

## Everyday Ethics: Regulating Lobbying Activities

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**Question:** *After a series of unfortunate experiences, our agency is considering whether to adopt regulations relating to lobbying the agency. What should we understand about regulating lobbyists?*

**Answer:** Let's start with a common scenario -- A local property owner wants to develop a vacant parcel of land. A group of neighbors hear about the project and arrange a meeting with local officials to express their concerns. The property owner, concerned about project approvals, hires a former elected official to advocate on behalf of the project. The local officials, after meeting with both sides, begin to form their opinions about the project."

While this scenario may sound familiar, it also raises a series complex issues about the role of "influence" in the public decision-making process. All U.S. citizens are guaranteed the right of free speech, the right to freely associate with like-minded persons, and the right to petition elected officials. But there are competing public interests involved, such as transparency, the fair exchange of ideas, and the integrity of the decision-making process.

Local lobbying laws attempt to reconcile these important rights and interests and raise the important and very practical questions the appropriate role of 'lobbying' in local governmental decision-making, and whether (and to what extent) local agencies should regulate lobbying.

This resource is a service of the Institute for Local Government (ILG) whose mission is to promote good government at the local level with practical, impartial, and easy-to-use resources for California communities. ILG is the nonprofit 501(c)(3) research and education affiliate of the League of California Cities and the California State Association of Counties. For more information and to access the Institute's resources on Ethics, visit <http://www.ca-ilg.org/ethics-transparency>. The direct link to this resource is [www.ca-ilg.org/post/local-regulation-lobbyists](http://www.ca-ilg.org/post/local-regulation-lobbyists) .

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## The Whys of Lobbyist Regulation

Over the years, courts and commentators have articulated the potential harms that unregulated lobbying can have on governmental institutions. Corruption and the appearance of corruption (often in the form of bribery, “sweet-heart” contracts, poor decisions such as pork-barreling and earmarking) are identified hazards that government has an interest in avoiding. Other potential hazards include having the public voice “drowned out” by the voice of special interests, or having public decisions based on flawed or incorrect information.

Commentators have also recognized potential benefits from professional lobbying, such as providing necessary information to decision-makers, and by organizing various and numerous voices into an efficient, collective and comprehensive message.<sup>1</sup> Today, even local agencies retain lobbyists to represent their interests before other legislative and administrative bodies.

In California, the state<sup>2</sup> and a growing number of local jurisdictions<sup>3</sup> have adopted lobbying laws. The California Supreme Court upheld the lobbyist registration and reporting requirements contained in the Political Reform Act of 1974, holding that those provisions, as well as the Act’s \$10 per month gift limit from lobbyists to state candidates and elective officials, “do not constitute substantial limitations on petition and speech rights.”<sup>4</sup>

(California law also acknowledges that local regulation of lobbying activities can apply equally to attorney lobbyists without creating issues under state law regulating attorney conduct.<sup>5</sup>)

### History of Lobbying Regulation

Influencing government decisions is hardly a modern phenomenon. Shakespeare’s famous play “Julius Caesar” begins with Cassius’ maneuverings to convince Roman senators to replace a popular Julius Caesar with a reluctant (but ultimately murderous) Brutus.

The current term “lobbyist” reportedly originated from people who gathered in the lobbies of legislative chambers and, in the United States, the lobby of the Willard Hotel in Washington D.C. where its occasional guest, Ulysses S. Grant, and other U.S. officials, would serve as the targets of their many petitions and requests.<sup>6</sup>

The first major effort to regulate lobbying at the federal level came in the 1940s when Congress enacted the “Federal Regulation of Lobbying Act.”<sup>7</sup> The Act imposed a registration requirement for people seeking to influence the passage or defeat of federal legislation, and imposed a quarterly reporting requirement of the money lobbyists received and expended for that purpose.

The United States Supreme Court, in a narrowly framed opinion, rejected a constitutional challenge to the Act, ruling in part that the Act’s registration and reporting requirements did not violate First Amendment rights “to speak, publish and petition the Government.”<sup>8</sup>

These laws share many common and essential elements and, at the same time, grapple in their own way with difficult-to-define terms and concepts.

## Defining “Lobbyist” and “Lobbying”

Every lobbying law must make an attempt to clearly define either who qualifies as a lobbyist or what activities constitute “lobbying.” This is often the most difficult and contentious part of a lobbying law because these terms often determine how broadly (in terms of people affected and/or activities regulated) the law applies.

“Lobbyists” are frequently characterized as either “contract” lobbyists or “in-house” lobbyists.<sup>9</sup> A “contract” lobbyist is someone who is hired on a specific project or contract basis.

Most laws establish a “time and money” test to define contract lobbyists, such as this language from Oakland’s ordinance:

Lobbyist’ means any individual who. . .receives or is entitled to receive one thousand dollars (\$1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses. . .<sup>10</sup>

“In-house” lobbyists are people who lobby exclusively for their own employer. A common example of an “in-house” lobbyist is a governmental affairs representative for a company.

Definitions of “in-house” lobbyists attempt to establish a minimum threshold of activity that distinguishes in-house lobbyists from any other employee whose communications with public officials may be occasional or minimal. These definitions vary, but are often based on such factors as:

- The amount of time spent lobbying (for example, five hours lobbying per month);
- The number of “contacts” they make with public officials (for example, a minimum of 10 lobbying contacts per month); or
- If the employee spends a “significant” or “substantial” amount of time lobbying public officials.<sup>11</sup>

The ultimate question is what constitutes the act “lobbying.” Basically, the act of lobbying is the act of communicating with public officials for the purpose of influencing certain types of decisions on behalf of another. The decisions sought to be influenced are usually characterized as either being legislative or administrative in nature.

How a local agency defines lobbying can sometimes be complex and/or be subject to certain exceptions. San Francisco's lobbying ordinance, for example, contains seventeen exceptions from its definition of what constitutes lobbying "contacts."<sup>12</sup> These include commonly found exceptions for

1. Public officials who lobby in the course of their official duties;
2. People submitting bids or applying for permits;
3. People negotiating contracts with designated representatives of the local agency; and
4. People providing testimony or information at the invitation of a public official.

Los Angeles exempts on public policy grounds representatives of non-profit organizations that receive government funding to represent the "interests of indigent persons."<sup>13</sup> San Jose provides an even broader exemption for "uncompensated members of the board of directors of nonprofit organizations" and for "[c]ompensated officers or employees of a [501(c)(3)] nonprofit organization. . . whose attempts to influence governmental action are on behalf of the organization."<sup>14</sup>

## **Imposing Certain Transparency Obligations on Lobbyists**

In addition to the basic definitions of lobbyist, lobbying, and the types of decisions to which lobbying can apply, local lobbying laws typically require lobbyists to

1. Register with the local agency;
2. Maintain a current list of clients;
3. Provide periodic reports on their activities; and
4. Refrain from certain types of activities.

## **Registration Requirements**

Lobbying laws typically require persons to register with the local agency within a certain time period after qualifying as a lobbyist. Registration involves providing name, address and contact information for the lobbyist, client information and, in some jurisdictions, the nature of the client's business and the matters for which the client has hired the lobbyist to influence.

## Reporting Requirements

One of the key components of local lobbying laws is the requirement that lobbyists periodically report on their activities. At the most basic level, almost all laws require an identification of the decision the lobbyist seeks to influence for each client during the reporting period.

Beyond that, jurisdictions vary in the type and detail of information lobbyists must provide. Examples of the type of information required by local agencies include:

1. The amount of payments made by lobbyists to public officials (usually known as “activity expenses”);
2. The amount of campaign contributions made or arranged by the lobbyist to local officeholders and candidates;
3. The amount of payments the lobbyist made to a non-profit or charitable organization at the behest of a public official or candidate;
4. Professional services the lobbyist provided to a public official or candidate, such as fundraising or campaign consulting services;
5. The amount of compensation received from clients;
6. Any employment the lobbyist provided to or arranged for a public official and/or the public official’s family;
7. The identity of the local department, office or individual who was lobbied; and
8. A description of the client’s position or arguments regarding the decision sought to be influenced.

The key is to determine what information is relevant or useful in providing insight into lobbying activities.

## Prohibited Activities

In addition to periodic reporting of lobbyist activities, most ordinances contain a number of limitations on lobbying activities. Examples include:

1. Restrictions on the amount of gifts or activity expenses a lobbyist may confer on a public official;
2. Making false statements to public officials or creating fictitious statements of support or opposition to a pending governmental decision;<sup>15</sup>

3. Promising clients that the lobbyist can obtain a particular outcome and/or basing the lobbyist's fee on whether that outcome was achieved (in other words, no "contingent fee" arrangements);
4. Making or bundling campaign contributions;
5. Introducing measures for the sole purpose of creating future work for a lobbyist; and
6. Forbidding persons from acting as lobbyists without registering.

## **"Revolving Door" Regulations**

Another provision addressed not so much to lobbyists but to local public officials is a prohibition on leaving public employment and returning to lobby their former agencies or co-workers. Known as "revolving door" laws, these prohibitions exist primarily because of the perceived advantage that a former local official may have in representing clients before his or her former agencies. Revolving door laws typically try to limit this advantage by imposing a "cooling-off" period of up to one or two years before a public official may lobby his or her former agency or co-workers.<sup>16</sup>

The doors can swing in the other direction, too; some jurisdictions prohibit registered lobbyists from serving on local boards and commissions.<sup>17</sup>

## **Penalties for Non-Compliance**

Almost every lobbying ordinance contains some type of civil or criminal sanction for the violation of its provisions. Monetary penalties are common and many ordinances include a prohibition from working as a lobbyist, typically for up to one-year, if the lobbyist is found to have intentionally violated one or more of the law's provisions.

## **The Challenges of Effective Enforcement**

Establishing a culture of effective administration and compliance presents one of the greatest challenges to a successful lobbyist registration program. It is not enough simply to prescribe penalties in the text of an ordinance. An effective lobbying program depends largely on active administration and workable compliance measures.

## **Getting Complete and Accurate Reports**

Lobbying laws essentially operate on the honor system. Lobbyists are expected to register in a timely manner and truthfully report their activities. So how does a local agency ensure that these registration and reporting requirements are being met?

One of the ways to help ensure accurate reporting is by requiring lobbyists to verify under penalty of perjury that the information contained in the reports is both complete and accurate. Professional lobbyists are not likely to risk damaging their credibility by failing to make full and honest disclosures. However, a strict verification requirement can help remind lobbyists that their disclosures are important and the local agency takes them seriously.

Another way to ensure full disclosure is by developing a process for diligently reviewing information contained in lobbyist reports and cross-checking it against other sources. Given the large number of lobbyists, clients and decisions they seek to influence, even in moderately sized jurisdictions, chances are good that some reportable information may go unreported unless the lobbyist reports are reviewed carefully for errors and possible omissions.

## **Penalties for Noncompliance**

Many lobbying laws provide for criminal misdemeanor penalties in the event of an intentional violation. But because of the high burden of proof in criminal prosecutions, not all claimed violations may receive the attention they arguably deserve. Consequently some jurisdictions also provide for civil penalties, such as monetary fines and suspension from practice, in addition to criminal sanctions.

Before any civil penalties can be imposed, however, alleged violations must first be investigated and, if necessary, submitted to a neutral fact-finder authorized to impose penalties. Investigating alleged violations of lobbying laws, often in the form of written complaints filed by members of the public, can be a complex, time-consuming activity. The process frequently involves interviewing parties and witnesses, obtaining records and ultimately analyzing whether enough facts exist to proceed with a formal hearing. If an investigation finds a reasonable basis for believing a violation has occurred, the local agency may conduct a formal hearing before a neutral hearing officer. While rare, such formal hearings can also be very time intensive and must conform to exacting procedural due-process requirements. These include adequate notice and a fair hearing

## **Assigning Responsibility for Enforcing and Administering the Law**

Some jurisdictions have addressed the compliance issue, along with administrative issues, by creating a local body with limited powers of oversight and enforcement. For example, the cities of San Diego, Los Angeles, Oakland and San Francisco have delegated civil enforcement authority over their respective lobbying laws to local ethics commissions.

These commissions also have jurisdiction over other local ethics laws, such as campaign finance and government conduct ordinances. Staff to these appointed boards investigate alleged violations in addition to administering the law, including such activities as developing forms, creating educational material and managing filed documents. The

ethics commissions are authorized to sit as hearing panels to determine alleged violations of law and impose appropriate civil penalties.

Not every local jurisdiction has the resources or desire to create an ethics commission to take responsibility for ensuring lobbyist compliance. Before adopting any lobbying law, serious thought should be given to the resources that the local agency is prepared to commit for necessary administration and enforcement. Without credible enforcement, compliance can suffer. The initial and annual registration fees many jurisdictions charge to cover or defray the cost of administering and enforcing the ordinance cannot always anticipate the sometimes extensive costs for a complex investigation or a protracted enforcement proceeding.

## Alternative and Complementary Laws

Given that lobbying laws can be challenging to administer and enforce, what alternative approaches can local agencies use? If one of the primary purposes of lobbying laws is to shed light on how public decisions are influenced and made, lobbyists are not the only source of pertinent information. Public officials can also serve as a source of information.

One option is to adopt “ex parte communication” rules that essentially take the burden of disclosure and shift it to or share it with the public officials being lobbied. This approach is unique because it expands a public official’s obligation to disclose his or her outside (“ex parte”) communications made in connection with quasi-judicial proceedings to include communications related to certain legislative or administrative actions as well.

For example, the City of San Jose’s municipal code includes the following language: “Before taking any legislative or administrative action, the mayor, each member of the city council ... and each member of the planning commission, civil service commission or appeals hearing board must disclose all scheduled meetings and telephone conversations with a registered lobbyist about the action. The disclosure may be made orally at the meeting before discussion of the action on the meeting agenda. The oral disclosure must identify the registered lobbyists, the date(s) of the scheduled meetings and telephone conversations and the substance of the communication ...”

Not all public officials will be particularly excited about having to track and record the names of lobbyists they speak with, much less having to announce publicly that they meet with lobbyists at all on legislative or administrative matters. Still, few people are in a better position to know who is trying to influence decision-makers’ actions than a public official. A requirement to disclose ex parte communications on legislative and administrative matters has the advantage of providing the public with information that is both immediate and relevant to the decision at hand. It can also provide an effective cross-check on subsequent lobbying reports.

Another source of information about lobbying activities is the online posting of public officials' calendars and appointment books. Such requirements are usually adopted in the context of local transparency ordinances. But in conjunction with a local lobbying law, such requirements can provide relevant information about meetings involving public officials and lobbyists. Some public agencies and officials already use software packages that include electronic calendaring functions that can be adapted to include the pertinent meeting information. This information can be posted and updated daily if desired.

The compulsory disclosure of meeting information is not without controversy. California courts have generally upheld disclosure requirements as part of the regulation of professional lobbyists. However, the courts have not addressed the specific issue of whether local agencies can compel uncompensated residents to register as lobbyists and provide information regarding their communications with public officials. Privacy and First Amendment issues could also arise if public officials are required to publicly identify and disclose the names of constituents with whom they meet or produce records containing similar information.

Legal issues aside, it would seem essential to consider as a matter of public policy whether a contemplated disclosure law — such as *ex parte* communications and public posting of appointment calendars — could chill public interest and participation for individual residents in the decision-making process.

## Identifying the Right Approach for Your Agency

An unfortunate reality is that ethics laws are often adopted reactively following a public crisis or scandal. Lobbying laws are no exception and are sometimes susceptible to the political dynamic in which legal, ethical or practical considerations give way to an overriding desire to “do something.”

Part of the measured consideration of whether and how to regulate lobbying should include an assessment of:

- Which approach is pertinent and necessary within a particular jurisdiction; and
- How the information gathered will be put to use.

## What Problem Does the Agency Need to Solve?

Looking at what other jurisdictions have done can be helpful in assessing which approach makes sense, but policy-makers are also well-advised to consider the dynamics within their particular community. Such considerations include:

- Are there relatively few or many lobbyists operating in the community?

- What types of interests do they represent, and what types of decisions tend to be influenced?
- How do lobbyists exercise influence: by directly urging certain public policy decisions, financing political campaigns and/or channeling money to favored causes or organizations?
- Which approach would best target the perceived need?

It may be helpful to consider other options, too, such as:

- A local campaign-financing ordinance that limits the amount and/or restricts the source of contributions; or
- A transparency ordinance that augments the local agency's duty to disclose information.

Taking the community's unique needs into account will help determine what type of information to seek from local lobbyists as well as what restrictions to place on lobbying activities.

## **How Will Any Information Collected Be Used?**

The next question is what should be done with the information once it is obtained. This is a key element of a lobbying ordinance's effectiveness. Some jurisdictions use interactive online systems. These can be more convenient for both those reporting information and those wanting to access it. Some have useful search functions and other helpful features.

In jurisdictions without interactive systems, one option is to post a current list of lobbyists and their clients on the agency's website.

The goal is to present information in a way that allows the public and public officials to easily access key facts. Charts and tables can be beneficial tools in this regard. Sharing this information regularly with elected officials and staff can also be a good practice. Doing so can provide an important check to ensure that lobbyists are fully complying with disclosure requirements. Periodically transmitting such information can encourage recipients to contact the filing office if they notice any discrepancies or errors.

## **Measuring Lobbying Ordinance Effectiveness**

Tracking and analyzing the number of lobbyists and clients registered, the issues lobbied upon and the number of staff hours expended to administer and enforce the

ordinance can provide valuable and useful information. The ultimate success of a lobbyist registration program, however, will ultimately rely on community perceptions. Has the law improved transparency and public confidence in the decision-making process? Does it help community members better understand lobbyists' role in influencing public policy? Have problematic activities diminished?

While there may not always be consensus about whether these subjective standards have been achieved, a publicly noticed discussion — as part of a governing board, ethics commission or committee meeting — can produce valuable insights as to the effectiveness of the local ordinance and produce ideas for future amendments. At the very least, a well-administered lobbying law can and should provide elected officials and the public essential insight into the role of professional influence on the people's business.

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## References and Resources

<sup>1</sup> See, for example, Lanny Davis, *Huffington Post*, November 17, 2008.

<sup>2</sup> See Cal. Gov't Code § 81000 and following (Political Reform Act of 1974).

<sup>3</sup> The following cities and counties have adopted some form of lobbyist registration (not inclusive): Fairfield, Fresno, Irvine, Long Beach, Los Angeles, Malibu, Milpitas, Oakland, Orange, Richmond, Sacramento, San Diego, San Francisco, San Jose, San Louis Obispo, Santa Ana, Santa Rosa, Santa Clarita, Los Angeles County, Orange County, San Diego County.

<sup>4</sup> *Fair Political Practices Comm. v. Superior Court*, 25 Cal. 3d 33, 49 (1979).

<sup>5</sup> See Cal. Bus. & Prof. Code § 6009, which reads:

(a) Notwithstanding any other provision of law, a city, county, or city and county may require attorneys who qualify as **lobbyists**, as defined by the local jurisdiction, to register and disclose their lobbying activities directed toward the local agencies of those jurisdictions, in the same manner and to the same extent such registration and disclosure is required of nonattorney **lobbyists**. Any prohibitions against specified activities by **lobbyists** enacted by a city, county, or city and county shall also apply to attorneys who qualify as **lobbyists**.

(b) For purposes of this section, information about a lobbyist that may be required to be disclosed is:

(1) The name, business address, and telephone number of the lobbyist, of any lobbying firm of which the lobbyist is a partner, owner, officer, or employee; and of any persons or lobbying firms paid to lobby by the lobbyist.

(2) The name, business address, and business telephone number of each client who pays the lobbyist to lobby; the specific matter and agency lobbied, itemized by client; and the amount of money paid to the lobbyist for lobbying and the total expenses of the lobbyist for lobbying, itemized by client.

(3) All gifts or payments made by the lobbyist to officials in the jurisdiction, itemized by the name of the official, the amount, date, and description of the gift or payment, and the names of the person making the gift or payment and the person receiving the gift or payment.

(4) All campaign contributions made, arranged, or delivered by the lobbyist to officials in the jurisdiction, specified by amount, date, and name of the official receiving the contribution.

<sup>6</sup> James Burns and Thomas Cronin, "Government By The People" (2000) Prentis Hall, 18th ed., pg. 216.

<sup>7</sup> 2 U.S.C. §§ 261-270 (repealed).

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<sup>8</sup> *United States v. Harriss*, 347 U.S. 612 (1954).

<sup>9</sup> There are other categories of lobbyists too, such as “expenditure” or “grassroots” lobbyists. These lobbyists are typically defined as persons who spend a specified sum of money to present their clients’ views to the the public or to a specific segment of the public (community groups, industries or professions) and encourage them to contact officials and advocate for or against a particular project or proposal.

<sup>10</sup> Oakland Municipal Code Section 3.20.030(D), available at <http://library.municode.com/index.aspx?clientId=16308>.

<sup>11</sup> Some jurisdictions also impose filing and reporting obligations on “lobbyist employers” (that is, the entities that employ individual lobbyists).

<sup>12</sup> City of San Francisco Campaign and Government Conduct Code, Art. II, Chpt. 1, Section 2.100 and following; available at <http://www.sfethics.org/ethics/2009/12/lobbyist-ordinance-2010.html>.

<sup>13</sup> Los Angeles Municipal Code Ch. IV, Art. 8, Section 48.03(E), available at <http://www.amlegal.com/library/ca/losangeles.shtml>.

<sup>14</sup> San Jose Municipal Code, Section 12.12.020(I) and (M), respectively, available at [http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose\\_ca/sanjosemunicipalcode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:sanjose\\_ca](http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca).

<sup>15</sup> Note that rules pending before the California Supreme Court regarding attorney conduct do *not* require attorneys who serve as lobbyists to accord the same standards of veracity to nonjudicial tribunals. Compare California Proposed Rules of Professional Conduct Rule 3.3 (prohibiting false statements, failures to disclose authority, and false evidence to courts) with Rule 3.9 (requiring only that the attorney disclose that he or she is appearing in a representative capacity in communicating with administrative or legislative bodies). Contrast Proposed California Rule 3.9 with the American Bar Association Model Rule 3.9 (applying rule 3.3 to non-adjudicative proceedings and noting in comment 2 to Rule 3.9 (“ . . . legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.”)).

<sup>16</sup> See, for example, Cal. Gov’t Code § 87406.3. For more information on state revolving door laws, see <http://www.ca-ilg.org/document/revolving-door-restrictions-local-officials>.

<sup>17</sup> Los Angeles City Charter, Art. V, Section 501(d)(2), available at <http://www.amlegal.com/library/ca/losangeles.shtml> .