

By COOK BARWICK*

During the 1953 session of the General Assembly of Georgia, and from time to time during the past fifty to seventy years, there has been considerable public concern over "lobbying." This criticism has in certain instances been very violent. There is a common misunderstanding in the minds of most people as to what is meant by lobbying. Few people realize that lobbying constitutes a criminal offence in Georgia, whereas it is perfectly legal and permissible for a lawyer or an agent of a person or corporation to attempt to influence legislation so long as it is done in the proper manner.

This subject is of special concern to lawyers, since they are called on in their representative capacities to prepare bills, to appear before committees and to contact, from time to time, members of the legislative branch of government in an effort to either prevent the passage of unwholesome legislation or to stimulate interest in worthwhile legislation.

In earliest days of recorded history, there were no legislatures or legislative branches of existing governments. The king was all-powerful and in addition to being a judge of the rights of all of his subjects, he made the laws for them. The revolutionary steps which brought us to a form of government under which we have an executive, a judicial and a legislative branch are well known. One of the fundamental rights of the citizens of this country and this state is the right to petition the legislature for redress of grievances. The Constitution of our state requires the General Assembly to enact such laws as will protect citizens in the full enjoyment of the rights, privileges and immunities due to such citizenship.[1] One of the constitutional rights of a citizen of Georgia is the right to petition the General Assembly[2] and let the legislators know what he considers to be his right and what legislation will fully protect his right.

Very early in the history of our government there occurred certain abuses which made it necessary to provide for penalties against lobbying. Consequently, the Georgia Constitution contains the provision that "lobbying is declared to be a crime, and the General Assembly shall enforce this provision by suitable

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1. GA. CONST. Art. I, § 1, ¶ 25, GA. CODE ANN. § 2-125 (1948).
2. GA. CONST. Art. I, § 1, ¶ 24, GA. CODE ANN. § 2-124 (1948).

penalties."[3] This constitutional provision is not new in the 1945 Constitution but was contained in the Constitution of Georgia as early as 1882.

As far back as 1878 the General Assembly was concerned with this problem. The General Assembly in 1878 at its regular session passed a law[4] which is now contained in Code Section 47-1001. This Code section defines what lobbying is and reads as follows:

> Lobbying is any personal solicitation of a member of the General Assembly, during a session thereof, by private interview, or letter, or message, or other means, not addressed solely to the judgment, to favor or oppose, or to vote for or against any bill, resolution, report, or claim, pending or to be introduced in either branch thereof, by any person who misrepresents the nature of his interest in the matter to such member, or who is employed for a consideration by a person or corporation interested in the passage or defeat of such bill, resolution, report, or claim, for the purpose of procuring the passage or defeat thereof. But this shall not include such service as drafting petitions, bills, or resolutions, attending to the taking of testimony, collating facts, preparing arguments and memorials, and submitting them orally, or in writing, to a committee or member of the General Assembly, and other services of like character, intended to reach the reason of the legislators. Lobbying shall be punished by confinement in the penitentiary for not less than one year nor more than five years.

It is interesting to note in passing that Black's Law Dictionary, which is published in St. Paul, Minnesota, uses this Code section in its entirety to define what lobbying is. The language of this Georgia statute has not been changed since 1882, and it appears that there have been no prosecutions under this section; at least, none of them have reached the higher courts.

There are several unusual features of Code Section 47-1001. First of all, the crime of lobbying can be committed only while the legislature is in session. If a person knows that a particular bill will be introduced, he can, individually or through his agent, before the legislature convenes, use all the means otherwise prohibited by this Code section to promote or to defeat the particular piece of legislation in question.

The second important thing to be noted concerning the section—and this is the distinction which apparently is not well understood by the public—is that if arguments are addressed solely to the judgment of a legislator, there can be no criminal offence, except failure to register and pay a tax as will be discussed later. The Code section, in defining what acts were not intended to be covered, again used a similar illustration, namely, "intended to reach the reason."

3. GA. CONST. Art. I, § 2, ¶ 5, GA. CODE ANN. § 2-205 (1948).
4. Ga. Laws 1878-1879, p. 30.

Although no definite evidence can be found for the fact, one suspects that the legislature of Georgia might have been influenced in passing the statute which is now Code Section 47-1001 by the decision of the United States Supreme Court in the case of *Trist v. Child*.[5] In that case a suit was brought to recover a contingent fee by a lawyer who, together with his father, had handled the claim of the defendant before Congress in securing payment of a fee which the Government owed him for negotiating a treaty. They were successful in getting the law passed and the defendant refused to pay the fee after the money was granted to him. The Supreme Court, while admitting that the lawyers were above reproach in so far as their characters were concerned, refused to sanction the contract on the ground that abuses were present. The whole contract, the Court said, must fall.

The Court made some significant observations in that it said:[6]

> We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to *reach only the reason of those sought to be influenced.* (Underscoring added.)

The *Trist* case was decided in October, 1874, and the Georgia statute was passed in 1882, some four years later. The Georgia statute was a pioneer statute and in all probability the exception in the Georgia statute regarding "appeals to reason" stems from the language of the *Trist* case.

A careful examination of the *Trist* case will reveal that the Supreme Court of the United States did not intend to do away with all beneficial lobbying, although the subsequent Georgia statute was more restrictive than was the Court's decision. In commenting on the professional actions which were considered to be proper, the Supreme Court in the *Trist* case said:[7]

> They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable.

In 1911 the General Assembly decided that it would require every person who acted as an agent for compensation to oppose or aid, directly or indirectly, the enactment of legislation to register with the Secretary of State.[8] Such person, including

5. 21 Wall. 441, 22 L. Ed. 623 (1874).
6. *Id.* at 450, 22 L. Ed. at 624.
7. *Ibid.*
8. Ga. Laws 1911, p. 151.

lawyers, must indicate the subject matter of the legislation with reference to which service is rendered. For example, if an attorney represents a corporate client which is interested in fifteen or twenty different bills, all dealing with different subject matter, he would be required to register that number of times in order to comply with Code Section 47-1002.[9] This Code section does not exclude from registration persons who go before the General Assembly to appeal to the reason of the legislators. Anyone who attempts, for compensation, to aid or oppose, directly or indirectly, the passage of legislation, must register.

Supplementing this Code section, Code Section 92-508[10] requires that every person registered as a "legislative agent shall pay the sum of $250 for every person, firm or corporation represented by said agent."

The $250 is payable at the time such person registers and he cannot register until this tax is paid. Let's assume that Attorney Jones represents the XYZ Corporation and on the first day of the General Assembly they ask him to appear before a committee in support of a certain piece of legislation in which they are interested. To comply with the law, he registers, states the subject matter of the legislation, and pays the $250 tax. If, later on in the session, his client desires to oppose another piece of legislation, which was not even introduced at the time he made his first appearance, Attorney Jones, in order to comply with the law, must go back to the Secretary of State and register again showing the new subject matter in which he is interested. However, in order to register, he must pay an additional $250.

The General Assembly in 1911 enacted Code Section 47-1003[11] which prohibits contingent fees based on the passage or defeat of any legislative measure. This, it is believed, all concerned would agree is a good law.

Also in 1911, the General Assembly enacted Code Section 47-1004[12] which requires a complete report of the expenses of any person, firm or corporation in connection with the passage or defeat of any legislation. This must be filed in detail with the Secretary of State within two months after adjournment.

The General Assembly of 1911 also enacted Code Section 47-1005[13] which makes it unlawful for a regularly retained attorney or special attorney or agent, employed for compensation, regardless of whether or not he is registered, to go upon the

9. *Ibid.*
10. Ga. Laws 1927, p. 91; 1935, p. 39.
11. Ga. Laws 1911, p. 151.
12. *Id.* at 153.
13. *Ibid.*

floor of either House of the legislature while the same is in session and "discuss privately measures then pending in the legislature." It is not clear whether this Code section includes members of the General Assembly. Technically speaking, if a lawyer who is also a member of the General Assembly represents a client on a regular retainer and discusses privately with some of his colleagues on the floor of the House measures in which his regular client is interested, he may have violated this Code section. However, it is not the purpose of this article to discuss the propriety or impropriety of members of the General Assembly being on retainer or receiving fees in connection with matters which come before the General Assembly.

Congress has passed an act requiring that persons aiding in the passage or defeat of legislation register with the Clerk of the House of Representatives and the Secretary of the Senate, and also requires that additional information be given to the Clerk and Secretary.[14] Congress apparently has never passed a statute similar to Georgia Code Section 47-1001. If a person properly registers and complies with the U. S. Statute last mentioned, no prohibition has been found against such person's appealing to a Senator or Congressman on grounds other than sound judgment. The District Court for the District of Columbia, in 1952, held that certain portions of the Federal law are invalid because of the fact that they are too indefinite.[15] For example, the Court said[16] that:

> The clause, 'to influence, directly or indirectly, the passage or defeat of any legislation by the Congress' is manifestly too indenite and vague to constitute an ascertainable standard of guilt. What is meant by influencing the passage or defeat of legislation indirectly? It may be communication with Committees or Members of the Congress; it may be to cause other persons to communicate with Committees or Members of the Congress; it may be to influence public opinion by literature, speeches, advertisements, or other means in respect to matters that might eventually be affected by legislation; it may be to influence others to help formulate public opinion. It may cover any one of a multitude of undefined activities. No one can foretell how far the meaning of this phrase may be carried. No one can determine in advance what activities are comprehended within its scope.

Applying the reasoning of this case to Georgia Code Section 47-1002, it is believed that the phrases " . . . not addressed solely to the judgment" and "intended to reach the reason" might also be declared to be vague and indefinite if they were challenged in the courts of Georgia.

14. 60 STAT. 841, 2 U.S.C.A. §§ 266, 267 (Supp. 1953).
15. National Association of Manufacturers v. McGrath, 103 F. Supp. 510 (D.D.C. 1952).
16. *Id.* at 514.

There is a possibility that, in addition to the lobbying statutes in Georgia abridging the right to petition for redress, the registration act, requiring a disclosure of expenses, might amount to an illegal search and seizure prohibited by the Fourth Amendment.

Another important constitutional question could be raised in connection with the Georgia law in so far as an attorney or agent is required to pay $250 for each matter in which he represents his client. This requirement is not a revenue producing enactment. The courts might well say that the $250 is to discourage the practice which has been legalized. Freedom of speech and the right peaceably to assemble and petition the Government for redress of grievances are guaranteed by the First Amendment to the United States Constitution. These rights are also granted to citizens by the Constitution of Georgia.[17] It is believed that the requirement that a person's agent has to pay $250 before speaking his views before a legislative committee might be such an abridgment of the constitutional right of a citizen as to make the Georgia act unconstitutional.[18]

This problem is one which should concern all lawyers, since it is considered to be a part of a lawyer's duty to represent his client in all legitimate and worthwhile capacities. It goes without saying that all businesses are interested in this day and time in seeing that the proper legislation is passed and that certain types of legislation are defeated. In effect, the General Assembly of Georgia has said to lawyers, "If you want to come and be branded as a 'lobbyist' by registering and paying a prohibitive fee—or prohibitive in many cases—you can represent your client legally before various committees in the House." A lawyer should not be so stigmatized.

If laws are needed to restrict and control lobbying before the General Assembly in Georgia, why aren't such laws needed to control and regulate the practice of lobbying by lawyers and others before administrative agencies in Georgia, such as the Public Service Commission, the Milk Control Board, the Merit Board and numerous others which have the power to make rules and regulations? Registration is designed for the purpose of making known to the public and to the legislators those who are engaged in the practice of influencing legislation by whatever means they may employ. There is no provision for publica-

17. GA. CONST. Art. I, § 1.
18. In this connection, see that portion of the National Association of Manufacturers case, note 14 *supra*, which deals with the provision that anyone found guilty of violating the registration statute cannot again represent a client for a period of three years after his conviction.

tion of the registrations, and if the public is to be informed of the facts disclosed by registration statements, such statements must get the widest possible circulation in a simplified, yet intelligible form. Some group, some committee, or some agency should be designated by the legislature to investigate the accuracy of the statements filed and secure the compliance of those to whom the law applies. One of the weaknesses of the Georgia registration law is that no specific agency has responsibility for enforcement.

The situation is this, all good laws are the result of public and human need. If there is a need for a law and it is proposed, people interested in it should be able to speak through their representatives to legislators concerning its good qualities or its bad qualities. Under the system in Georgia, committees do not have counsel nor do they have the machinery for conducting hearings and finding facts. Very frequently private lawyers render a very worthwhile function to various committees. For example, in the case of certain revenue measures, the committee considering the legislation might be composed of farmers, shopkeepers, and others, who may not have detailed knowledge of legislation necessary to provide for the State operating revenue. The counsel of attorneys and other people informed on this subject is very valuable to these committees. The bill drafting unit of the Attorney General's office cannot give full consideration to all substantive questions in connection with pending legislation. It is the function of this body or group to draft bills in such a way that they will not be unconstitutional. They cannot and do not advise members of the legislature or various committees on the appropriateness of particular legislation.

Is it reasonable to say to lawyers who want to exercise their right of free speech that they cannot come before a legislative committee without paying $250, although they are attempting to help the legislators formulate legislation which is not only constitutional but will be in the public interest? It seems that this is an unreasonable approach to the problem where the courts welcome all the assistance they can get from the same lawyers when the same bill has been challenged for unconstitutionality and is before another branch of our government.

It should be kept in mind that there are other ways in which a "lobbyist" can make his group's views known to legislators other than by direct contact or by testimony before committees. He can conduct factual surveys to support his client's position; he can analyze legislation; draft bills; and he can direct publicity campaigns through the press and radio to bring his particular point of view to the attention of the legislator or leg-

islators and through such publicity bring them to think that there is a public clamor for that particular piece of legislation to be passed.

In short, it seems that the things that are wrong, namely, attempting to influence legislation for purely ulterior motives or the giving of bribes, should not only be prohibited by statute, but the statute should be rigidly enforced. Aside from these things, attempts to have good legislation passed and attempts to kill bad legislation should be encouraged and all lawyers should be impressed with the fact that it is not only their privilege to engage in this type of practice but that it is one of their highest duties to the profession in which they are engaged and to the people whom they represent. Lobbying, as defined by the Georgia Code, is now a criminal offense. Lobbying in its broadest and most generally accepted term is not criminal, but the term has a bad connotation. This should not be so, and every effort should be made to eradicate this prejudice from the minds of the populace.

Only the State of Virignia makes concrete provision for detection and punishment of the crime of lobbying. Virginia makes it the duty of the Secretary of the Commonwealth, with whom the appearances and accounts must be filed, to take necessary steps to prosecute violators.[19]

"Lobbyists" seem to fall into three classes: (1) the paid lobbyist; (2) the organized pressure group; and (3) the citizen who expresses his individual opinion. It seems unnecessary to regulate the third class. Elimination of the undesirable aspects of lobbying by the first two groups can best be accomplished by publicity. The most feasible distinction between those who are to be regulated and those who are not is to be drawn in terms of the amount of money expended to influence legislation. In these respects, the federal regulation of lobbying act[20] is theoretically sound, and its accounting and registration provisions would serve to accomplish its purpose if the act were more precise.

The dangers inherent in too stringent lobbying statutes are illustrated well by the case of *United States v. Rumley*.[21] This was a case in which a representative of a group sought to raise funds for his activities and to receive contributions for such activities by selling certain books. A committee appointed by the House of Representatives to investigate lobbying activities subpoenaed him and called on him to give the names of all the purchasers of his book. This he refused to do. He was convicted

19. VA. CODE ANN. (Mitchie, Supp. 1945) § 312(i).
20. See note 13 *supra*.
21. 345 U.S. 41, 73 S.Ct. 543, 97 L. Ed. 770 (1952).

of contempt by the full House. The Supreme Court of the United States said that he could not be convicted of failing to give the information sought because of the rights guaranteed to him by the First Amendment. This very significant language is contained in the concurring opinion of Justice Douglas:[22]

> The finger of Government leveled against the press is ominous. Once the Government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a Government agent will look over the shoulder of everyone who reads. The purchase of a book or pamphlet today may result in a subpoena tomorrow. Fear of criticism goes with every person into the bookstore. The subtle, imponderable pressures of the orthodox lay hold. Some will fear to read what is unpopular . . . When the light of publicity may reach any student, any teacher, inquiry will be discouraged . . . The press and its readers will pay a heavy price in harassment. But that will be minor in comparison with the meanace of the shadow which Government will cast over literature that does not follow the dominant party line.

It is recommended that a complete study be made of the laws of Georgia dealing with the subject of lobbying and that the provision requiring an agent or attorney to pay $250 be repealed. There is nothing wrong with having a lawyer register as the representative of a particular client, but one registration for one client should enable him to render such aid and assistance as he deems necessary or as any one legislator or any committee might deem necessary for his particular client.

22. *Id.* at 57, 73 S.Ct. at 551, 97 L. Ed. at 781.

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