The Regulation of Local Lobbying

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1. Local Lobbying

Most local governments do not have lobbying oversight programs, lobbying codes, or even provisions that relate specially to lobbyists. Nor do many states have municipal lobbying codes. The major reason for this is that most local government officials and local government associations take the position that there are not many local lobbyists and, therefore, no need for a lobbying code. It is because there are so few lobbying codes, and limited demand for them, that my book *Local Government Ethics Programs* did not contain a chapter on lobbying. I also failed to write much about lobbying in the City Ethics Blog until 2014, when I began work on this book, which began as an additional chapter of *Local Government Ethics Programs*.

Researching this book, I found that there is much more local lobbying than most people seem to believe. One reason few lobbyists register in those jurisdictions that do have disclosure requirements is that the lobbying codes' definitions of "lobbying" leave out a great deal of lobbying activity. This is largely because they use the language of federal and state lobbying codes, which focus on professional lobbyists and on lobbying with respect to policy (and even federal lobbying definitions leave out a large percentage of lobbyists and lobbying activities). At the local level, lobbying is done less by professional lobbyists than by owners and officers of companies and organizations, and their attorneys. And the lobbying is done less with respect to policy issues than with respect to procurement, grants, land use, subsidies, and licenses. Definitions that reflect the realities of local lobbying would show how much lobbying there actually is.

In addition, it is generally assumed that there is no lobbying in less populous jurisdictions and, therefore, that lobbying oversight is relevant only to big cities and counties. This simply is not true, and I have never seen any evidence presented to support this assumption. The numbers might not be as large in less populous jurisdictions, but there is still a great deal of lobbying in the usual areas of procurement, grants, land use, and licenses.

And big matters, which involve a great deal of lobbying, do happen in smaller jurisdictions. Take, for example, the building of casinos in New York state, whose municipal

lobbying code requires lobbying disclosure only in municipalities of over 50,000 people. All but one of the designated locations for these casinos were in municipalities under the population threshold. Therefore, the millions of dollars of lobbying that occurred was not considered "lobbying" and was, therefore, not disclosed to the public. This is what comes from making false assumptions about lobbying in less populous jurisdictions.

I have come to the conclusion that, with the exception perhaps of the tiniest municipalities (and these can cooperate on a joint code and program), every local government should have at least a basic lobbying code, or a lobbying section in an ethics (that is, conflicts of interest) code, that (1) requires ongoing, online disclosure of lobbying activities, broadly defined, and (2) contains certain prohibitions and obligations that relate to both lobbyists and principals (that is, clients and employers of those who lobby). It is important to include principals, because local lobbying can best be distinguished from state and federal lobbying by the fact that more of it is done by principals and their employees than by contract lobbyists.

One of the main reasons to have an inclusive lobbying code is to increase awareness not only in the community, but also among local officials and employees, that there is a lot of lobbying going on that they didn't realize was lobbying, and to give them a concrete picture of these lobbying activities — who is seeking to influence whom, who is given the opportunity to meet with officials, and when lobbying begins and with respect to what matters and issues. It's not that lobbying is wrong. However, it is important to be aware of it, to be open about it, to consider issues of fairness and inclusion, to deal responsibly with the special relationships that arise through and around lobbying, and to recognize that, especially when done in secret, both sides of the lobbying relationship can pressure each other in ways that are inappropriate and that undermine trust in those who govern a community.

It is irresponsible to deny the extent of lobbying and to push lobbying oversight under the rug because it is seen as a bother. It is an issue that should be dealt with openly and professionally, to assure transparency, to increase the points of view that officials hear, and to prevent the misuse of office, wrongful influence, pay to play, and the scandals that they lead to.

It is insufficient to simply pass one lobbying rule here, and another one there, when scandals arise or a local legislature wants to look like it cares about government ethics or to

employ lobbyists as scapegoats for institutional corruption. It is best to establish an effective, independent lobbying oversight program via a complete lobbying code. Thomas M. Susman recognized the problem of piecemeal lobbying reform in his essay "Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good," 19 *Stanford Law & Policy Review*, No. 10 (2008):

> Each piece of reform is crafted individually and sometimes (though not often) carefully. But they do not fit together to form a coherent whole. … Both Congress and the lobbying profession seem to be developing two dimensional solutions to three dimensional problems, so it is little wonder that those solutions often do not work as intended.

Because lobbying oversight brings together all the areas of government ethics — conflicts of interest, gifts, confidential information, the revolving door, political activity, preferential treatment, transparency, pay to play, and campaign finance — it is important that it be looked at three-dimensionally and treated as a whole. This book will break it down into its components, but City Ethics' Model Lobbying Code brings it all together. A halfway solution simply shifts the way business is done; it does not actually ensure more appropriate conduct or the appearance of appropriate conduct.

The Public's View of Lobbying

One reason lobbying oversight is important is that when people talk about ethical misconduct in government, they often have lobbyists in mind. Rightly or wrongly, lobbyists are many people's favorite villains. In a December 2013 Gallup poll that asked people to rate the "honesty and ethical standards" of various professions, lobbyists came in dead last.

This view of lobbyists hasn't changed much since Henry Adams wrote his 1880 novel, *Democracy,* wherein Mrs. Baker, a lobbyist, hints that there is little difference between lobbyists and members of the oldest profession:

> "Well! we got our bills through … Some of them liked suppers and cards and theatres and all sorts of things. Some of them could be led, and some had to be driven like Paddy's pig who thought he was going the other way. Some of them had wives who could talk to them, and some — hadn't," said Mrs. Baker, with a queer intonation in her abrupt ending.

It isn't lobbying per se that the public has a problem with. What they hate is the idea (1) that wealthy special interests get preferred access to government officials due to their lobbyists' special connections, wining and dining, and large campaign contributions, and (2) that government officials make decisions not based on what they feel is best for their constituents, but rather based on what will benefit people with whom they form (or already have) special relationships. As British Prime Minister David Cameron said in a February 2010 speech, "secret corporate lobbying . . . goes to the heart of why people are so fed up with politics. It arouses people's worst fears and suspicions about how our political system works, with money buying power, power fishing for money and a cosy club at the top making decisions in their own interest."

It is a question of fairness and of private interests winning out over the public interest. And it doesn't help that lobbying is done *privately* — in secret — even though it involves *public* officials. It is reasonable for people to think that if something public is done in secret, there is something to hide or to be ashamed of.

Most people (including local government officials) seem to have only a hazy idea what a lobbyist is and what a lobbyist does. Without local lobbying oversight programs providing training and disclosure, they are unlikely to get a clearer idea.

Considering the denial that local lobbying exists and the lack of understanding of local lobbying, it is no surprise that oversight of the lobbying of local government officials has been the topic of very little study, that existing local lobbying codes differ in numerous ways (and rarely due to conscious experimentation), and that there are no best practices available to help local governments decide how to provide this oversight.

There is also no information about the extent of lobbying at the local level. However, the extent of lobbying at the federal level suggests that it is probably much larger than people realize. According to the Center for Responsive Politics, spending on federal lobbying in 2009 was approximately $3.47 billion, while spending on federal campaigns that year was $3.2 billion. It is likely that expenditures on lobbying at the local level (if you were to include the value of the time of those who lobby but are not specially paid for their lobbying activities) are also about the same as campaign financing, which is substantial enough to be considered worthy of disclosure and oversight in just about every state. Considering that the resources used for lobbying are basically the same as those for

campaigns, it is interesting how much more attention is paid to campaign finance or, looked at the other way, how much more effort is made to keep lobbying activities secret.

This is true despite the fact that most local jurisdictions are more likely to have the authority to pass lobbying laws than to pass campaign finance laws, which are usually handled by state governments. One can only imagine, when the subject of lobbying oversight arises, how much secret lobbying is done to keep the lobbying that is done secret.

Connections and Reciprocity

Despite their bad reputation, lobbyists are not villains. They are mostly business owners or executives, association and organization executives, lawyers and other professionals, or members of the governmental relations and public relations professions. The economic and professional niche that lobbyists inhabit is problematic, because their financial self-interest, as well as that of their principals, is often set against government officials' focus on the public interest.

Possibly the most important single thing about lobbying is the fact that it is believed to provide a high return on value. Otherwise, so much money would not be spent on it. The financial success of lobbyists and their principals depends on their success in getting access to, developing relationships with, and influencing government officials to further their principals' personal or corporate interests. As Lee Drutman points out early in his book *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press, 2015), businesses have a "pervasive" position in government. This does not mean that they always have direct influence, but their access means that government officials are more likely to hear business-oriented arguments more than other arguments, and to take a business view of the decisions they are required to make. Business owners and their representatives come to be seen as "partners" who develop the municipality, provide jobs for citizens, make campaign contributions, and socialize with government leaders. There is no similar, countervailing force in the areas of procurement, grants, land use, licensing, subsidies, or regulation. At the federal level, according to Drutman, the ratio of money spent on corporate lobbying vs. all other lobbying combined is 34 to 1. At the local level, the ratio is most likely higher, at least if you include union lobbying together with corporate lobbying, considering that it too largely involves economic self-interest.

Contract lobbyists are more problematic than lobbyists who work for principals,

because influencing government officials for personal interests is their only business. Their goal is effectively to create and take advantage of personal relationships with government officials, that is, to create conflicts of interest for government officials. In government, most conflicts of interest already exist, but because lobbyists are not (or should not be) family or business associates of the officials they seek to influence, they have to create new conflicts. Their goal is to become *like* family, *like* business associates. Their goal is to create a relationship of reciprocity, "a whole string of contacts that forges the link," in the words of Alan Rosenthal in his book *The Third House: Lobbyists and Lobbying in the States* (CQ Press, 1993). And relationships of reciprocity with government officials are exactly what government ethics programs try to prevent and, when they exist, to keep from undermining trust in the government.

However, unlike new conflicts of interest, such as gifts, most lobbying relationships cannot be prohibited. But at least they can be made transparent, with some aspects limited or prohibited.

When lobbying is discussed, there is a great deal of talk about "influence" and "access," but I agree with Alan Rosenthal that "connections" is the aspect of lobbying that should be focused on. More than anything, it is personal relationships that enable lobbyists and principals to get access to government officials and to get preferential treatment relating to the special benefits they are seeking. It is also connections that lobbyists brag about to their potential clients, even on their websites.

Anyone can get occasional access to their representatives, but only connections provide access at critical times and in especially important ways, such as when land use and procurement matters are first being contemplated (including the ability to propose particular purchases, projects, and grants in the first place), during negotiations and the drafting of specifications and grant criteria, when legislation and regulations are being drafted and considered, and when committee chairs or staff are considering agenda items or letting a matter die in committee. Even during a legislative meeting or the meetings of many other local government bodies: it is text messages from lobbyists during these meetings that is causing a trend toward these bodies requiring that all members' cellphones (and their staff members') be turned off or that any text messages or e-mails relating to official business be disclosed online within 24 hours. In other words, rules regarding cellphone use are part of lobbying oversight.

It is also connections that make lobbyists and principals privy to non-public information, or public information before it becomes public, which can make all the difference in the success of their goals.

Rosenthal quotes an association lobbyist as saying, "It's harder to vote against someone you know than someone you don't know." And it is easier to give a contract or grant to someone you know, or allow a permit to someone you've been working with for years. It is ongoing, personal connections that lead to special access and influence less over general policy than over the specifics of a wide range of matters that directly or indirectly benefit particular individuals and businesses.

Personal relationships are central to being human, not to mention doing business. As the employee of a developer is quoted as saying about a bus trip of government officials to the site of a development similar to the one the developer is proposing, "we think that the bus ride is an important part of the trip. It allows us to talk to people in a more intimate environment. It also gives us a chance to demonstrate to the residents that we're human too. The public and confrontational environment of the township meetings creates a very depersonalized view of developers." (from Witold Rybczynski, *Last Harvest: How a Cornfield Became New Daleville* (Scribner, 2007), p. 69.)

When a lobbying firm bid for a lobbying contract with the town of Peoria, Arizona in 2012, it focused almost completely on its "positive," "key," and "extensive" relationships with state legislative and executive officials. Connections are the most important thing a lobbying client, even a local government, is looking for in a lobbyist.

One of the most problematic things about lobbying is that some lobbyists do things that look illegal and corrupt, but which are legal. Most of these have to do with the reciprocity that binds lobbyists' connections with government officials. This reciprocity often looks to the public like bribery and kickbacks: money paid for a specific result. But it is not so direct, not one payment for one result. Lobbying is much more complex and long-term than bribery. But that doesn't make it less problematic with respect to the public's trust in their officials not to provide preferential treatment to lobbyists and their principals.

Below is a description of lobbying activities from a 2009 report published by the Organisation for Economic Co-operation and Development (OECD), entitled "Self-Regulation and Regulation of the Lobbying Profession":

In their role of creating a bridge between the private sector and the public sector,

> lobbyists and public officials instinctively relate according to the "reciprocity principle," in which lobbyists providing needed research, gifts or other items of value help create a sense of obligation on behalf of appreciative public officials.

It is the ongoing reciprocity in the relationships between lobbyists and public officials that makes these relationships appear corrupt in the broader sense and that, therefore, requires lobbying activities be disclosed and certain conduct prohibited. As the federal Office of Governmental Ethics wrote in a 2012 proposal, "it is increasingly recognized that the more realistic problem [with gifts from lobbyists] is not the brazen quid pro quo, but rather the cultivation of familiarity and access that a lobbyist may use in the future to obtain a more sympathetic hearing for clients."

It is important to recognize up front that money is not the only thing that lobbyists give. In fact, it is often a minor element in an ongoing reciprocal relationship. More important, for example, is the provision of information and expertise. This includes legal and other technical information relevant to a particular matter, information about how the public feels about a matter (including polls and what lobbyists learn by talking with, for example, the opponents of a land use project), information about the politics of a matter, information about how similar projects have been greeted in other localities or how other localities have built a bridge, handled recycling, etc.

At the local level, lobbying is more valuable to elected officials, because they have fewer staff than elected officials at the state and federal levels. Therefore, they need more information, more expertise, more constituent services, and more help in drafting ordinances, specifications, and other documents, all of which lobbyists are willing and able to provide at no expense, but with expectations of reciprocity. Lobbyists and principals can prove useful to local officials by doing a lot of the support work they need, including professional advice in areas such as engineering, procurement, land use, accounting, and specialized areas of the law.

With respect to newly elected officials and board members, no information can be more helpful than information about how the legislative, land use, and procurement processes work. An experienced lobbyist, especially one with public service experience, is in the best position to provide this kind of information — and profit from it. According to a January 2014 CBS St. Louis article, an experienced Missouri lobbyist used to hold seminars for new legislators and provide them with ongoing informal guidance, in addition to

delivering beer (from a client) to legislative offices every Friday. He was so beloved for the services he provided to legislators that the Missouri Senate passed a resolution declaring him a designated smoking area in the smoke-free hallways of the legislative buildings. Reciprocity doesn't get more personal than this.

But it is important to recognize that, by providing expertise and information, not only more than others, but also before others have the opportunity, lobbyists can frame the way officials and the news media see issues such as developments and transit projects.

The other important thing that lobbyists provide as part of their reciprocal relationship with government officials is the gift of their friendship and ongoing support, including their role in political campaigns and the care they take in helping officials look good. In a world where it is hard to trust anyone, individuals who have a personal interest in having you trust them can be the most reliable people around. And trust is the core of friendship. It is around this core that socializing forms and grows, from golf and hunting to family get-togethers, shared vacations, and shared political campaigns. Reciprocity is a very human, emotional thing that should never be viewed solely, or even primarily, in terms of money. Or even beer.

"Follow the money" is a great slogan, but following the personal connections would give people a better picture of lobbying. That's what an effective lobbying oversight program does.

Differences at the Local Level

When people think of lobbying, they think of lobbying firms working at the federal level. They think of professional lobbyists representing big corporations, associations, and organizations trying to get laws changed in their favor. What people picture is public policy lobbying.

Less Professional Lobbying: Lobbying at the local level is different. Much of local lobbying is done not by professional lobbyists, but rather by owners, managers, attorneys, and community or government relations directors of entities that are directly seeking special financial benefits from the local government. Few of the individuals engaging in lobbying activities at the local level are paid specially to lobby, because the companies involved don't have the resources to have a lobbyist on staff or even to hire a professional lobbyist. In fact, it would often be a waste of money, because there is likely no professional lobbyist who has better relations with local officials than the business owner or the company's attorney does.

Unlike professional lobbyists, these business owners and lawyers generally do not consider themselves "lobbyists." Nor do federal and state definitions of "lobbyist" include many of these individuals. This means that the definition of lobbying has to be changed to be relevant to, and effective at, the local level. This is the most important thing that needs to be kept in mind in drafting a local lobbying code.

About Direct Benefits Rather than Public Policy: The other most important difference is that most local lobbying is not about public policy, but rather about land use matters, procurement, grants, subsidies, and licenses. It is about seeking financial benefits directly rather than through changes in laws that benefit entire industries or professions. Local lobbying is not about whether a policy is best for the community. It involves more mundane questions, such as the wording of contract specifications, whether a grant should be given to x rather than y, or whether a particular kind of business or development should be allowed in a particular part of town.

More Direct Control Over Lobbying: When local lobbyists *are* specially paid or hired for their work, they usually report directly to the business owner or CEO and, therefore, the owner or CEO is involved more closely in local lobbying activities than in federal and state lobbying, where lobbying is overseen by a governmental relations department or is done through professional and professional associations. Therefore, at the local level, it is more reasonable to hold the owner or CEO directly responsible for lobbying activities and their disclosure to the public.

Ease of Connections: It is easier for businesses to make long-term connections at the local level because local elected officials do not have a long commute. State and federal representatives disperse to their home towns, requiring lobbyists to concentrate their socializing when elected officials are in the capital. Local officials are, by definition, at home. Therefore, all year long local officials socialize at the same bars and restaurants as local lobbyists and business owners, play golf and tennis at the same clubs, etc. Having so many more opportunities to develop personal relationships with officials is a huge advantage for those seeking special benefits from their local government. It also mixes lobbying and socializing, so that it is very difficult to tell them apart. This mixture is more problematic locally than it is at the state and federal levels.

Less Time and More Opportunities: Owners, CEOs, and lobbyists from out of town often do not have the luxury locals have of gaining access and influence through long-term

reciprocal relationships with officials. These owners and CEOs have to work harder and faster to develop these relationships. Doing this — via gifts, entertaining, favors, and local lobbyists and attorneys — can lead to a stronger appearance of quid pro quo transactions.

Cause lobbyists, who are less prominent at the local level, are less likely to develop personal relationships with local officials, because it is their issues rather than their personal familiarity that is most important. In any event, they often lack the financial and social resources needed to develop personal relationships, except with those officials who already strongly support their cause.

Nonprofits Seeking Special Benefits: At the local level, there is also no important difference between a lobbyist for a for-profit developer and a lobbyist for a not-for-profit association, institution, or social service organization. Whereas at the national level, most nonprofits are concerned with policies, not with contracts, real estate projects, or grants, nonprofit hospitals, universities, social service providers, unions, and chambers of commerce lobby just the way for-profit contractors, developers, and regulated businesses do.

The Provision of Constituent Services: Besides providing money, information, and friendship, some local lobbyists gain access to and influence with local officials by providing constituent services. No one is in a better position to provide these services than local universities and hospitals, social service agencies, arts organizations, unions, and professional associations, all of which seek financial benefits from the local government. Sometimes these entities even lobby, raise funds, or put together coalitions in support of political and charitable causes that mean a lot to the mayor or the council president. And, of course, no cause means as much as a re-election campaign. Organizations, associations, and unions that have lots of members in the community, as well as companies with lots of employees, can provide valuable electoral and financial support. And something is usually expected in return.

Monitoring: Another part of lobbying that is more important at the local level is monitoring the status of matters, which is a service lobbyists supply to all their clients. At the state level, anyone can find the status of most matters online. But at the local level, things are usually not as transparent. This makes lobbyists who have connections and an understanding of the way things work especially valuable. Those who work in certain areas, such as procurement and land use, often monitor matters themselves through their personal

relationships with important officials.

Minor Matters Have Little Transparency: Another important thing that makes local lobbying more problematic than state and federal lobbying is that it mostly involves what, for the public, are minor matters, as compared with important public policy issues. Local lobbying involves such things as contract specifications and change orders, the handing out of federal, state, and local grant and loan money, zoning permits, and the regulation of businesses. In these areas, the only pressure on officials tends to come from those who lobby; there is, therefore, none of the competition, and the accompanying oversight, that comes in public policy matters from those with different views. Even with major property developments, much of the lobbying occurs early in the process, before the public is aware, and much of the lobbying thereafter consists of grassroots lobbying, which does not involve the direct communications with officials, which is all that many definitions of "lobbying" include. Few citizens follow or understand these areas, and they are also not well covered by the news media. Hence, local lobbying is even less transparent than state and federal lobbying. Therefore, the need for its disclosure — to make it more transparent — is more important at the local level. And yet it is far more rare for any disclosure to be required.

At the local level, it's the "minors" where the most important games are played, despite there being no opponent and audiences that are small, or non-existent.

As Alan Rosenthal wrote in his book *The Third House: Lobbyists and Lobbying in the States* (CQ Press, 1993), lobbying is most effective when it involves matters that mean a lot to those seeking special benefits, but mean little to the public. A principal reason is that, with respect to these minor matters, officials assume that, if no one objects, the public interest is being served or, at least, not being undermined. Therefore, officials feel more free to serve personal interests.

In his book, Rosenthal provided a telling example of a minor bill at the state level that has had huge ramifications at the local level. A local government ethics bill in New Jersey was killed year after year because there was only one lobbyist focused on it: the state's local government officials' association. Eventually, an ethics bill was passed (after the book was published), but it created a weak government ethics program that the same association has presumably been able to keep weak.

Blocking Change: Also relevant to the transparency of lobbying is the fact that it is not mostly about final votes, as the statistics provided by those who defend lobbying would

make you believe (they insist there is little relationship between final votes and campaign contributions from lobbyists, at the federal level). Even when it comes to public policy issues, it is mostly about getting matters on the agenda and, often more important, keeping matters off the agenda or bottled up in a committee. Shaping the agenda is an important form of influence that is often ignored because the results cannot be seen or enumerated. When policies and regulations are involved, the goal of lobbyists is often to block change, to preserve the status quo, so that policies and regulations never become the subject of public discussion.

At the local level, lobbyists block change less than at the state and federal levels. Their clients are more often focused on initiating projects and getting contracts, grants, tax abatements, licenses, and permits, and getting them fast. The principal kinds of status quo they seek to preserve are a lack of transparency or effective regulation and a continuation of their contracts, grants, and licenses. Otherwise, local lobbyists need to be more proactive than state and federal lobbyists. In many such instances, there is often no one on the defense, no one seeking to preserve the status quo, because while benefits are concentrated on one or two entities, possible costs to the community are widely distributed and often not recognized at all.

The Value of Transparency: All these aspects of lobbying that people don't see or understand become more visible when lobbying activities, broadly defined, must be disclosed. This presents a much more true picture of what goes on in local government.

This transparency is more important at the local level than at any other level, because each decision (and lack of decision) immediately affects the community and the taxes that locals have paid and will be paying in the future. And the names mean more, because contractors, developers, and grantees are more familiar locally than nationally. The smaller the town or county, the truer a picture lobbying disclosure gives of how a community's government is operating with respect to the special benefits it hands out.

Less Lobbying by Associations: Business and professional associations, which are very active in federal and state lobbying, rarely get involved in the principal local lobbying areas of procurement, grants, land use, subsidies, and licensing, because their members are competing against each other in these areas. Associations are most likely to get involved in big projects and public policy issues.

Opposition to Local Lobbying Regulation by Professional Lobbyists and Others: Since lobbying

at the local level is different in so many ways from lobbying at the state and, especially, the federal levels, lobbying laws should be different, too. They should not differentiate so much between lobbyist and principal. They should treat the principal as the lobbyist, and any employee or consultant who engages in lobbying activities for the principal as an agent of the lobbyist (lobbyists were originally called "lobby agents," and the City Ethics Model Lobbying Code refers to them "agent lobbyists"), responsible perhaps for filling out disclosure forms, but not for the lobbying activities themselves, except as agents.

Possibly the most problematic thing about the prevalence of non-professional lobbying at the local level (that is, business owners doing their own lobbying or having their lawyers do it) is the fact that non-professional lobbyists are less likely to support lobbying regulation than professional lobbyists are. Professional lobbyists at the federal level have supported lobbying oversight because they want the respect that regulation provides, they want the protection that clear-line rules provide, and they have an advantage in fulfilling requirements, since they can easily set up a compliance program. Compliance is more difficult for, and therefore seen as an annoyance by, non-professional lobbyists, who do not even see themselves as lobbyists. For them, lobbying codes seem unnecessarily burdensome, completely inappropriate, even damaging.

However, even professional lobbyists who work at the local level have not, for the most part, embraced lobbying oversight. Since professional lobbyists generally do not seek to hide their fees or to prevent the paperwork that would be involved, it is reasonable for the public to wonder what these lobbyists, their principals, and elected officials feel is worth keeping hidden from them.

In two essays, "Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right," 19 *Stanford Law and Policy Review* 23 (2008), and "The Seven Deadly Virtues of Lobbying," *Election Law Journal* (2014), federal lobbyist Nicholas W. Allard made an excellent case for the value of lobbying. But the arguments he made do not apply to local businesses and organizations seeking special benefits such as contracts, grants, permits, tax abatements, and licenses. In fact, he began the first essay by saying that his arguments involve only advocacy relating to policies, not to earmarks (his focus is the federal level), adding, "The need for new rules to curb abuses in the earmark area is apparent." In his second essay, he wrote of earmarks, "That is a practice where often there is too much of an appearance, if not the reality, that campaign contributions influence results, that taxpayer

money ends up in the hands of those who lobby and pay politicians with campaign contributions and favors." The arguments he brings to lobbyists' defense in his essays involve ideas, where there are multiple sides to every issue, not special benefits, where the competition is only for government funds and favors among entities who do not generally make their views available to the public. At the local level, it is special benefits that are the principal goal of lobbying, and the need for rules to curb abuses is strong.

Land Use, Procurement, and Other Special Local Lobbying

Almost all books and essays about lobbying and lobbying oversight in the United States focus on lobbying at the federal or, occasionally, at the state level. This makes Anthony Nownes' *Total Lobbying: What Lobbyists Want (and How They Try to Get It)* (Cambridge University Press, 2006) stand out from the pack (ignore the inappropriate title)

Nownes divides lobbying into three kinds: public policy, land use, and procurement lobbying, each of which gets its own, large section of the book. Most books and essays are limited to public policy, with the occasional look at procurement at the federal level (especially defense procurement). Nownes does take most of his procurement examples from the federal level, but when it comes to land use lobbying, he has to focus on the local level, because this is where it primarily occurs.

Ottawa's lobbying register provides a good idea of the subjects of local lobbying. In the two years up to October 2014, the zoning law was the top subject, with 600 lobbying activities. Next came "planning and development," that is, more land use lobbying. Third was "infrastructure," that is, procurement related to construction. "Garbage," another procurement area, was also among the top five subjects.

Chicago has a pie chart of lobbyist clients, by industry. In such a big city, there is a lot more variety. However, real estate and construction has the biggest slice, by far. Industries with other large slices include financial (bonds and pensions), transportation (procurement and land use), retail (land use and regulation), hospitality (land use and regulation), medical/hospital (land use and regulation), education (land use, government employment, and charter schools), IT, technology, and engineering (procurement), and public utilities (land use and regulation). The pie chart only shows the number of clients, not the amount of lobbying they do.

Since most local lobbying occurs in the two areas of land use and procurement (as well as grants, licenses, loans, subsidies, tax abatements, and regulation, which even

Nownes doesn't cover), this book is the closest thing I have found to a study of local government lobbying (but there is nothing about lobbying oversight). The book is descriptive and introductory in its approach, and is based primarily on interviews with a wide variety of lobbyists.

Nownes not only acknowledges the most important areas of local lobbying, but says that "it is arguably the case that land use decisions … and procurement decisions … are more important to a wider range of people and organized interests than are public policy decisions." And it is partly because this is not generally recognized that local lobbying can occur under the radar and, therefore, be more effective than public policy lobbying.

Nownes shows that business interests and major institutions (universities, hospitals, and governmental entities) are "far better represented before government than are other types of organized interests." With respect to procurement matters, they are usually the only ones involved in lobbying. The only opposition comes from lobbyists representing other businesses seeking the same contract. With respect to land use matters, where there is often citizen (usually neighborhood) opposition to major projects, there is usually no lobbyist — that is, no one with an ongoing, reciprocal relationship with involved government officials — in opposition. However, when there is a well-funded opposition group that can afford a contract lobbyist or experienced director-lobbyist, a business interest that feels it might be harmed by the project is often funding the group.

In short, local lobbying is mostly about businesses seeking special financial benefits for themselves. Only government officials are looking out for the public interest, at least if they are not overly biased toward one of the lobbyists or principals.

An important reason that most types of local lobbying are more successful than public policy lobbying is that a lobbyist is more likely to be successful when not opposed by other lobbyists. Nownes writes, "studies suggest that lobbyists who avoid conflict with other lobbyists by focusing narrowly on one small issue or set of issues are more effective than lobbyists who regularly confront other lobbyists." At the local level, the way to do this, with respect to contracts and grants, is either (1) have a hand in developing specifications so that one's company or client is the only one that can supply the product or service, or get the grant, or (2) develop a relationship and reputation with officials such that the renewal of one's contract or grant appears inevitable, so that no one wastes their energy making an opposing bid.

Toronto recognizes this in its lobbying code by including in its definition of "to lobby" the phrase "determining the model and method of delivering a service." That is, it expressly includes lobbying done to influence whether a service will be contracted out or delivered by the government itself and, if contracted out, in what manner the service will be provided. This form of lobbying can lead to huge, often effectively no-bid contracts that would not otherwise exist, and yet it does not involve any existing bill or even contract that is being discussed publicly, as some lobbying codes require.

Nownes found that, among the lobbyists he interviewed, only 13% of land use and 20% of procurement lobbyists work in-house, both lower percentages than public policy lobbyists. This would imply that local lobbying is more the work of contract lobbyists than in-house lobbyists. But Nownes did not consider or interview contractors and developers who lobby for themselves, who do not need the connections of lobbyists because they are themselves involved in local politics and have longstanding relationships with both the relevant agencies and the elected officials whose influence in procurement and land use matters is essential when it comes to bid selection committee nominations, final approval, budgeting, developments in their districts, change orders, and the like.

Nor did he consider how many of the people who engage in land use lobbying, other than grassroots lobbying, are lawyers who consider their work to be legal representation rather than lobbying and, therefore, do not register as lobbyists or disclose their lobbying activities. Much land use lobbying is done by developers' agents, but many if not most of these agents are also not professional lobbyists. The problem is defining "lobbying" and "lobbyist" in such a way that the lobbying activities of land use lawyers, realtors, builders, architects, and the like are not excluded from oversight.

With respect to land use lobbying and lobbying related to obtaining other kinds of permits as well as licenses, grants, and contracts, lobbying involves a great deal of negotiation. It helps the principal's cause when the lobbyist has a good, personal relationship with the individuals with whom she must negotiate and those who have influence on these individuals. Although the negotiator is often a lawyer, the negotiations rarely or only partially involve legal issues. The fact that the negotiator is an attorney is irrelevant to whether the negotiation constitutes a "lobbying activity."

Land Use Lobbying

Nownes noted in his book that land use decisions are political decisions rather than simply

technical or legal decisions." The land use process *is* a political process, not only an administrative or legal process. But not all developers appear to know this, and so they often employ lawyers to represent them rather than lobbyists. And law firms often provide both legal and lobbying services. Lawyers, like lobbyists, often have just the right connections to allow their clients to negotiate their way through the land use approval process most efficiently and effectively. But much of what they are doing is lobbying, not practicing law.

Land use lobbying involves a number of players, including planning commissions, zoning boards, boards of zoning appeals, conservation and wetlands commissions, local legislative bodies (especially the member representing the district in which the development would be built and members of the relevant legislative committees), mayors and county executives (who can greatly influence results and affect the messages given to the public), city and county managers, engineers, building inspectors, health and public works departments, sewer and water districts, and transit authorities, and the staff for each of these bodies and individuals. Staff reports and recommendations count for a great deal. And staff also have, and are often willing to share, information that elected and appointed officials are not willing (or able) to divulge. This information often proves useful in lobbying those officials.

But what is most important, Nownes points out, is the fact that because legal standards are generally vague (e.g., "not injurious to the public welfare" or "generally compatible with surrounding land uses") and, in any event, developers can seek variances (exemptions from standards), each of these players has a great deal of discretion in interpreting laws and regulations, as well as slowing and speeding the land use process. Wherever there is discretion, there is an opportunity to influence, an opportunity for lobbyists to do their work.

This is why, in lobbying codes, definitional language is so important, as are advisory opinions that make definitional language more concrete. For example, see below for an advisory opinion detailing when the activities of a land use expeditor (often a lawyer) are considered "lobbying activities."

With respect to the goals of government ethics, it is very important how the public views relationships between officials and developers. According to the 2015 Saint Index (which focuses on land use), "54 percent of Americans said the relationship between local officials and developers makes the approval process unfair." This implies that local lobbying

oversight would be valuable to a community by improving the land use process and changing the public's attitude toward it.

Not only developers engage in land use lobbying. Nownes notes that property management companies, construction companies, utilities, railroads, cellular companies, chain stores, universities and other nonprofit institutions also seek land use permits and variances. Nownes quotes a lobbyist for a university as saying, "Pretty much everything that we do … involving land, construction, [and] everything else, involves some land use permit or permission." Neighborhood groups are often involved in land use decisions, but tend to use volunteers rather than lobbyists. When they do hire lobbyists, the cost is usually covered by a business that feels it would be harmed by a development.

Owen Eagan's book *So What: Measuring and Assessing Strategic Communications in Land Use Politics* (Saint University Press, 2013) provides a huge amount of detail about another kind of land use lobbying: the provision of strategic advice regarding the direction of the "complex political campaigns" that accompany major land developments. These political campaigns are focused not on planning commissions and local legislatures, but rather on the public, especially neighbors, "influentials," possible supporters and opponents and, when a referendum or initiative is involved, possible voters. Important aspects of these campaigns include identifying likely supporters of one's side, convincing them to participate in the land use process (through conversations, meetings, letters to the editor, op-ed pieces, blog posts, etc.), listening to opponents and possibly negotiating with them, controlling the debate and the message, and engaging in citizen education and outreach. The means include door-to-door canvassing, direct mail, phone banks, advertising, social and other online media, forming coalitions, polling, microtargeting, petitions, forums, the establishment of community advisory groups, videos of local supporters, small meetings and "kiosk-style" events, the support of local charities and government projects, opposition research, "truth squads" to debunk "myths," "rapid-response teams," and "crisis communications." The book is full of quotes from notable behavioral psychologists.

These campaigns are known familiarly as "astroturf" campaigns, that is, grassroots campaigns led not by people in the community, but by people seeking special benefits and their agents. Both astroturf and grassroots campaigns involve the lobbying of local officials, only in an indirect fashion. It is the targets of these astroturf campaigns who lobby officials, but their one-time communications are not usually called "lobbying." The professional

lobbying that goes into these campaigns does not directly involve the "contacts" and "communications" with officials that often appear in lobbying code definitions. Like most government ethics provisions, lobbying provisions tend to be limited to direct lobbying, leaving large loopholes for astroturf lobbying, as well as strategic advice, which need not be disclosed and are not subject to restrictions and prohibitions. This means that the public, government officials, and even interested parties are given a skewed picture of the actual lobbying that goes into land use matters. This is why it is so important that definitions of "lobbying activities" be as inclusive as possible, and take into account the actual work that is done to influence government officials directly and indirectly.

It is notable that nowhere in Eagan's book does the word "lobby" appear, except with respect to what he refers to as the old-fashioned way of getting land use projects approved. The author's terms of choice are "grassroots advocacy" and "grassroots organizing" — no one admits to astroturfing. In other words, the author does not consider the work his firm does to be "lobbying," even though it involves professional campaigns to influence officials to support or oppose developers' projects, albeit in an indirect fashion. The author's firm refers to the field as "land use politics," and its members consider themselves "management consultants." Many, although not all, lobbying codes allow these "management consultants" not to register as "lobbyists," disclose their lobbying activities, or be subject to lobbying rules.

A sizeable portion of the firm's work seems to have involved blocking development projects, such as the building of big box stores, especially Walmarts, according to a 2010 *Wall Street Journal* article. This opposition is paid for by local retailers that fear they will lose business to the new store. Eagan calls this sort of campaign "protecting market share." It is the same kind of campaign as supporting a development project, only focused on engaging possible opponents to a project instead of possible supporters.

According to the article, opposition to Walmart stores includes assumed names, phone banks to make it look like calls are coming from a variety of phones, training supermarket employees in public speaking, lawsuits to delay permit approval, and the creation of "astroturf" organizations, so that people think neighbors and other locals are in charge of the opposition.

And if the rules are not in one's favor, Eagan says, one can seek to change the rules, often through what is known as a "big box ordinance," which sets a maximum store size or

the need for special approval for stores over a certain size. Land use lobbying can, therefore, involve traditional legislative lobbying, as well.

An excellent journalistic description of land use lobbying, and the range and complexity of the relationships between land use lobbyists and the government they lobby, can be found in a 1986 article by Ralph Frammolino in the Los Angeles *Times*.

Procurement Lobbying

Procurement lobbying is equally important at the local level. In fact, it is growing, because local government procurement itself has increased in recent years, due to greater demand for services as well as an increase in the outsourcing of services formerly provided by government agencies themselves. Procurement usually involves fewer independent boards than land use, but it does include the departments and agencies making the purchases, bid selection and oversight boards, financial departments and bodies, and the local legislative body, which is involved in budgeting for departments and agencies, in the approval of larger contracts, extensions, and renewals, and sometimes in the nomination of members to bid selection boards and in oversight of procedures and projects.

Although fewer boards may be involved in procurement, there are many stages in the process, and each of them involves lobbying. This lobbying requires timely access, which requires connections, more than any other kind of lobbying. Former government experience helps a great deal in developing connections with department and agency personnel, but local, statewide, and regional business owners often have the experience and political and personal connections needed to get their feet in the door, without having to hire a lobbyist to do this for them.

Nothing is more effective than getting involved in the process as early as possible. Ongoing or "background" lobbying is required to determine and influence the needs of the departments and agencies involved in procurement matters. Part of this background lobbying involves the stimulation of demand for particular products and services ("the county's been using this product for two years, and it's worked for them; give Jane Doe a call and she'll tell you all about it."). When demand is stimulated for a particular product or service, the company that stimulated the demand is almost guaranteed to win the contract.

At the next stage, lobbying's goal is often to get bid specifications tailored to fit a particular product, service, or company. This can limit bidders to only two or three, or even just one. The holy grail of procurement lobbying is a contract that is bid out, but which only

one's company can win, a no-bid contract that fits the legal open bidding requirements. Barring this, the best solution is to get on a preferred contractors list and have a bid limited to companies on the list, which often greatly lessens competition and makes it easier for those on the list to divvy up contracts among themselves ("bid rotation").

Nownes wrote in his book, "The ultimate background lobbying triumph for the procurement lobbyist is a case in which a government entity designs a [bid] solicitation with a single specific business in mind." The procurement lobbyists who spoke with Nownes said that this is very common, especially with respect to big contracts. All of the lobbyists told him that "affecting the content of a solicitation is often the key to successful procurement lobbying."

One reason background lobbying is so key is that if a solicitation can make one vendor or contractor the almost certain winner of a bid, the lobbyist has no opposition. In procurement, where there is little worry about public opposition, getting specifications designed for your firm makes the process much quicker and less expensive, not to mention more likely to be successful.

With the increased use of "best value" criteria, where factors other than price are given serious consideration, the relationship between lobbyist and procurement staff can be crucial. The reason is that the use of "best value" criteria gives staff more discretion and, with more discretion, there is a greater chance that lobbyists can succeed by personally relating to officials. As Nownes says, "'best value' evaluation and award practices raise the old bugaboos of subjectivity and corruption in purchasing."

As one lobbyist told Nownes, "the firm from which an agency chooses to purchase something often comes down to personalities. 'Everyone [at the agency] has to assume that you can do [the job in question],' he said, and thus technical aspects of a specific proposal are generally not the determining factors in who wins and who loses. Rather, it comes down to crafting the type of proposal that the specific decision-making individuals within an agency will respond positively to." Nownes gave the example of recognizing the importance of meeting an agency's minority outreach goals, but the issue is often nothing more than personal familiarity and the feeling of obligation that exists in a longstanding reciprocal relationship.

As another lobbyist told Nownes, "You don't really hire a firm [to fulfill a contract]. You hire a group of people…" This is most true with respect to the procurement decisions

that involve the greatest amount of discretion, and often do not require sealed bidding: professional services contracts. These also happen to be the contracts in which high-level officials often get the most involved, because they want to work with specific lawyers, consultants, and other professionals. In these procurement decisions, price is a relatively minor consideration, and relationships (in addition to past performance) are everything. This is also true of other special contract situations, including sole source contracts, bids limited to a preferred contractors list, multiple award or bundling contracts, emergency contracts, rebids, and contracts where there is an understanding that there will be substantial change orders (which can greatly expand both the services or products required and the pay for these services or products).

At a different level, contractors separately and together, often through the local chamber of commerce, lobby for (and to preserve or increase) in-town preferences that allow in-town contractors (or contractors with an in-town office) to win a bid even if their bid is, say, 10% higher than an out-of-town contractor.

In addition, as Nownes noted, much procurement lobbying is not related to a particular contract, but is rather background lobbying "designed simply to draw attention to a particular good or service." And, I would add, to the people involved. Procurement lobbying is much more like sales than it is like public policy lobbying or even land use lobbying. It involves not only pushing products and services, but also creating a demand for them.

At the local level, no one can do sales better than local business owners. At higher levels, smaller vendors and contractors have a distinct disadvantage. At the local level, out-of-towners have a greater need to hire local contract lobbyists to alert them to opportunities, open doors for them, and give them advice that will give them an advantage in seeking a contract. Or, at least, give them a chance.

One area where lobbying is crucial is getting on to preferred contractor lists. Long-term experience and relations with procurement personnel, as well as the recommendations of high-level officials, are crucial to getting on these lists, to convincing agencies to create such lists, and to preventing contractors who fail to get on a list from undermining the use of such lists.

Another area where background lobbying is important involves a department or agency's budget requests. If a department or agency can be convinced to request money for

a particular product or service, and the local legislature can be convinced to fund the request, the chances of obtaining a contract are much greater. One example Nownes gave is of a landscaping firm lobbying for increased spending on parks. Such requests are most likely to follow a small, successful contract for a new product or service, a foot in the door. In this way, lobbying that follows winning a contract can also be a form of background lobbying, with the goal a larger contract or an extension into other products or services.

Background lobbying is more important in procurement lobbying than anywhere else, because once the bid process has begun, most jurisdictions greatly restrict or prohibit communication with agency and procurement staff. But once a bid solicitation has been affected in a way to favor a particular company, there is no need to do more lobbying. But even during a sealed bid process, there is often a point where lobbyists may be called in to answer questions, make a more detailed pitch, or negotiate with respect to price or other specifications.

When a sealed negotiation process is employed, negotiations continue throughout the process. Nownes said that the sealed negotiation process is being employed more frequently, due to an emphasis on quality in addition to price. A contractor whose lobbyist is not trusted by procurement staff has a hard time winning and negotiating contracts pursuant to this process.

Once a department, agency, or bid selection board makes a procurement decision, the legislative body will be asked to approve the bid result, if the size of the contract is large enough. Legislative bodies tend to be more involved in procurement at the local level than at the state or federal levels. This may require a great deal more lobbying, and in larger cities and counties this is more likely to be done by contract lobbyists, because they are more likely to have the necessary connections and understanding of the legislative process.

There are also oversight bodies that are involved in the procurement process, such as public works boards and park commissions, as well as special committees appointed for big projects, such as the building of a school or a library. These bodies, and their staff, are often lobbied, as well.

And then there are all the issues that arise during implementation, which may involve much more lobbying and negotiation. Lobbying at this stage is focused on problems that arise in implementation, as well as on extensions, change orders, and renewals. This continues to the end of the contract, even when there is no extension or renewal. Lobbying

at this stage involves the determination when the job is actually over, putting the best spin on the work done, and dealing with claims each party may have against each other or against other parties, including subcontractors.

As Nownes noted, winning a delivery order contract doesn't guarantee sales. A vendor may need to lobby in order to get orders under the contract.

Considering all of this together, it appears that lobbying — especially ongoing background lobbying — is even more essential to procurement than to public policy or land use matters. For the same reasons, lobbying would seem that it would be equally important with respect to grants.

The Courtiers of Today

One of the most important revelations of Nownes' book is that government officials "meet with lobbyists partially because *it is fun*. Politics is still a *people* business. Many of the people involved in politics enjoy the give-and-take of personal interactions." They are more than anything social people. But as a council member once said, "There is no such thing as purely social."

In addition, staff members like to meet with lobbyists because it makes them feel important, and there is the possibility of looking good when they recommend a better or less expensive product, service, service provider, or grant recipient.

Another reason officials like to spend time with lobbyists is that they tend to be former government officials or are politically involved. Lobbyists understand the issues in the same way government officials do, they can provide valuable expertise as well as information about constituents and other officials, and they have every reason to support officials not only politically, but also socially and emotionally. When it is one's job to be a pal, a lobbyist with government experience can be a very good pal indeed. Lobbyists are the courtiers of today.

Nownes pointed out one way to get around the apparent unfairness that can result from the relationships that lobbying provides. The solution he proposed is more lobbying: lobbying the local legislature or an oversight committee to get them to better monitor the procurement process or even intervene when, for example, a contract is not bid out according to the rules. If this doesn't work, there is the possibility of a lawsuit (and this possibility can be held over the head of a local legislature and the city or county attorney). But this is difficult to do when one has limited information and personal contacts, and when

the interest in better procurement practices is widespread, while the interest in getting contracts is spread only among a small number of companies.

New Public Policy Lobbying

After all this talk about how different local lobbying is, because it is far less about public policy than state and federal lobbying are, it is important to note that local governments have recently been dealing with certain public policy issues more than they used to, and that the result of this has been more local lobbying by state and national lobbyists. The issues include immigrants, fracking, wind farms, gambling, minimum wage, oil shipments, campaign finance programs, and bans on paper bags, soda, soda bottles, and the like for health and environmental reasons. Although most municipalities don't have these issues, or they're relatively minor, many find themselves inundated by professional lobbyist. Without a lobbying program, officials and the public cannot see what is going on.

The Value of Lobbying and of Lobbying Oversight

Although it is unpopular with the public at large, it is important to acknowledge that lobbying, like a conflict of interest, is not a bad thing in and of itself. In fact, it plays an important role in our democracy. It is a way for citizens (including those who run businesses as well as those who lead citizen groups) to get their opinions heard by government officials; it is a way to educate government officials and the public; and it is a way to provide specialized expertise to government. When people say they think lobbying should be banned, they are thinking of lobbying by big corporations at the federal level. They are not thinking of citizens banding together to try to stop a development project in their neighborhood by having the organization president or a contract lobbyist educate officials about the possible negative consequences of the project.

Those who seek benefits from a government may not even have a choice not to lobby. The more lobbying there is, the more necessary it is for everyone to have a lobbyist. Here's an instructive story from Alan Rosenthal's book *The Third House: Lobbyists and Lobbying in the States* (CQ Press, 1993). The Florida League of Cities, a municipal association, was lobbying for a state program to facilitate urban development projects. State legislators demanded that the League come up with a revenue source to fund the program. The League settled on a sales tax on dry-cleaning. Why? Because the Florida dry-cleaning industry didn't

have a lobbyist to oppose the tax. The dry-cleaning industry learned its lesson the hard way and made sure it had a lobbyist monitoring the state legislature. This story also illustrates how much the game of lobbying is about defense as much as offense.

Lobbying is considered to be protected by the First Amendment of the U.S. Constitution and by many state constitutions. The part of the First Amendment that most specifically protects lobbying is the right to petition the government for redress of grievances. Lobbying is also an exercise of free speech and, where it involves groups of people working together, of free association.

What does it mean to "petition the government for redress of grievances"? In "Toward an Ethics of Being Lobbied: Affirmative Obligations to Listen," *Georgetown Journal of Law & Public Policy* (2014), Heidi Li Feldman looks at the history of petitioning. It goes back centuries before the founding of the United States, and was even included in the thirteenth-century Magna Carta. It was originally a process by which individuals and groups could petition their feudal lords, and the lords could in turn petition, or send on petitions to, the king. It legitimated the authority of each, as well as constrained this authority, because the king could not directly hear petitions from ordinary people.

Later, petitions started being made to Parliament. A petition "had to address a recognized authority, state a defined grievance, and pray for relief. A petition was a discrete political and legal instrument for seeking justice." In other words, there is limited overlap between the concept of a "petition for redress of grievances" and lobbying.

In colonial America, people made petitions to colonial assemblies. In fact, much of these assemblies' time was spent dealing with petitions, and most petitions were addressed in the form of bills. Standing committees were formed to hear and address petitions. It is through petitions that these assemblies legitimized their lawmaking authorities and gained information about the problems in their communities. It is worth noting that petitions were not only accepted from the minority of voting white men, but also from women, Native Americans, slaves and free African Americans, and felons.

Congress also handled petitions. But its handling of petitions was undermined when it was flooded with petitions calling for the abolition of slavery, and southerners started asserting a states' rights argument against petitions to Congress. After the Civil War, Feldman says, petitioning Congress "died out completely." The Supreme Court found that the right to seek a redress of grievances did not require governments to actually listen.

This is where it gets interesting. Free speech is limited by the fact that no one has an obligation to listen. But when it comes to speech directed at government officials, should there be an obligation to listen? And if there is an obligation to listen to people seeking justice, wouldn't it have to be done fairly? That is, wouldn't government officials be obligated to listen to multiple viewpoints? Wouldn't officials be obligated to listen not only to developers, contractors, and business associations, but also to ordinary citizens and citizen groups that lack the ability to hire a professional lobbyist and have no personal connections with government officials? There is far too little talk about this obligation, which is closely related to both individuals' right to lobby and the community's right to have decisions made in the public interest.

Feldman calls this "the ethical practice of being lobbied." She suggests that government officials do such things as block out periods of time for appointments with non-lobbyists. At the local level, this would mean blocking out time for those who are not seeking financial benefits, at least other than preserving the value of their homes. This would include community associations, environmental organizations, good government groups, and individuals.

Feldman also suggests that officials not be passive about getting this input, but rather seek out information from those who might be affected by their decisions, as well as from outside experts. For example, so often, when government ethics reform is being discussed, officials simply hand the matter over to the city or county attorney, who has no specialized knowledge, who feels required to give officials what they want, who does not want to know what outside experts think (not one has ever contacted me, for example), and who therefore recommends the least amount of change possible. Things can be very different when councils contact outside experts. But it is more common for officials to seek out opinions only from within the community, where few people other than those with financial interests understand the matters or know about alternative solutions.

Citizens and citizen groups make a much higher percentage of speeches at public meetings than participate in lobbying, but their speeches are often time-limited, come too late in the process, and are ignored partly because public speaking is not the best way to present their views, partly because they lack understanding as well as many of the facts, partly because decisions have already been made, and partly because their presence was not requested. Officials should take more initiative making the facts and issues widely known,

inviting groups to speak, giving them more time and at an earlier point in the process, and letting them know that written submissions would be welcome (and when). It doesn't take much to totally change the tenor of public participation in local government.

Feldman also recommends that officials make use of online ways of getting opinions from people in the community, such as online surveys, discussion forums, data analytic tools, and good old e-mail. She writes, "the internet enables willing, eager listeners to create opportunities for people who want to speak to them to make themselves heard."

Most petitions to local legislators are dealt with in the form of what are referred to (sometimes mistakenly) as "constituent services," not in the form of ordinances (as were petitions in past eras). And local lobbying rarely seeks justice, as in the past. What it seeks is financial benefits. This doesn't mean that local lobbying is wrong, although it can be, for example, during the procurement process, when the best practice is to prohibit it. What it means is that most local lobbying was not contemplated by the Founders and is arguably not protected by the Constitution. It's good that officials provide constituent services, but no one believes anyone has a right to them. The First Amendment should not play an important role in discussions about local lobbying.

More important than constitutional rights is the obligation of officials to seek out and listen to those who may have differing views. In a democracy, and especially at the local level, where individual citizen participation can have the greatest effect, it is extremely important who is included and who is excluded, and whose interests are being allowed to distort government processes. Fairness and inclusiveness are also constitutional requirements. Unfairness and preferential treatment can be damaging to the public's trust in its local government and to its political legitimacy. Fairness is the most important basis for the obligations and prohibitions placed on a lobbyist by a local lobbying code.

There are other good reasons for regulating local lobbying. One reason is the need for transparency, for the public, as well as for their representatives and for the news media, to know in a timely manner who is getting access to and seeking to influence those who represent the public and manage their communities, when and with respect to what matters.

One reason for transparency is that, knowing their contacts with lobbyists will be seen by the public, officials will be more likely to meet with multiples parties in a matter and, therefore, more likely to hear a range of views, which will help them make decisions in a more fair, balanced manner and, presumably, more in the public interest, rather than in

the interest of well-connected companies. When there is transparency, an official who meets only with those who are seeking special benefits will appear biased toward special interests. It will also look like he is more interested in contracts and grants than in the issues that community residents care about. Lobbying disclosure can cause local officials to take the initiative, to seek out the opinions of local individuals and groups, as well as to consult with experts who have no horse in the race. Fairness and the appearance of fairness requires work.

Another reason for transparency is to ensure that lobbyists make use of their and their principals' rights in a responsible manner, and do not get unfair access to or have improper influence on officials. The goal here is the protection of the integrity of legislative and administrative processes. Transparency can prevent a great deal of improper conduct. The biggest problems involving lobbying — preferential access, undue influence, drafting laws and regulations, ongoing, reciprocal relationships — are facilitated by secrecy.

A final reason for transparency, especially with respect to the extent of spending on lobbying, is that, as Anthony Nownes wrote in his book *Total Lobbying: What Lobbyists Want (and How They Try to Get It)* (Cambridge University Press, 2006), "the data show that, … all things being equal, lobbyists with lots of money at their disposal have a higher chance of succeeding than lobbyists with little money to spend." Transparency lets the public know who is spending money on lobbying, how much, in what manner, and for what goals.

Accountability is another important reason for lobbying regulation. There is no possibility of accountability without transparency. In addition, there is a need to prevent lobbyists from corrupting government officials through gifts (including large campaign contributions and fundraising activity), and to prevent pay to play and other forms of lobbyist complicity in officials' ethical misconduct. There is a need to prevent personal influence from affecting such areas as procurement, property development, tax abatement, and grant-making in a way that is costly and otherwise harmful to the community. And there is a need to gain the public's trust that transparency and proper oversight are preventing misconduct in lobbyist-official relationships. The appearance issue is extremely important, because it is on the basis of appearances that citizens decide how much to participate in local government, including by voting.

Another reason the regulation of lobbying is appropriate has been pointed out by Thomas M. Susman in his essay "Private Ethics, Public Conduct: An Essay on Ethical

Lobbying, Campaign Contributions, Reciprocity, and the Public Good," *Stanford Law & Policy Review*, Vol. 19, No. 10 (2008): that although lobbying is an activity primarily engaged in by private parties, it is "inevitably and unavoidably imbued with public implications. Thus, when applied to the lobbyist, the ethical standards ordinarily used to guide private conduct must have an added component to accommodate the public impact of that conduct." In other words, the private values that accompany doing what one can to get a contract or a land use permit need to be balanced against the public values of fairness, transparency, and accountability.

In "Towards a Madisonian 'Interest-Group' Approach to Lobbying Regulation" (St. John's University School of Law Legal Studies Research Paper Series #07-0064, January 2007), Anita S. Krishnakumar argues that lobbying regulation should effect "change in how elected officials conduct business with lobbyists." She feels that most lobbying regulation is done for symbolic purposes, to offset the negative feelings the public has about lobbyists, with disclosure as a "magical cure-all." The focus, she feels, should be more on government officials and on lobbyists' principals. And disclosure should be handled in such a way that it benefits the processes of government, rather than simply to increase transparency and, hopefully, understanding of and trust in government.

Krishnakumar believes that more, and more timely, disclosure will help lobbyists know what lobbying is going on and, therefore, compete better, giving officials more views. Similarly, knowing that, if they meet with only one side of a matter, it will give the public the impression that they are biased or have been "bought," officials will want to hear the views of various parties. This will make it more likely that their decisions will reflect the various views, that is, be more balanced, informed, and in the public interest.

This competition, she believes, will spread to enforcement, making it more likely that lobbyists will accurately report their spending and contacts, for fear that competing interests will challenge their disclosure reports, leading to audits.

It should not be surprising that broad and timely disclosure is likely to lead to more rather than less lobbying, because this happens with campaign finance disclosure, which makes campaigning a horse race with lots more information about the jockeys' strategies and has not led to less contributing to political campaigns. The result of this effect is that lobbyists benefit from an effective lobbying program as much as anyone. This is one reason many professional lobbyists support lobbying disclosure, often more than officials do.

One problem Krishakumar points out is that most government officials do not see the lobbying process the same way the public does. They think more kindly about lobbyists than other people do, and they do not believe that lobbyists have as much influence on government decisions as is commonly thought. Of course, they also do not think that they or their colleagues are corrupted by the gifts and campaign contributions of lobbyists and their principals. And they do not see any problem with the revolving door when it means working for lobbyists before or after their public service. In fact, they see post-employment lobbying as a way for them to continue serving the public by providing its representatives with useful information based on what they learned in their public service (similarly, they consider it valuable to attract lobbyists into government service, to make use of their expertise). With this point of view, many officials do not agree with the reasons, or need, for lobbying regulation.

Officials also argue that lobbying disclosure hurts incumbents, who can be seen spending lots of time with lobbyists. However, when they run against other government officials, they too will have a record of meeting with lobbyists. In any event, officials are accountable for their time managing a community. Incumbency should never be an argument against transparency and accountability.

A reason that is less often mentioned now, but which was central to judicial arguments in cases involving lobbying, is the legitimate interest of government officials in knowing who is behind efforts to influence their actions. Not only the public needs to know this. It is also valuable for a council member to know (1) who is contacting him as a lobbyist or as part of a lobbyist's campaign to inundate the council with communications in support of a position on a matter before it, and (2) the extent of his colleagues' (and, in council-manager forms of government, executive branch officials') contacts with lobbyists. In the important lobbying decision *United States* v. *Harriss*, 347 U.S. 612 (1954), the U.S. Supreme Court said, "we believe that Congress … is not constitutionally forbidden to require the disclosure of lobbying activities. To do so would be to deny Congress in large measure the power of self-protection." In short, lobbying disclosure is intended to protect both the public and those who manage their community.

In his paper "The Anxiety of Influence: The Evolving Regulation of Lobbying," Columbia Public Law Research Paper No. 14-367 (January 2014), Columbia law professor Richard Briffault summed up the good and bad of lobbying in a way that is consistent with

government ethics concerns: "Lobbying should inform and thereby improve government action, not distort it by appeals to the private self-interest of decision-makers. The principal concern here is not with the communicative aspect of lobbying per se, but with activities ancillary to communication that may improperly influence government action."

Lobbying regulation will have an effect on lobbying and on government processes and decisions that lobbyists seek to influence. If lobbying regulation is done unfairly, it may give an advantage to one side or the other. For example, if developers are required to disclose and follow the rules, but those who oppose developments are not, either because they are homeowner associations, environmental organizations, or competitors engaged in grassroots lobbying, more developments may be blocked. If lobbying regulation is done well, it will give officials more information, create more even-sided debate, and give everyone a clearer picture of how their local government is working.

An Increase in and Equalization of Lobbying

The First Amendment right to petition for a redress of grievances was intended to be employed relatively equally, not primarily by those with personal or political connections, or with the money to hire those who have such connections. Nor was access to officials intended to be given preferentially to those seeking special financial benefits rather than furthering communal interests. This right was not intended to involve money, and certainly not money placed into the hands of those representing the community. When rights are employed unequally, it undermines the legitimacy of our governmental processes.

The federal government has recognized the inequality issues in lobbying by prohibiting the deduction of lobbying expenses by companies, by prohibiting the use of federal grant funds to lobby the federal government, and by limiting the lobbying activities of those who have recently left government service.

Inequalities of access and influence have repercussions similar to those of ethical misconduct. When citizens feel that those with financial interests have special, secret access to officials, directly or through agents who have personal relationships with these officials, they stop bothering to participate. As it says in the Woodstock Theological Center at Georgetown University's 2002 book entitled *The Ethics of Lobbying* (Georgetown University Press), lobbying should be viewed in the context of all democratic values and requirements, not solely in terms of the First Amendment. These values include political equality, accountability, informed consent of the governed, the promotion of justice, and the

refinement, enlargement, and deepening of public opinion through deliberative practices.

In its recommendations, the Woodstock Theological Center goes further than ordinary lobbying rules by suggesting an increase in citizen lobbying through many more public forums where citizens and their representatives can exchange information and opinions, and deliberate about the public good.

An alternate approach would be for state governments and charitable foundations to provide grants to citizen groups with limited funds to enable them to hire a lobbyist to pursue their goals at the state and local levels, so that both or all sides of an issue can be presented professionally to government officials. At least with respect to issues and projects — as opposed to procurement, grant, loan, permit, license, and other financial matters, which are the subject of most local lobbying — this would provide a countervailing increase in lobbying with the goals of increasing First Amendment speech and grievances, that is, increasing the good things that lobbying provides and the number of sources it comes from.

Stanford professor Bruce Cain has suggested something along these lines in his essay, "More or Less: Searching for Regulatory Balance, " in *Race, Reform, and Regulation of the Electoral Process*, ed. Guy-Uriel E. Charles, Heather K. Gerken, and Michael S. Kang (Cambridge Univ. Press, 2011). The idea is to have public lobbyists similar to public defenders in criminal proceedings. This would provide more voice in lobbying, equivalent to what matching funds provide with respect to campaign finance.

Yale law professor Heather Gerken, in a 2011 Election Law Blog post, suggested "providing a legislative subsidy for issues where lobbyists aren't there to provide a helping hand, where staffers and their bosses need political, electoral, and policymaking information to move forward." This would entail funding independent "policy research consultants." Alex Tausanovitch worked with her on this idea.

Former federal lobbyist, now Dean of Brooklyn Law School, Nicholas W. Allard signed on to the idea in his essay "The Seven Deadly Virtues of Lobbying," *Election Law Journal* (2014), and contributed two more ideas: making "pro bono public service part of a lobbyist's job description" and helping citizens to join together in lobbying coalitions the way they join together in class actions, possibly with the use of contingency fees, which are otherwise prohibited for lobbying in many jurisdictions.

Lee Drutman has a different approach, but it involves Congress and would likely be applicable only in larger cities and counties. In "A Better Way to Fix Lobbying," *Issues in*

Governance Studies 40 (Brookings Institution, June 2011), Drutman focuses on the value of the information lobbyists provide, arguing that the problem is that it usually comes primarily from one side and is not transparent. What he proposes is that a website be created as a "forum and clearinghouse for all public policy advocacy," so that congressional staffers can see all sides of an issue, as agencies do with comments on proposed regulations, and that the information provided by lobbyists be available to all, since its purpose is, supposedly, to aid public knowledge during the legislative process.

Another approach has a different advantage. This is to better fund local legislative bodies, especially their policy-oriented committees, so that they can have more expertise on staff and be able to pay for expertise when they need to, without having to depend on lobbyists. This gives local legislatures the ability to call the shots when it comes to obtaining information. They can take or leave lobbyists' information, they can supplement it with that of neutral experts as well as that of experts who take a different position. This approach was pushed by Lee Drutman in a 2014 Cato Online Forum paper entitled "Invest in Smarter Government." In addition, local governments could offer clerkships to local college students to engage in research for local officials, and they could even offer fellowships to professors for more sophisticated research into big local projects and policy issues.

Unfortunately, all of these ideas would only apply to a small part of local lobbying, since there would be no role for it in lobbying about procurement, grants, licenses, tax abatement, and most land use matters.

These ideas would be good not only for the citizen groups who would provide the information, arguments, and draft legislation, but also for officials. It's amazing that a win-win situation like this has not been attempted. There are federal grants, from agencies such as the Centers for Disease Control and Prevention, that include within them the funding of efforts to influence state and local governments in ways that will enable specific federal goals to be realized at the local level. But these are not grants for lobbying; they are multi-million-dollar grants that provide within them some funds for lobbying activities. And it appears that most of these grants go to government agencies. In fact, it is illegal for the federal government to fund lobbying, so there has been criticism of these grants. Most other federal grants require applicants to promise that they will not use the funds for lobbying activities.

Similarly, there are rules that make it difficult for foundations to provide grants for lobbying. There should be discussion of an exception that would allow foundations to fund

citizen groups who can make a good argument that, without the help of a professional lobbyist, they would not be able to effectively communicate their views to local or state officials. As with campaign finance, the most constitutional way to get a range of views expressed is to fund communications rather than limiting them.

A Short History of Lobbying in the United States

For most of American history, lobbying was not viewed through the lens of the First Amendment. According to a 2014 essay by Fordham University law professor Zephyr Teachout, "The Forgotten Law of Lobbying" (which was incorporated into her 2014 book, *Corruption in America* (Harvard Univ. Press)), lobbying was primarily viewed as the sale of personal access and influence, the sale of an ongoing, reciprocal relationship in which a government official provides special access and engages in conduct in return for past personal acts and the implied promise of future acts.

It is still the degree of personal influence, rather than the specialized knowledge, that determines the monetary value of a lobbyist. This is why so many government officials, and their family members, become lobbyists. Their personal relationships create a market in access to government officials, which has, through most of American history, been seen as degrading to government and harmful to the public interest.

For example, in an 1864 decision, the U.S. Supreme Court refused to enforce a lobbying contract, stating, "all agreements for pecuniary considerations to control the business operations of the Government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution." (*Tool Company* v. *Norris*, 69 U.S. 45, 56 (1864), cited in *Oscayan* v. *Arms Co.*, 103 U.S. 261, 273 (1880))

A big problem with lobbying was its secrecy. However, as the U.S. Supreme Court said in *Trist* v. *Child*, 88 U.S. 441, 452 (1874), there is "no clear way to regularly distinguish between secret, inappropriate lobbying and appropriate paid lobbying."

As late as 1941, in a case involving the prohibition of deducting lobbying expenses as business expenses, the U.S. Supreme Court referred to lobbying as a "family of contracts to which the law has given no sanction." (*Textile Mills Sec. Corp.* v. *C.I.R.*, 314 U.S. 326, 339 (1941))

Lobbying was so frowned upon in the nineteenth century that, in 1877, Georgia's draft constitution included a provision criminalizing those aspects of lobbying that involved personal access sold to those with a financial interest in the matter (other state constitutions prohibited lobbying, without making it a crime). The provision's proponents argued that lobbying was corrupting the state government and costing the state millions of dollars a year, especially with respect to private bills. Private bills, that is, government acts related to a single matter rather than to a more general issue, are effectively what most local lobbying deals with.

The U.S. Supreme Court set forth the costs of lobbying specifically with respect to procurement in its *Oscayan* opinion: "[W]here, instead of placing before the officers of the government the information which should properly guide their judgments, personal influence is the means used to secure the sales, and is allowed to prevail, the public good is lost sight of, unnecessary expenditures are incurred, and, generally, defective supplies are obtained, producing inefficiency in the public service."

As nineteenth-century courts recognized, personal access is not an individual, but rather a societal problem. Personal, reciprocal relationships, and private meetings between officials and lobbyists, allow undetectable bribery as a matter of course. In ongoing reciprocal relationships, there is no reason for immediate quid pro quo exchange and, therefore, it is hard to tell the difference between lobbying and corruption. After all, since a lobbyist's goal is to influence officials (or, in pay to play, not to lose current or likely future benefits by refusing to pay up), anything a lobbyist gives an official, directly or indirectly, before or after a client receives a benefit, is intended to influence or reward the official for past, present, and/or future acts. Whether or not any particular lobbyist is doing anything criminal or unethical, lobbying is a powerful enabler of both personal and systemic corruption.

U.S. Senator Paul H. Douglas described the situation well in his 1953 book *Ethics in Government* (Harvard University Press), at p. 44:

> The enticer does not generally pay money directly to the public representative. He tries instead by a series of favors to put the public official under such a feeling of personal obligation that the latter gradually loses his sense of mission to the public and comes to feel that his first loyalties are to his private benefactors and patrons. What happens is a gradual shifting of a man's loyalties from the community to those

> who have been doing him favors. His final decisions are, therefore, made in response to his private friendships and loyalties rather than to the public good. Throughout this whole process, the official will claim—and may indeed believe—that there is no causal connection between the favors he has received and the decisions which he makes.

Lobbyists themselves are corrupted by what they do. This was a concern of the U.S. Supreme Court in its decision in *Marshall* v. *Baltimore Ohio Railroad Co.*, 57 U.S. 314 (1853). The court found that a lobbyist is "soon brought to believe that any means which will produce so beneficial a result to himself are 'proper means'...."

Lobbyists are also corrupted in their role as citizens. According to Teachout, a lobbyist has "a distinct relationship to what he himself might believe. He is selling his own citizenship, or one of the obligations of his own citizenship, for a fee. In this sense, agreeing to work, for pay, on political issues is more akin to selling the personal right to vote than selling legal skills." This is not only true with respect to political issues. It can also be true with respect to the means by which a client chooses to seek financial benefits from a local government.

Here's a concrete example of a lobbyist who realized he'd sold his own citizenship for a fee only when he found himself conflicted. A lobbyist for the city of Cincinnati sat on the county elections board. When, as a member of the board, he supported moving an early-voting site out of the city's downtown, and the city, which opposed this move, asked him to abstain from the board's vote, he chose to withdraw from his lobbying contract instead. Only at this point did he recognize that a lobbyist gives up his right to go public with a personal view that contradicts that of his client. Lobbyists should recognize this not when it threatens their personal freedom in a concrete way, but rather before they sign their first lobbying contract.

The Sale of Personal Influence

Not only do judges no longer recognize the concerns of their nineteenth- and early-twentieth-century predecessors, some are now applying to lobbying cases the First Amendment decisions reached in campaign finance cases, without recognizing the differences between them. What lobbyists and their clients say is that the right to do something includes the right to do it well, to spend as much money as one wants on it. The

right to seek a redress of grievances is a marketplace, like free speech, they say.

But, Teachout notes, the *Citizens United* decision was based on the public's "right to hear," to maximize political information in the *public sphere*, not on the maximization of political information *within government*. When people say there is a "marketplace of ideas," that marketplace is not for the speaker as much as it is for the public. And it is not really a "marketplace" at all, but rather an open, public forum.

In government, there is no marketplace. As Teachout wrote, "The sale of personal influence is not part of an open market of any kind, but part of a closed market that is only available to office holders by virtue of their official role. Members of government have a different relationship to knowledge in the first place, and [to support unregulated lobbying] it would have to be grounded in a right to receive information in a personal, private forum from paid influencers." When information is given privately, it is not the same as information given publicly, and the First Amendment should, therefore, be applied differently.

As Harvard University professor Michael Sandel explained in his book *What Money Can't Buy: The Moral Limits of Markets* (Farrar Straus, 2012), a market approach comes with certain norms that may not be appropriate to government. A market approach places a monetary value on goods and assumes that the principal way of handling these goods is exchange. Like one's vote, personal influence on government officials is something people believe should not be bought and sold. This influence is often derived either by working with the officials in government, or by being related to officials, which is why many spouses, children, and siblings of high-level officials become lobbyists.

Sandel explains that a market for government access or favors degrades government "by treating it as a source of private gain rather than as an instrument of the public good." This is not just an observation about the difference between free markets and government, but the central concept in government ethics. What may first appear as a goody-goody way of looking at lobbying (personal influence should not be sold) actually gets to the essence of why lobbying regulation is more central to local government ethics than many people think: most local lobbying is about private gain, not political grievances. The failure to acknowledge this is one of the reasons that most local governments have no lobbying rules in their ethics codes.

Lobbying As an Inefficient Use of Resources

In his essay "Lobbying, Rent-Seeking, and the Constitution," 64 Stanford Law Review 191 (2011), UC at Irvine law professor Richard Hasen has identified another problem with lobbying: its threat to our nation's economic welfare. There are two aspects to this threat: (1) lobbying facilitates rent-seeking behavior, that is, companies' financial resources are devoted to obtaining financial benefits from government (and providing financial benefits to officials, sometimes due to pay to play) rather than being put to a truly productive use — it should never be forgotten that there is so much lobbying because it is profitable — and (2) the government acts that lobbyists seek to influence often involve the inefficient use of government resources. The latter is especially true at the local level where, for example, lobbying can influence the drafting of contract specifications so that contracts do not go to the lowest bidder, so that the products and services that are purchased may not be of sufficient quality, and so that change orders can easily be arranged to greatly increase the cost of a contract. And grants can go to inefficient or low-quality arts and social service providers.

In addition, lobbying undermines competition and generally helps weaker companies more than it helps stronger companies. As Tamasin Cave and Andy Rowell wrote in *A Quiet Word: Lobbying, Crony Capitalism and Broken Politics in Britain* (Random House UK, 2014), "losers lobby harder."

The cost to our economy of lobbying is many times greater than the amount of money spent on lobbying. Back in 1935, then U.S. Senator Hugo Black (later U.S. Supreme Court Justice) blamed the Depression in part on lobbyists: "our Government has lost hundreds of millions of dollars which it should not have lost and which it would not have lost if there had been proper publicity given to the activities of lobbyists."

Hasen notes that rent-seeking lobbying occurs most often and most successfully with low-salience issues, that is, those issues where officials have little personal, political preference and where the public is either ignorant of what is going on or does not have strong views. Lobbyists succeed mostly with respect to the details and implementation of a bill, regulation, contract, or property development, or in the blocking of new laws or projects, where little or nothing actually becomes public, at least until after the lobbyist's job has been done. "[L]obbyists, like mushrooms, thrive in areas of low light."

This is a good description of most of the local issues in which lobbying is most successful. It is the problem of "low light" that has led to disclosure as the principal form of

lobbying regulation. Lobbying disclosure can shed light not only on lobbying activities, but also on government activities. It is, therefore, doubly valuable. But the disclosure needs to be broad or the most successful activities, such as preventing matters from coming up, will be the activities that end up not being disclosed.

Lobbying may provide government officials with valuable specialized information, which results in more informed decision-making. But it is important to also recognize the costs of lobbying and the economic benefits of lobbying oversight.

Lobbying-Related Prohibitions

While most lobbying rules provide transparency rather than restrict lobbying activities, there are some generally accepted restrictions, prohibitions, and obligations that are an important part a complete lobbying oversight program. One of the most common restrictions is the ban on ex parte communications. These rules restrict all but procedural and necessary private communications with officials during quasi-judicial proceedings, such as an administrative or ethics proceeding, as well as during procurement, grant, and permit matters. These restrictions are not directed specifically at lobbyists, but they prohibit some lobbying activities. See the section of the Procurement chapter of *Local Government Ethics Programs* on ex parte communications, and the section on them below.

There are also restrictions relating to campaign finance. As Heather Gerken said in "Lobbying as the New Campaign Finance," 27 Georgia State Univ. Law Review Vol. 27, Issue 4, Article 11 (2010), "Lobbying and campaign finance work in tandem with one another as interests seek political influence." One might add, "and as officials seek political benefits," to acknowledge pay to play.

In addition to ex parte communications rules, local government ethics codes have several provisions that apply to lobbyists, but normally do not mention lobbyists by name. Here is how some of the basic ethics provisions apply to lobbyists (the links are to sections of the online edition of my book *Local Government Ethics Programs*):

1. Conflict of Interest/Withdrawal from Participation - An official who has a special relationship with a lobbyist, or with the lobbyist's principal, must withdraw from participation in any matter in which that lobbyist or principal is involved. In addition, part of withdrawal from participation involves not communicating with lobbyists with respect to a matter in which an official has a conflict of interest, even when the conflict does not directly

involve the lobbyist. Withdrawal from participation involves all communications, direct and indirect.

2. Gifts - Officials cannot accept gifts, at least above a certain small amount, from lobbyists seeking to benefit, directly or indirectly (that is, on behalf of a principal), from the local government.

3. Representation - Officials cannot act as lobbyists in matters before the local government or against the government's interests.

4. Appearances - Officials cannot appear on behalf of a client, as counsel or as lobbyist, before the local government, including any communications with other officials or employees.

5. Post-Employment - Under some circumstances and for a certain period of time, former officials cannot work as a lobbyist or for a firm that lobbies local government officials.

6. Complicity - No lobbyist may, directly or indirectly, induce, encourage, or aid anyone to violate any ethics provision.

Unfortunately, lobbyists are not always covered by these rules, because too many ethics provisions are drafted without the important phrase "directly or indirectly." Lobbyists who are "in-house" employees of companies that do business with or are regulated by a local government are covered. However, those lobbyists who are external agents are not covered by rules limited to direct conflicts, direct gifts, and direct employment. This is one of the reasons why the phrase "directly or indirectly" is so important to ethics provisions.

In addition to the above sorts of rules, some local governments have limits and prohibitions that apply only to lobbyists. Click here for the chapter of this book on these rules.

In Conclusion

What if a city or county's administration and legislative body want nothing to do with lobbying oversight. High-level officials insist that lobbying is a good thing that is protected

by the First Amendment, and that lobbyists should not be "treated as criminals" unless they engage in bribery. A government ethics program still has an option to bring lobbyists into the program. It can, without legislation, institute an opt-in program for lobbyists who want to distinguish themselves by agreeing to accept ethics commission jurisdiction over them, disclose their lobbying activities, and abide by certain rules.

I do not know of any jurisdiction where this has been tried, but it would be valuable to see what would happen, especially with respect to professional lobbyists, who have become more professional and want to be seen as transparent and law-abiding. If they opt in to the program, they would likely put pressure on non-professional lobbyists to opt in and on officials to pass laws that cover all those who engage in lobbying activities. An opt-in program is less likely to work in smaller jurisdictions where there are no regularly involved professional lobbyists.

There is no statistical study of lobbying codes in local governments in the United States, but a 2012 study of Florida lobbying codes by Wesley F. Hunt, for the Jacksonville Office of Ethics, provides an idea of how common they are, at least in larger jurisdictions. Of the 19 Florida cities with a population over 100,000, 14 (74%) had a lobbying code in 2012. Of the 33 Florida counties with a population over 100,000, 16 (48%) had a lobbying code, including the 9 with the largest populations. Florida does appear to have more lobbying codes than most states.

Finally, it is important to point out the most important difference between government ethics programs and lobbying programs. Local government ethics programs provide oversight primarily over government officials and employees who have a special, fiduciary duty to the community. Lobbying programs provide oversight primarily over entities and their agents that are members of the public (although not necessarily of the local community) with no fiduciary duties. This is why lobbying programs consist primarily of disclosure. But it is important to recognize that those who are granted access to government officials with limited time, and the officials who grant this access, do have an obligation to the public to be transparent about their contacts and relationships.

2. **Statement of Policy**

Most lobbying codes that are not part of a larger conflicts of interest code have an introductory section that sets forth the aspirational grounding for the code. This section is given a variety of names, such as "Statement of Policy," "Legislative Intent," "Purpose and Intent," "Findings," "Objectives," or "Goals." Here is the City Ethics Model Lobbying Code language (§300):

> Lobbying involves private interests seeking access to public servants, seeking to influence public servants, and seeking to obtain special public benefits. Because of their public nature, lobbying activities need to be disclosed to the public. And due to the appearance of impropriety that accompanies the intersection of private interests and the public interest, those who lobby have certain obligations and certain of their activities need to be restricted.
>
> It is, therefore, the purpose and intent of the legislative body in drafting this lobbying code to:
>
> > In the name of transparency and the integrity of the government's decision-making processes, ensure the community and those who manage the community easy, timely access to information about attempts to influence the government's decisions;
> >
> > In the name of fairness, apply the same rules to all persons engaged in lobbying activities, regardless of their position, training, or license, whether or not they are represented by others, or whether or not they consider themselves "lobbyists";
> >
> > Prohibit improper influence on government officials and employees, and prohibit government officials from exerting improper coercion on those who seek to influence them;
> >
> > Avoid corruption and the appearance of corruption; and
> >
> > Reinforce the community's trust in the integrity of its government.

Most policy statement sections refer to the constitutional right to redress grievances through lobbying. However, as discussed above, this right is misunderstood and, too often,

used to unreasonably limit the regulation of lobbyists. This is why it has been left out of the model code policy statement.

It also should be noted that none of the lobbying code policy statements I have consulted has included, in addition to the problem of influence, the problem of some officials requiring lobbyists and their clients to pay in order to play, in the form of campaign contributions, gifts, or favors (see the third entry in the above list). If lobbyists wrote lobbying codes, the policy statements (and rules) would certainly refer to pay to play, which is usually, from the outside, indistinguishable from gifts made to influence. The difference is that, by referring to such gifts as pay to play, the onus falls on the official rather than on the lobbyist. Of course, if lobbyists and their principals were to report pay to play, it wouldn't happen. It is their reasonable fear of losing officials' support, which means losing benefits, that leads to the complicit silence that allows pay to play to occur. It is all part of the reciprocal system that forms the foundation of lobbying, sometimes at the community's expense.

3. **Definitions**

Your neighbor shares with you a rumor that a big housing development is going to be built right behind your suburban house, so you pick up the phone and call a council member you know because her son goes to school with your daughter. Are you a lobbyist? Is what you're doing lobbying?

If you're making the call as a board member of a local environmental group, does that make you a lobbyist? If you make the call as a developer interested in the property, is it any different? As the spouse of a developer's employee? Does it matter if you make one call or a dozen? Does it matter whether or not you're paid to make the calls, whether or not you're an employee or agent of the company you're calling for, how much you're paid?

If you give a speech at a council meeting as the paid executive director of a statewide environmental organization, are you lobbying? What if you give the speech as the governmental relations manager for the state developers association? What if you talk ten citizens into making speeches, but you don't say a word in public or to any official in private? Is that lobbying?

What if you meet with a council member, but don't talk government — you're just having a drink or playing a round of golf — even though your organization is seeking a government grant? Is that lobbying? What if you never talk to an official at all, but do the research a lobbyist needs before meeting with the official, don't get the meeting, and the information gets sent to an aide? Or you draft language for an ordinance or for contract specifications?

What if you're a public relations professional asked by a company to send favorable news stories to council members as part of an attempt to influence them? (This situation came before the Miami-Dade County ethics commission in 2014, and it found the PR professional was engaged in lobbying activities.)

What if you're a lawyer representing a client in a zoning matter, or a contractor putting together a bid? Can you talk to the county attorney or a procurement officer without having to register as a lobbyist?

What if you're a newspaper publisher? A representative or member of the county or

state municipal association? A council member? A recently retired council member? A city manager's spouse?

These are only a few of the questions that together go to form the definition of the terms "lobbying" and "lobbyist."

Everyone knows who is a government official or employee for the purposes of a government ethics code. But who is a "lobbyist" and what activities are considered "lobbying" for the purposes of a lobbying code are very complex questions. In fact, there are two principal uses for these definitions: determining who must register as a "lobbyist" and determining what activities a lobbyist must disclose. Some activities that are insufficient to require someone to register must still be disclosed by someone who engages in other activities. And there is a third use: individuals and entities can be held to obligations and often be prohibited from certain activities only if they are "lobbyists" (some ethics code prohibitions apply to all "restricted sources," a term that includes individuals and entities who seek special benefits from a government, whether or not they actually lobby).

Neither local lobbying codes nor commentators agree on how to define these terms. In fact, there is little discussion of this issue, even though who is and is not considered a "lobbyist" determines whose activities are disclosed and regulated. In 2013, Tim LaPira, a professor at James Madison University and Sunlight Foundation Academic Fellow, estimated that, at the federal level, about half of all those getting paid to influence public policy were not required to register as lobbyists. The narrower the definition, the less disclosure and oversight there will be, the less clear a picture of lobbying be will available to the public and to government officials, and the less fair those required to register will feel the lobbying oversight program is.

This is why the most important and complex element in lobbying regulation is defining what constitutes "lobbying" (or, as in the City Ethics Model Lobbying Code, "lobbying activities") and who is a "lobbyist" is (sometimes, "lobbying" is included in the definition of "lobbyist" as, for example, in Philadelphia and Chicago).

In the first chapter of my book *Local Government Ethics Programs*, I wrote, "Definitions should not go first [in an ethics code and] should be used for clarification alone, not to catch officials who don't check the definition of every word in the provisions. This is why there should be no rules in the definitions section (although including exceptions is permissible)." Because the definitions of "lobbying" and "lobbyist" are so important to lobbying regulation,

this statement does not apply to lobbying codes. Unlike an ethics code, a lobbying code should begin with the Definitions section. When lobbying rules appear in an ethics code, the rules should begin with their own Definitions section, which may be replicated in the ethics code's Definitions section, as well, especially if the code is long or where the same terms are used outside the lobbying section of the code.

In his book *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press, 2015), Lee Drutman defines "lobbying" broadly as "any activity oriented towards shaping public policy outcomes." This sounds very broad and, in fact, it does include most federal lobbying, but it is not nearly broad enough to cover most local lobbying, most of which does not involve policy outcomes. This is why local definitions refer not to policy or to outcomes, but to decisions or, better yet, actions.

Some definitions of "lobbying" are very short, such as San Diego's "direct communication with a City Official for the purpose of influencing a municipal decision on behalf of any other person." Although short, it is too limiting. It is limited to "direct communication with a City Official" and to lobbying for other persons. Although direct communication is what we first think of when we think of "lobbying," it does not define lobbying. And, unlike D.C.'s K Street lobbyists working on behalf of big corporations, most local lobbying is done directly by business owners or executives (as San Diego's code recognizes in its definition of "lobbyist"), not by contract lobbyists.

In drafting these basic definitions, the place to begin is deciding what role the definitions are supposed to play. Are they supposed to be exclusive, so that only a few professional, full-time lobbyists will register? Or are they supposed to be inclusive, so that everyone whom the public would consider as engaging in lobbying activities will register and, thereby, the public will have a full picture of who is trying to influence those who manage their community? Are they supposed to include only direct communications, or are they supposed to include all the activities lobbyists engage in, from research and socializing to grassroots lobbying and strategic advice?

Since lobbying codes are part of government ethics, and appearance is central to government ethics, the best practice is not to split hairs, but rather to include everyone whose job (in part or in whole) is to seek to influence government decisions, and those for whom they work. Disclosing all lobbying activities may take up the time of more

individuals, but it will provide the optimum amount of transparency and fairness, and there won't be a lot of loopholes and gray areas that make it look like local elected officials and special interests are trying to keep a lot of lobbying hidden from the public, so that the public wonders why and trusts government officials less rather than more. Loopholes and gray areas are not a good way to convince the public that the principal goal of a lobbying oversight program is to bring transparency to lobbying.

As for lobbyists' principals and those who directly lobby for special benefits for themselves, they need to recognize an essential problem with lobbying, even when it has been disclosed: that the public cannot know what they are saying to officials and, often, what they are seeking from these officials (or the officials are seeking from them). Recognizing how their interactions with officials appear to the public, those seeking special benefits from the institution that manages a community should try to increase trust in that institution's processes by supporting lobbying oversight and, even when not required to by law, registering as a lobbyist, not only to be on the safe side (for their own benefit), but also because of the importance to the community of appearance, trust, and transparency.

Some definitions focus on or are even limited to elected officials. This is far too narrow. People lobby elected officials' staff members, appointed officials, board and commission members and staff, and all other officials and employees, including consultants and advisers, who have any influence, directly or indirectly, on decisions that are made. There are only a few local legislators, but there are hundreds of other officials to whom it is easier to get access, who make decisions separate from the local legislature, and on whom local legislators depend. In the most important areas of local lobbying — procurement and land use — local legislators often play a small role, and often get involved only toward the end of the process.

The Actions and People That Lobbying Seeks to Influence

One of the approaches to defining "lobbying" and "lobbyist" is in terms of the actions and people that lobbying seeks to influence. For example, Baltimore defines three types of lobbying, based on whom the lobbying is seeking to influence: executive, legislative, and grass roots. Other jurisdictions detail the actions that lobbying can influence, although sometimes they are merely examples, not limitations on the definition of lobbying: Toronto lists six, New York City lists eleven, and Chicago lists ten, as follows, in its definition of

"lobbyist" (§2-156-010(p)):

> (1) a bond inducement ordinance; (2) a zoning matter; (3) a concession agreement; (4) the creation of a tax increment financing district; (5) the establishment of a Class 6(b) Cook County property tax classification; (6) the introduction, passage or other action to be taken on an ordinance, resolution, motion, order, appointment or other matter before the City Council; (7) the preparation of contract specifications; (8) the solicitation, award or administration of a contract; (9) the award or administration of a grant, loan, or other agreement involving the disbursement of public monies; or (10) any other determination made by an elected or appointed City official or employee of the City with respect to the procurement of goods, services or construction.

By providing so much detail, this list leaves out of the definition a lot of matters and officials that may be influenced. For example, the list includes "zoning matters," but not other land use matters. It includes contracts, grants, and loans, but not licenses. It includes legislation, but not regulations. Details such as those in the list are useful to make a definition more concrete, but they should be used only as supporting examples. They should not be part of the actual definition.

New York City's list focuses less on matters than on the processes involved. This makes the definition more inclusive than Chicago's list, but even wordier. Here is New York City's list in its definition of "lobbying" (Title 3, Ch. 2, Subch. 2, §3-211(c)(1)):

> any attempt to influence:
>
> (i) any determination made by the city council or any member thereof with respect to the introduction, passage, defeat, or substance of any local legislation or resolution,
>
> (ii) any determination made by the mayor to support, oppose, approve, or disapprove any local legislation or resolution, whether or not such legislation or resolution has been introduced in the city council,
>
> (iii) any determination made by an elected city official or an officer or employee of the city with respect to the procurement of goods, services or construction, including the preparation of contract specifications, or the solicitation, award or administration of a contract, or with respect the solicitation, award or

administration of a grant, loan, or agreement involving the disbursement of public monies,

(iv) any determination made by the mayor, the city council, the city planning commission, a borough president, a borough board or a community board with respect to zoning or the use, development or improvement of real property subject to city regulation,

(v) any determination made by an elected city official or an officer or employee of the city with respect to the terms of the acquisition or disposition by the city of any interest in real property, with respect to a license or permit for the use of real property of or by the city, or with respect to a franchise, concession or revocable consent,

(vi) the proposal, adoption, amendment or rejection by an agency of any rule having the force and effect of law,

(vii) the decision to hold, timing or outcome of any rate making proceeding before an agency,

(viii) the agenda or any determination of a board or commission,

(ix) any determination regarding the calendaring or scope of any city council oversight hearing,

(x) the issuance, repeal, modification or substance of a mayoral executive order, or

(xi) any determination made by an elected city official or an officer or employee of the city to support or oppose any state or federal legislation, rule or regulation, including any determination made to support or oppose that is contingent on any amendment of such legislation, rule or regulation, whether or not such legislation has been formally introduced and whether or not such rule or regulation has been formally proposed.

It is good that New York City changed its language to acknowledge, as in (ii), that lobbying occurs even when there is not yet any legislation, for example, when an attempt is being made to block the consideration of legislation. But New York City's language is still not inclusive enough. For example, what about seeking to influence boards, commissions, and offices that make recommendations rather than determinations? Is it okay not to disclose lobbying that seeks to influence these boards, merely because the board is only influential?

That doesn't make sense when lobbying is all about influencing.

Consider the situation where the clerk's office (which oversees the NYC lobbying oversight program) is preparing to recommend lobbying reforms to the council. If the local chamber of commerce lobbies the clerk and staff in an attempt to prevent the office from recommending that contractors file lobbying disclosure reports, shouldn't this be disclosed, even if the clerk's recommendation may not become law? It is better to use the more inclusive word "action" than the more restrictive word "determination." And, like the City Ethics Model Lobbying Code, it is valuable to expressly include recommending among the actions that may be influenced by lobbying, so that it is not a gray area that leads people not to disclose.

Compare Chicago's (6) [" the introduction, passage or other action to be taken on an ordinance, resolution, motion, order, appointment or other matter before the City Council; "]to New York's (I) ["any determination made by the city council or any member thereof with respect to the introduction, passage, defeat, or substance of any local legislation or resolution"]. Chicago's language is broader, because it includes other action taken on such resolutions, including motions, orders, appointments and other matters. This inclusiveness is important, because a great deal of lobbying effort goes into attempts to prevent the introduction of resolutions or to have them die in committee.

In short, any definitional language that is unnecessarily restrictive, even terms such as "determination" or "passage or defeat," should be carefully discussed. A list should be prepared of the many exceptions that the language effectively creates, and each of these exceptions should be discussed in terms of whether any lobbying might be involved.

It is best for definitional language to be inclusive rather than restrictive. It is best to make exclusions in the form of exceptions that are clearly described in the lobbying code or, when unforeseen consequences are discovered, dealt with by the lobbying oversight office in the form of waivers and interpretations of code language.

There is no need for long lists or details. Any list should be only an attempt to be inclusive, not to effectively create exceptions. Here is the beginning of the City Ethics Model Lobbying Code definition of "lobbying activities" (§301):

> "Lobbying Activities" includes any activity undertaken to influence a city/county official, employee, consultant, adviser, candidate, official-elect, or nominee, directly or indirectly, to favor or oppose, recommend or not recommend, vote for

or against or abstain, or take or refrain from taking action on …

San Jose chose to make "Influencing" its most important definition (§12.12.170(A)). It defines this term as "contacting, either directly or indirectly, for the purpose of promoting, supporting, modifying, opposing, causing the delay or abandonment of conduct, or otherwise intentionally affecting the official actions of the city official or city official-elect, by any means, including, but not limited to providing, preparing, processing, or submitting information, incentives, statistics, studies or analyses." There's some good language here, but the definition still limits lobbying to "contacting" officials.

The San Jose definition does add one valuable element: it includes not only officials, but also officials-elect. This is good, but it would seem reasonable to extend this to include all candidates as well as officials who have been nominated for a position, but not yet appointed to it. After all, giving and raising campaign contributions are important elements of lobbying, and they are provided to candidates, including those who do not currently hold a government office. Lobbying candidates and nominees should have the same restrictions as lobbying the same individuals the day they have been elected, appointed, or taken office. It's the same lobbying with the same goals. There's no reason to wait until election day or the swearing-in day to require this lobbying, and attendant campaign-related activities, to be disclosed. Note that the City Ethics Model Lobbying Code definition of "lobbying activities" includes lobbying candidates, officials-elect, and nominees. These individuals are also included in the definition of "official or employee," a term used throughout the Model Ethics Code.

San Jose's definition of "Legislative Action" (§12.12.170(B)) also has some good language, including not only the mayor and council, but all boards and commissions, all task forces and "joint powers authorities of which the city is a party," and the city's redevelopment agency. Too often it is assumed that only councils engage in legislative action. Even ethics commissions engage in legislative action by interpreting ethics codes, drafting rules and regulations, and recommending amendments to the ethics code and to other ordinances relating to government ethics. Although lobbying of ethics commissions relating to proceedings should be prohibited, there is nothing to stop the lobbying of ethics commission members and staff with respect to its other activities.

Intent vs. Appearance. One disadvantage to defining "lobbying" in terms of activities

done in order to influence is that it brings intent and motive into government ethics, where they do not belong. Government ethics is not part of criminal law. It is easy for someone to insist (to himself as well as others) that a particular communication or series of communications, including meetings, was not intended to influence, but only to inform, advise, or be social. After all, who can prove they're not telling the truth?

Imagine that the owner of a construction company with city contracts plays golf with the mayor every Saturday morning throughout the summer. Most of the time they will talk about sports and politics, but sometimes they will talk about the building of a new school or road. And yet the contractor never plays golf with the mayor with an intent to influence. What is important is not the intent, but the *appearance*, and the appearance is that there is a special relationship between the two people, that they talk business at least part of the time, and that the mayor is likely to give the contractor preferential treatment. The fact that they are golf buddies means the contractor is *seen* as influencing the mayor. Therefore, these meetings should be disclosed just like a business meeting.

Since government ethics is about appearance, it is best that government officials, and those seeking special benefits from them, not consider their intent, but rather recognize how their contacts appear to anyone not involved in them. After all, they cannot prove that their socializing or political conversations have nothing to do with municipal business. They should disclose their contacts on the basis of how they appear.

Another problem with requiring intent to influence is that it is impossible to know (and prove) this intent, especially if there is nothing in writing. In fact, a note can be sent afterwards to make it clear that the communication or meeting was not about influence — "I really enjoyed our golf game yesterday. It's so nice to get away from work and just have some fun for a change." Requiring intent makes it very difficult to enforce lobbying rules. That is one reason why it is so common to require intent. It creates a huge loophole and allows lobbyists and officials the perfect defense to an allegation of failure to disclose lobbying activities.

When the definition of "lobbying activities" requires there to be an intent to influence, lobbyists and the officials they lobby can also say that because the official, not the lobbyist, initiated the communication, there was no intent on the lobbyist's part to influence. Many communications with lobbyists are initiated by officials, especially in their guise as candidates. Lobbyists can ensure more frequent contacts with such officials by

making several small contributions rather than one large one. The official-initiated thank-you contacts are likely to involve lobbying and certainly will appear as lobbying to anyone who is not listening in. Therefore, these contacts, and all official-initiated contacts, should be disclosed.

Here is an example of a situation where an official said that he had initiated a contact and, therefore, the lobbyist was not required to register. In 2013, soccer star David Beckham met with officials about the building of a stadium in southern Florida for the soccer team he owns, and was accused of lobbying without registering as a lobbyist. It was in the officials' interest to say they had initiated the contact, since otherwise Beckham would be embarrassed by being fined for failure to register. It is true that the officials wanted to attract Beckham's team, but Beckham was equally trying to obtain the best deal (that is, the most local government subsidies) possible, which would benefit himself financially at the taxpayers' expense. There is no doubt that both sides were seeking to influence the other's decision, but requiring proof of motive would be difficult in such a situation.

Despite Miami-Dade County's definition of "lobbyist" as someone who "seeks to encourage the passage, defeat, or modifications of … any action, decision or recommendation," the county ethics commission concluded that "if [Beckham] is [to be] involved in discussions intended to influence County officials, he would need to register as a lobbyist." This was a good decision, but many ethics commissions would have decided that Beckham did not need to register.

Therefore, is best to make this clear either by not including language in the definition of "lobbyist" that implies that a particular intent or motive is required, or by creating a presumption that contacts are intended to influence when one of the parties is seeking benefits from the other's government. Anyone who seeks special treatment by a government should be considered to be lobbying when he communicates with an official of that government.

The fourth sentence of the City Ethics Model Lobbying Code definition of "lobbying activities" (§301) contains just this sort of presumption:

> Any contact with a city/county official, employee, consultant, adviser, candidate, official-elect, or nominee, by someone who might specially benefit, directly or indirectly, from any government action or inaction is deemed to have been "undertaken to influence," whatever the content of the contact may have been or

whoever may have initiated any particular contact.

Government Advisers. Take the situation of an adviser to a government official, an adviser that has clients who are seeking special benefits from the government. Considering that lobbyists insist that their principal role is providing valuable information and expertise to government officials, what is the principal difference between an adviser and a lobbyist? It's the fact that the official initiates and controls the adviser-official relationship. But it is in a lobbyist's interest to have the ear of an official, not only to have more influence over the official, but also to attract clients who are looking for someone with the right connections. This is why the difference between an adviser and a lobbyist is not nearly as great or as simple as it first appears. Initiation is no more relevant here than in a romantic relationship. That is why it is important to acknowledge in a definition of "lobbying activities" that who initiates a contact is meaningless. This is the reason for the final phrase of the definitional language above, "whoever may have initiated any particular contact."

Sometimes an advisory relationship starts when a lobbyist contacts an official, and from their communications the official comes to respect the individual, ask for her advice, and encourage her to give her opinion about particular matters (say, environmental issues) or all sorts of things. This can extend to election-related advice, where the lobbyist can be paid by a candidate committee for her advice, if this is permitted (I recommend that lobbyists not be allowed to participate in the campaigns of officials they lobby). A lobbyist who acts as a political consultant is still a lobbyist and is seen as acting as a lobbyist.

Even when a lobbying code does not require an adviser who is also a lobbyist or principal to disclose the contacts in which she advises on topics other than those that involve her or her clients' financial interests, it is best that she disclose these contacts, showing in the list of topics discussed that these communications involved topics that have no relationship to her own or her clients' interests.

Lobbyists also lobby advisers, as a way of access to officials and sources of important and timely information. This is why it is important that lobbying disclosure not be limited to the lobbying only of government officials and employees, but also of consultants and advisers.

Goodwill Lobbying. The reason for doing this brings us to another problem with requiring an intent to influence: it is a reflection of the popular conception of lobbying,

rather than what really goes on. So much lobbying is not about directly influencing with respect to a particular topic or matter. It's about developing and maintaining a personal relationship that will, in the future, pay off for oneself, one's company or organization, or one's clients. There need not be a current matter or even a foreseeable matter for lobbying to occur, when one party is a government official in a position to influence government action and the other is someone who, directly or indirectly, is likely to specially benefit from government action.

This part of lobbying is sometimes referred to as "lobbying for goodwill" or "background lobbying," as Anthony Nownes calls it. Goodwill is every bit as important a goal of lobbying as influence is. Portland, Oregon and Palm Beach County, Florida each have a nice little addition to the definition of lobbying: "attempting to obtain the good will" of officials. Vermont has language that makes it more clear what this is all about: "an attempt to obtain the goodwill of a legislator or administrative official by communications or activities with that legislator or administrative official intended ultimately to influence legislative or administrative action." The recognition of this kind of lobbying expands the definition to include not only attempts to directly influence an official with respect to a particular matter or client, but also the glad-handing, entertaining, general advising, and other activities, including those that apply to political campaigns, which are done on an ongoing basis, even when there are no relevant matters currently before the official.

The City Ethics Model Lobbying Code's definition of "lobbying activities" (§301) includes the following language: "trying to influence or obtain the goodwill of an official." This simple language greatly increases the transparency of a lobbying program and maturely acknowledges what everyone knows: that lobbying is about relationships and connections.

Campaign contributions are the best known form of goodwill lobbying. They are rarely given quid pro quo, but rather as part of a long-term relationship based on reciprocity. Campaign contributions are limited in value, because they can only indirectly, if at all, help gain access to the majority of officials local lobbyists seek to influence: appointed officials, agency employees, and board and commission staff. With them, connections need to be built up over a long period of time, either by the principal or by its lobbyist.

Goodwill is a valuable asset that is less about gaining influence than about gaining and maintaining access both to government officials and to information that is not yet public. As one lobbyist told Nownes, "[If] we invite staff to functions … and go buy donuts

occasionally, and [there is a bill out there that is] affecting us, or more importantly, looks like it's pending … we get a call from [these] staff." Nownes adds, "The telephone calls … may stop if the background lobbying stops."

In many cases, goodwill is based on a relationship formed before the lobbyist represented the client or even before she became a lobbyist or the official became an official. A lobbyist's representation of a client in a particular matter may be only a tiny part of a long-term relationship with an official. But what goes on between them is lobbying, whatever time it happens to be, at least once the individual is seeking special benefits from the government, directly or on behalf of another.

Future Matters. Directly influencing with respect to a particular matter is not a necessary element of lobbying, especially with respect to what activities should be disclosed. Lobbying is equally about keeping possibilities alive and information channels open. And the particular matter may be in the future. If a lobbyist plays golf with five council members in one week, and is not currently involved in any matter before the council, won't that suggest that something might be in the works? Isn't this information of interest and value to the public?

Palm Beach County deals with this aspect of ongoing relationships by defining "lobbying" to include attempts to influence with respect to "any item which may *foreseeably* be presented for consideration" (§2-351 of its Lobbyist Registration Ordinance; emphasis added). This prevents an individual from saying that he was not lobbying because his communication with an official regarded matters that were not before the official, when they were expected to be before the official or, in fact, the goal of the communication was to get the matter before the official or before other officials through the official's influence. The City Ethics Model Lobbying Code follows Palm Beach County in its definition of "lobbying activities" (§301) by using the phrase "which may foreseeably come before" a government.

The Actions That Constitute Lobbying

Some jurisdictions take a different approach, detailing not the actions that lobbyists seek to influence, but rather the kinds of actions that constitute lobbying. Today, every lobbying firm, as well as public relations firms in the political field, present themselves as capable of engaging in all aspects of lobbying, far beyond direct contacts with government officials. There is no reason to exclude from a definition of "lobbying" any of the services they offer as

part of a comprehensive lobbying effort.

Activities directly "undertaken to influence" officials are commonly understood to be communications with them in various forms. These are the activities most often included in "lobbying" definitions; sometimes, unfortunately, they are the only activities included. The second sentence of the City Ethics Model Lobbying Code extends "lobbying activities" to include many other activities, which often take up a greater part of a lobbyist's time:

> … any activity undertaken to support such influencing, including research, investigation, drafting, advising, monitoring, socializing, preliminary contacts to facilitate lobbying activities, and attending meetings and events related to lobbying goals or attended by targeted officials.

The Model Code does the same thing in its definition of "grassroots lobbying," which is the subject of the next subsection:

> It includes such activities as advertising, mailings, phone banks, and door-to-door campaigns, the creation and use of an organization through which issue-oriented activities and campaign expenditures may pass, and the conciliatory lobbying of groups in opposition to the lobbyist's goals.

Both definitions are kept open-ended by listing examples rather than by containing exhaustive lists that allow other activities to be kept secret.

Other activities too often left out of "lobbying" definitions include the fastest growing area of lobbying, strategic advising, as well as the activities of political fixers and go-betweens, which are covered later in this section.

Indirect Lobbying: An area of lobbying that is not part of the popular conception of lobbying — despite the fact that it's been around for decades and is especially important in big land use matters — involves indirect lobbying, that is, activities that seek to get others to contact government officials, especially elected representatives. Indirect lobbying includes public relations (including social media) campaigns, mobilization campaigns, coalition building, and the strategic advising behind all these activities.

Indirect lobbying is valuable, because lobbying directly to officials leaves out the most

important connection an elected official has: with constituents. Indirect lobbying is, therefore, an important complement to direct lobbying. It shows officials that it's not just about the lobbyist's interests, but that their constituents are also concerned about the matter, showing their concern in the form of communications, petitions, demonstrations, op-ed pieces and letters to the editor, etc.

Of course, not all constituents are created equal. Alan Rosenthal, in his book *The Third House: Lobbyists and Lobbying in the States* (CQ Press, 1993), talked about "key contacts," that is, constituents who have a connection with an individual or entity that is seeking a special benefit from the government (e.g., a friend, a member, or an employee), but also have a personal relationship with a particular official (friend, political colleague, family member, customer, neighbor, former colleague, or professional (e.g., the official's doctor or personal trainer)). One personally known constituent is worth a hundred strangers.

The most important subcategory of indirect lobbying is grassroots lobbying, which itself comes in four forms: (1) lobbying via an organization's membership (e.g., an environmental organization e-mailing its members and asking them to call their council members); (2) seeking the involvement of non-members via advertising, mailings, phone banks, and door-to-door campaigns; (3) "astroturf" lobbying via the creation of an organization through which issue-oriented and campaign expenditures may pass, but which has no original base in the community; and (4) the conciliatory lobbying of opposition groups.

There do not appear to be statistics on grassroots lobbying at the local level, but a 2015 report from the Center for Public Integrity shows that national trade associations spend substantially more on grassroots lobbying than on direct lobbying.

The first and last kinds of grassroots lobbying generally do not require registration and disclosure. However, the last kind rarely occurs without the second and third kinds of lobbying, which should require registration and disclosure.

Grassroots lobbying works because elected officials care what their constituents think. They are responsible for representing their constituents, and it is their constituents who determine whether they are re-elected. Even when a developer has a good relationship with council members, it helps the developer's cause a great deal when constituents express their support and, even more important, when few or no constituents express opposition. Anthony Nownes wrote in his book *Total Lobbying: What Lobbyists Want (and How They Try to*

Get It) (Cambridge University Press, 2006), "In virtually all of my interviews with public policy lobbyists, I heard a variation of the following statement: If it comes down to a choice between what their constituents want and what a lobbyist wants, elected officials will almost always do what their constituents want."

Grassroots lobbying is especially valuable when a referendum or initiative must be passed in order to approve a big development or transportation project, change the charter for various reasons (including government ethics reform), or allow a bond sale for school construction. Sometimes there is a choice between council and voter approval, and interested parties use grassroots lobbying to push for voter approval, which leads to even more grassroots lobbying. A good example of lobbying of this is the attempt in 2014 by the Aircraft Owners and Pilots Association (AOPA) to require voter approval, rather than council authority, over any changes to the Santa Monica, California airport. AOPA and its allies spent over $800,000 in support of the initiative, including the petition process and the campaign for the initiative's approval and against an alternative initiative. However, many community, good government, and environmental groups opposed the AOPA initiative, and it was defeated.

Grassroots lobbying is becoming increasingly cheaper, with e-mails that allow constituents to easily communicate with elected officials, and even an app, Phone2Action, which provides for automatic social media barrages, including e-mails, tweets, and communications with Facebook and other social media accounts.

And yet the description of lobbying that was, in 2015, on the website of the national association of lobbyists (the Association of Government Relations Professionals) did not mention grassroots lobbying, and many lobbying codes do not mention it, either. For many years, people have considered the biggest weakness of the federal lobbying code to be the omission of grassroots lobbying from the definition of "lobbying." At the local level, especially with respect to land use matters, grassroots lobbying is extremely important. To leave it out of the definition of "lobbying" is to leave out a great deal of lobbying, in many cases a majority of the lobbying on a land use matter.

As Anita S. Krishnakumar states in her essay "Towards A Madisonian 'Interest-Group' Approach To Lobbying Regulation" (St. John's University School of Law Legal Studies Research Paper Series #07-0064, January 2007), if ordinary lobbying must be disclosed, but not grassroots lobbying, then lobbyists will engage in more grassroots

lobbying. And grassroots lobbying benefits those with greater resources even more than ordinary lobbying. Therefore, lobbying oversight must apply equally to these two principal sorts of lobbying.

One kind of grassroots lobbying that need not be disclosed is the most basic, old-fashioned kind of grassroots lobbying, in which an organization or association communicates with its own members. This is a common exception to the disclosure rule. Even though artificial letter-writing campaigns can occur within organizations, this is more of a problem with national organizations than with local organizations. No one cares what out-of-towners think about a local land use matter.

Astroturf Lobbying. "Astroturf" lobbying is an insidious kind of grassroots lobbying that appears to be issue advocacy when it is actually something else. It involves grassroots campaigns run by fake organizations that only seem based in the community, fake letter-writing campaigns, and the like. There are many ways to make it appear as if there is more support for a company's interests than there actually is. Other ways include the use of nonprofits, think tanks, professional associations, the news media, and organizations led by individuals with special relationships to companies and individuals seeking special benefits from a local government.

There is often no disclosure of the sponsor of an "astroturf" campaign, even though the sponsor is seeking special financial benefits for itself. The campaign only discusses policy issues, as if it were only a policy matter and not a matter of seeking special benefits. The Public Relations Society of America recognizes the problems with this type of lobbying and prohibits it in its code of ethics. The reason is that "astroturf" campaigns are fraudulent.

Sometimes, the fake organization works in coalition with other organizations, so that ordinary people without special interests are involved. But the coalition's work is paid for and orchestrated by those who do have special financial interests and their agents, including lobbyists, lawyers, and public relations professionals.

Oakland prohibits "astroturf" groups in a provision that starts by saying that no lobbyist may "attempt to create a fictitious appearance of public support or opposition to any governmental action." This could be considered a subset of the prohibition of deception through false information (see the section on deception below). But here it is not factual information that is false, but rather the level of support or opposition to governmental action that exists in the community.

It is important in prohibiting or requiring the disclosure of "astroturf" lobbying to clearly differentiate it from actual issue advocacy. This is much harder to do at the federal and state level than at the local level, where "astroturf" lobbying almost always occurs with respect to land use matters, and is almost always funded either by a land owner or developer, or by local businesses opposing a competitor that wants to build in the community. Whatever their policy views might be, they are acting in their personal financial interests. Disclosure of their schemes will limit speech only through self-censorship, because it is embarrassing to be caught selling your personal financial interests in the form of public policy views.

Some argue for the right to speak anonymously, but that is about issues, not about the seeking of financial benefits by communicating indirectly, and secretly, with government officials. For a detailed account of the constitutional issues involved in the disclosure and other regulation of "astroturf" lobbying, see Jonathan C. Zellner, "Artificial Grassroots Advocacy and the Constitutionality of Legislative Identification and Control Measures," 43 *Connecticut Law Review* 1 (November 2010). The most important case is *United States* v. *Harriss*, 347 U.S. 612 (1954), where the Supreme Court recognized the constitutionality of requiring the disclosure of an "artificially stimulated letter campaign." The Court felt that the public needed to be able to properly evaluate the pressures that were being placed on them with respect to a matter, so that they could make informed political decisions. "Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal."

Between "astroturf" and old-fashioned grassroots lobbying (that is, an organization getting its members to contact officials and attend public meetings) is lobbying that openly seeks to stir up a community, without the use of fake organizations, fake coalitions, or fake letter-writing campaigns, but for the special benefit of the individual or entity that is funding the campaign. This often takes the form of advertising, mailings, surveys, and phone banks. There is nothing wrong with this, but it is indirect lobbying that should be disclosed just as much as direct lobbying.

Conciliatory lobbying (what Nownes calls "demobilizing public opposition") is the least known kind of grassroots lobbying, especially in the area of land use. Conciliatory lobbying consists primarily of meeting (one on one, or in small groups) with individuals and

representatives of groups that oppose a development, in order to explain the issues to them, to show them (and, when they are told about the meetings, government officials) that the developer cares about their concerns, and to offer them concessions that will satisfy their concerns so that their opposition goes away or lessens. These concessions usually involve the effect of a development on the neighborhood, on traffic patterns, and on noise, health, and the environment. It is as important to have good relations, and connections, with neighborhood groups as it is to have them with government officials.

Tamasin Cave and Andy Rowell devote a full chapter of their book *A Quiet Word: Lobbying, Crony Capitalism and Broken Politics in Britain* (Random House UK, 2014) to a variation of conciliatory lobbying, known in the U.K. as "consultation." Consultation involves a range of interactions — including focus groups, planning exercises, and public meetings — that are supposed to give a community a voice regarding land use projects. Cave and Rowell show how developers and their agents often use this process to "head off local hostility" and satisfy planning officials that they are open to opposing ideas and willing to compromise. Cave and Rowell consider the process more about managing a community than empowering it. There is a British how-to book on the topic, Tom Curtin and Daniel Hayman's *Managing Green Issues, 2d Edition* (Palgrave Macmillan, 2006), which says that companies have moved from the old DAD approach (Decide, Announce, Defend) to a new CHARM approach (Consult, Harmonize, Adjust, Reinforce, Maintain).

Conciliatory lobbying also involves co-opting less extreme parts of the opposition so that it becomes divided. This makes the opposition not only smaller, but weaker, because much energy is wasted in disagreements among the members of a coalition.

With respect to the community as a whole, and those who represent it, a lobbyist will emphasize job creation, property taxes, a positive effect on other businesses, and other economic benefits. The lobbyist will also try to get community groups, such as the chamber of commerce, active in support of the land use project.

Constitutionality. Most state lobbying codes require the disclosure of at least some forms of indirect lobbying. But some people insist that requiring disclosure of grassroots lobbying is an unconstitutional infringement of free speech and free association rights. In a decision about the constitutionality of such a disclosure requirement, the Washington state supreme court wrote that striking down the law "would leave a loophole for indirect lobbying without allowing or providing the public with information and knowledge re the

sponsorship of the lobbying and its financial magnitude." *(Young Americans for Freedom, Inc.* v. *Gorton*, 522 P.2d 189, 192 (Wash. 1974)) In *Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11th Cir. 1996), a federal appellate court found that the government's interest in disclosure of indirect lobbying may be stronger than the case for disclosure of direct lobbying because "when the pressures are indirect . . . they are harder to identify without the aid of disclosure requirements." In addition, the U.S. Supreme Court, in *United States* v. *Harriss*, 347 U.S. 612 (1954), said that any impact on free speech rights occurred merely because of "self-censorship."

Lobbying re State and Federal Matters. There is another kind of indirect lobbying that most jurisdictions ignore: the lobbying of local officials with respect to state and federal matters. Local officials spend a great deal of time applying and lobbying for grants, loans, subsidies, approvals, and legislation at the state and federal levels that lead to important benefits for certain local companies and organizations. Lobbying local officials (directly or via grassroots lobbying) to give priority to certain grant opportunities is no different from lobbying state or federal officials directly, but it is not considered state or federal lobbying, because no state or federal officials are directly contacted. They are only contacted by local officials, and this is generally not considered lobbying and is, therefore, not disclosed.

Here is New York City's provision on this kind of indirect lobbying:

> an attempt to influence … any determination made by an elected city official or an officer or employee of the city to support or oppose any state or federal legislation, rule or regulation, including any determination made to support or oppose that is contingent on any amendment of such legislation, rule or regulation, whether or not such legislation has been formally introduced and whether or not such rule or regulation has been formally proposed.

The City Ethics Model Lobbying Code covers this kind of lobbying more simply, in the last phrase of the first sentence of its definition of "lobbying activities" (§301): "… any matter before or which may foreseeably come before any level of government." This includes not only state and federal matters, but also matters that come before independent local and regional agencies, which can be extremely important, especially those that deal with transportation, economic development, and water.

Beyond the inclusion of indirect lobbying in the definition of lobbying activities, an

important question is whether indirect lobbying is enough, without any direct lobbying, to require an individual or entity to register as a "lobbyist." I think it is enough, because indirect lobbying is no longer a secondary form of lobbying, but rather an essential lobbying activity. When left out of a lobbying oversight program, it is a way for individuals to hide their activities from the public. Individuals clever and connected enough to wield influence without the need for direct communication should not be allowed to hide their activities.

However, it would be reasonable, with respect to indirect lobbying, to have a higher expenditure amount below which registration is not necessary. This would take the burden off individuals and organizations involved in putting together small local coalitions and mailings. Another alternative would to limit required disclosure of indirect lobbying to situations where a specific government action or matter, rather than a general issue, is involved. This way, campaigns for economic equality would be excepted from disclosure, but not campaigns for a minimum wage law; campaigns for or against gun control would be excepted, but not when a particular gun law was under discussion. But the dividing line can be difficult. Would, for example, a campaign to institute a government ethics program, when none was being discussed by the government, be considered specific (proposed ethics reforms) or general (the issue of government ethics)?

A third alternative would be to limit the disclosure requirement to situations where people are expressly asked to contact a government official. But such a limited requirement should (1) be worded in such a way as to prevent loopholes that would allow such requests, but in a tacit form and (2) include all related activities.

Detailing the actions that lobbyists engage in not only clarifies what lobbying consists of, but also expands the concept of lobbying from the limited, simplistic picture that first comes to mind. Here are the six actions listed in Los Angeles's definition of "lobbying activities" in the first section (§48.01) of its Municipal Lobbying Ordinance:

> (1) engaging in, either personally or through an agent, written or oral direct communication with a City official;
>
> (2) drafting ordinances, resolutions or regulations;
>
> (3) providing advice or recommending strategy to a client or others;
>
> (4) research, investigation and information gathering;

(5) seeking to influence the position of a third party on municipal legislation or an issue related to municipal legislation by any means, including but not limited to engaging in community, public or press relations activities; and

(6) attending or monitoring City meetings, hearings or other events.

This definition recognizes that lobbying involves much more than communicating with a government official. It provides a much more realistic picture of what lobbyists actually do. Numbers 2 and 5 are at least as important lobbying activities as number 1. Although the drafting role of lobbyists is less important at the local level, it can make a huge difference. For example, professional and business associations often seek to regulate competitors' conduct through ordinances they draft and which are passed, with little or no changes, by local legislatures. However, local lobbyists' drafting activities go beyond laws and regulations, to include such things as contract specifications, reports, the recommendations of advisory boards, and materials relating to development projects and grants.

Dallas is one city that uses the phrase "directly or indirectly," while Philadelphia uses the adjectival form of this phrase, modifying "communication." These may appear to be the same, but whereas seeking to communicate indirectly, by getting others to communicate, is what public relations is all about, an "indirect communication" could be interpreted as limited to a communication made through an agent or made to an official's aide rather than directly to the official herself. The adverbial form is preferable.

Since many people don't believe that the activities included above in numbers 3 and 4 — research and advising — are really lobbying activities, one possibility is to break them out, as Connecticut does, calling them "activities in furtherance of lobbying." They describe these as follows: "research, reports, polls, media buys, activities fostering good will, office expenses, secretarial or paralegal salaries, etc.; essentially the activities that support the actual lobbying efforts" (a concept that the City Ethics Model Lobbying Code borrows). These activities are counted for the threshold for lobbying registration, so they are considered "lobbying activities." They are simply differentiated to make it clear that these activities are included.

The City Ethics Model Lobbying Code definition of "lobbying activities" (§301) takes a combined approach to indirect lobbying. First, it uses the phrase "directly or indirectly."

Second, like Los Angeles, it details the activities that are often left out of a definition, such as research, advising, and monitoring. Third, it expressly includes lobbying local officials for state and federal benefits by ending the first sentence of the definition of "lobbying activities" with the phrase " any matter before or which may foreseeably come before any level of government." Fourth, it expressly includes grassroots lobbying and provides a separate definition for it, which follows the same format as the "lobbying activities" definition:

> "Grassroots Lobbying" includes any activity undertaken to encourage others to influence a city/county official, employee, or consultant to favor or oppose, recommend or not recommend, vote for or against, or take or refrain from taking action on any matter at any level of government. It includes such activities as advertising, mailings, phone banks, and door-to-door campaigns, the creation or use of an organization through which issue-oriented activities and campaign expenditures may pass, and the conciliatory lobbying of groups in opposition to the lobbyist's goals.

This provision does not expressly refer to "astroturf" lobbying, because it is often hard to differentiate between grassroots and astroturf lobbying and, for the purpose of disclosure, it is not necessary to make this differentiation. The disclosure itself will provide the sort of information that will help citizens and the news media determine what is going on.

Strategic Advice: Number 3 on the Los Angeles list of lobbying activities – providing advice or recommending strategy to a client or others – is, at first glance, the oddest of the six. But it is important, because it is a way to include strategic advice, the most recent growth field in lobbying. In a December 2013 New York *Times* op-ed piece, Columbia University professor Thomas Edsall defined "strategic advice" as focusing on "how to convince and mobilize voters and opinion elites in support of a client's agenda." Strategic advisers help companies, associations, and organizations (1) plan out legislative and independent campaigns and drives, especially to affect the establishment and implementation of regulations; (2) determine which officials and agencies to deal with; and (3) determine potential coalition partners.

Lobbyists engage in strategic advising without making direct, or even indirect, contact with officials. They don't even get directly involved in public relations activity. Strategic advisers make use of their knowledge rather than their contacts, or at least their

contacts who are still in government (many, like them, are on the outside).

Providing expert information is what lobbyists insist is their principal purpose. The provision of strategic advice is the provision of expert information at a level above ordinary lobbying, that is, it involves the development of the strategies that lobbyists (both internal and external) and their principals will employ. Therefore, it too should be included in the definition of "lobbying activities." The City Ethics Model Lobbying Code does this by including the word "advising" in the list of activities "undertaken to support such influencing."

Edsall quotes from a self-description by one lobbying firm: "Old lines between public and private sector, journalist and civilian, outside agitator and inside power broker are blurring. GPG was built to help organizations navigate this shifting landscape." Lobbying definitions also need to keep up with this shifting landscape.

Fixers: A group of people who, like strategic advisers, facilitate and guide influence on behalf of people seeking special benefits from a local government are also often left out of lobbying code definitions: individuals known as power brokers, fixers, or bagmen. These are the people who bring people together, arrange meetings, help get people through bureaucratic processes, and make things happen. These individuals often exert no influence and are rarely paid directly for their services. They may not even represent anyone, or they may officially work for a political party, which gets the benefit, while the fixer gets the credit and, therefore, the power. Or they may get paid for giving advice (often about people, processes, and tactics) rather than influencing. They may set up meetings without attending them. They may not perpetrate ethical misconduct, but instead enable and be complicit in it.

One big-time fixer in the Jersey Sting told an FBI informant, "You don't need to know how I do something. All you need to know is whether it got done." When it comes to government, the public should know who and how things are getting done. This is public information.

Because there are few, if any professional lobbyists at the local level, the contract lobbyists who are successful locally sometimes become power brokers. These individuals can best represent their clients by being in a position to pull a lot of strings. They can get into this position through their involvement in the majority political party, through the services they provide to officials, through their involvement in and financial support (directly and

through clients) of political campaigns, and through the personal relationships they form with officials. When they engage in ordinary lobbying activities, these power brokers do register as lobbyists. But sometimes they stop engaging in these activities, or report only a small percentage of the activities by which they help influence government decisions, providing limited transparency.

It is difficult to include fixers in lobbying oversight programs, because they don't fit the usual definitions. What makes it especially difficult is that they are rarely "hired" and rarely "represent" anyone. They are rewarded in other ways, but through the usual reciprocal relationships.

One approach is for lobbying oversight offices to try to identify these individuals and ask them to participate, to file disclosures and register as lobbyists, even if they are not required to. The worst they can do is say No. And if one or more of them say Yes, the pressure is on the others to follow suit.

As for lobbyist-power brokers, a lobbying oversight office can ask for information about their other activities, where they bring people together in ways that facilitate lobbying.

Placement Agents: In 2011, California began requiring placement agents to register as lobbyists, attend ethics training, and not take finder's fees from money managers. California defines "placement agent" as follows:

> an individual hired, engaged or retained by, or serving for the benefit of or on behalf of, an external manager, or on behalf of another placement agent, who acts or has acted for compensation as a finder, solicitor, marketer, consultant, broker or other intermediary in connection with the offer or sale of the securities, assets or services of an external manager to a state public retirement system in California or an investment vehicle, either directly or indirectly.

"External managers" are consultants who manage a pension portfolio or investment fund. Due to the conflict between their fiduciary duties, placement agents are more controversial than lobbyists, but they are similarly the representatives of entities seeking a special benefit from the government, in this case the business of a pension fund. They have become increasingly regulated, mostly through disclosure, but in some states, such as New York, their activities have been banned.

In New York City, pursuant to a 2010 law department opinion, placement agents attempting to influence decisions made by the city comptroller or staff, or the boards of trustees of the city's pension funds and retirement systems or staff, were deemed to be lobbyists. If a local government is in a state that is not requiring placement agents to make full disclosure of their activities, it may require this by expressly including placement agents in its definition of "lobbyist," including their activities in its definition of "lobbying," or by designating them as a special sort of lobbyist subject to the same or similar rules. The City Ethics Model Lobbying Code includes them in the definition of "lobbyist" and gives them their own definition, based closely on California's.

One thing placement agents must keep in mind with respect to compliance with local lobbying laws is the fact that a criminal conviction could be considered a "disqualifying event," resulting in treatment as a "bad boy" for purposes of the federal Securities and Exchange Commision's (SEC) Regulation D Rule 506 exemption.

Other Activities: Los Angeles's lobbying activities numbers 4 and 6 – research, investigation, and attendance at meetings – are activities that are necessary in order to prepare for communications with officials and for other lobbying activities. Lobbyists do not just show up at meetings with officials, they do lots of research and watch the officials in action, scouting them just as sports team scout their competition. Philadelphia's phrase "incurring office expenses" might be considered to deal with this part of lobbying, but it is best to clearly describe the activities for which such expenses are incurred, or it is likely that they will not be disclosed. This is what the City Ethics Model Lobbying Code does this in its definition of "lobbying activities" (§301).

San Diego has a list that is similar to the Los Angeles list, but not as good. However, it does contain two elements that do not appear on the Los Angeles list: communications with clients (like L.A.'s number 3, but more inclusive) and waiting to meet with officials, which can presumably take all day.

Philadelphia includes in its short list the provision of a gift "to advance the interest of the lobbyist or the principal." Since most definitions of "lobbying" are based on communications, this effectively makes gifts a form of speech. After all, if you send three council members to a conference in Hawaii and you're trying to get a development project accepted, you don't really have to say much more. But it is best to prohibit or seriously limit gifts from lobbyists. There is no need for the extra language about advancing interests; this

only requires evidence that can be difficult to provide. Anyway, as an Alabama lobbyist once pointed out, "lobbyists don't give anything to public officials but for the purpose of influencing official action."

One kind of lobbying that is often left out of definitions is negative lobbying. For example, in Missouri a political consultant for a major corporate user of electricity wanted to prevent the electric utility from charging its customers for a new nuclear power plant before it came on board. To do this, the consultant put together a program of mailings and robocalls to people in the district of a state senator who was leading the attempt to allow the utility to pre-charge its customers. The public relations program alerted people to spiraling utility costs, even though they did not even get their electricity from the relevant utility. The goal was not informing the public, but using corporate money to pressure a senator to back off (and intimidate others away from supporting the bill). This type of activity can be included under the definition of "grassroots lobbying" by including language, as in the City Ethics Model Lobbying Code (§301), that makes it clear that lobbying includes attempts to get officials to oppose as well as support matters that come before them.

Who Can Be Lobbied

Many jurisdictions limit who can be lobbied for an activity to count as "lobbying." Sometimes, the definition limits "lobbying" to communications with elected officials. Sometimes, the definition also includes decision-making bodies, procurement decision-makers, and/or department and agency directors, referring to them and their members as "covered individuals" or the like.

At best, these limitations on who can be "lobbied" ignore reality. A lot of lobbying is not directed toward the highest officials. The highest officials are the hardest to get access to, and they often listen to their staff and legal counsel. Lobbying their staff and their counsel can be equally effective and much easier. In addition, it is usually aides, counsel, and other staff who draft laws, regulations, letters, and press releases. And aides, counsel, and other staff have input into setting priorities and agendas (especially keeping matters off the agenda, which is a common goal of lobbyists). They have a great deal more authority than they are given credit for.

Because it is difficult to determine which employees, in which situations, are likely to be lobbied, it is best to define "lobbying" broadly to include the lobbying of any official or

employee, as well as consultants and advisers. This is true even if one considers that many government employees generally engage in ministerial matters, that is, matters where no one has discretion. It is better to make an exception for ministerial matters than for the people who generally engage in them, because these individuals sometimes act as advisers and have authority of their own, such as choosing not to put a matter on an agenda. See the City Ethics Model Lobbying Code's ministerial matters exception to the registration requirement.

Similarly, it is better to make an exception with respect to adversarial proceedings than to except the individuals who sometimes take part in such proceedings, that is, government lawyers.

Exceptions

As with gift definitions, in some jurisdictions a great deal of the definition of "lobbying" consists of exceptions or, as many lobbying codes call them, "exemptions." Exceptions must be carefully phrased or they will be seen and used as loopholes, and have many unintended (or, at least, unstated) consequences that undermine lobbying oversight by removing individuals, entities, professions, and activities from disclosure and limitations. Many exceptions also undermine support for a lobbying oversight program by those lobbyists who feel the program is unfair to include them but not others, especially those on the opposing side of matters they are involved with. Inclusiveness is essential to fairness, the appearance of fairness, the effectiveness of a lobbying oversight program, and the public's belief that the program is designed to disclose all lobbying activities and prohibit misconduct no matter who engages in it.

When one starts thinking of exceptions, it can become difficult (1) to decide which to accept and which to reject, and (2) to use language that will prevent what was intended to be a narrow exception from being turned into something you can drive a truck through (sometimes, the exception is designed to fit a certain truck; sometimes the truck hasn't even been designed yet, but the exception will determine its design). In 2013,Tim LaPira, a professor at James Madison University and Sunlight Foundation Academic Fellow, estimated that, at the federal level, about half of all those getting paid to engage in lobbying activities were not required to register as "lobbyists" due to the kinds of lobbying that are excepted, including grassroots lobbying and strategic advice. These exceptions have greatly affected

the way federal lobbyists do their work as well as the effectiveness of the federal lobbying oversight program.

However, the broader the definitions of "lobbying" and "lobbyist," the more exceptions are required. Since the City Ethics Model Lobbying Code employs a broad definition of "lobbying activities" (§301), it contains many exceptions. But the exceptions themselves are not as broad as those in many lobbying codes, nor do they open up loopholes for lobbyists to get around registering as "lobbyists." In addition, they are not exceptions to the definition of "lobbying activities" or "lobbyist," but rather to the requirement of lobbyists to register. Whichever place the exceptions appear, they should, as much as possible, all appear in the same place.

Minimum Requirements. It is important that individuals who seeks to influence local officials acknowledge that it is inappropriate to take advantage of express exceptions or exceptions created by vague language. Lobbying is not a sport; it is a right that comes with obligations. Like all government ethics rules, lobbyist registration rules are minimum requirements. What this means is that exceptions only say that people who fit the exceptions do not *have* to register or disclose; they do not say that they *should not* register or disclose. Vague language allows individuals to argue that they do not *have* to register as a lobbyist, but this does not mean that they *should not* register anyway, both to be safe and to show their support for transparency. Even if one seeks ethics advice and is told that one does not *have* to register, one may register anyway. For the good of the community and the fairness of the lobbying oversight program, individuals should choose to register as a lobbyist and disclose activities and expenditures that they may not be required to disclose. This is especially true of nonprofits, which are subsidized by laws that allow their contributors to deduct from their taxes the money that allows the nonprofits to function.

One may do more than is minimally required by law not only because it's the right thing to do, but also because it may very well be in one's personal interest and, if one is a contract lobbyist, in the interest of one's principal. This is true because one's failure to be transparent could, if the facts come out, put one in the middle of a scandal that will not only hurt one's reputation in the community, but also may require government officials to reject not only one's meeting requests, but perhaps also one's requests for grants and permits, and even one's contract bids. Better safe than sorry is a valuable bit of wisdom when it comes to lobbying registration.

Seattle has good language that speaks to this (which the City Ethics Model Lobbying Code has borrowed (§302.2)): "Any person exempted under this chapter from registering and reporting may at his or her option voluntarily register and report under this Chapter." This should not, however, be in a separate provision following the exceptions. It should appear right after the registration requirement and before the exceptions, as it does in the Model Code.

In general, a large number of exceptions reflects either too great a concern that non-lobbying activity will be considered lobbying, or an attempt to greatly limit the regulation of lobbyists. Or both. But the number of exceptions is affected by how broad the definition of "lobbying" is; the broader the definition, the more exceptions there need to be.

Chicago has just two exceptions to a fairly narrow definition: "solely … submitting an application for a City permit or license or … responding to a City request for proposals or qualifications." The first goes without saying; the second is dealt with below.

The District of Columbia has six exceptions:

> (i) The appearance or presentation of written testimony by a person on his or her own behalf, or representation by an attorney on behalf of any such person in a rulemaking (which includes a formal public hearing), rate-making, or adjudicatory hearing before an executive agency or the Tax Assessor; (ii) Information supplied in response to written inquiries by an executive agency, the Council, or any public official; (iii) Inquiries concerning only the status of specific actions by an executive agency or the Council; (iv) Testimony given before the Council or a committee of the Council, during which a public record is made of such proceedings or testimony submitted for inclusion in such a public record; (v) A communication made through the instrumentality of a newspaper, television, or radio of general circulation, or a publication whose primary audience is the organization's membership; and (vi) Communications by a bona fide political party.

San Francisco wins the prize with sixteen exceptions, with Dallas and San Diego tied for second with thirteen each, while the City Ethics Model Lobbying Code (§302.3) has fourteen. But all exceptions are not alike. Most of Dallas's are unnecessary, while most of San Diego's and San Francisco's are important, although they could have been consolidated into a less unwieldy list. The Model Code's exceptions are to a much broader registration requirement.

The two exceptions in Jacksonville's lobbying code are important, although they could be conflated into one (see exception for lawyers below):

> (1) Legal or settlement discussions directed toward an attorney for the City or of an independent agency; or
>
> (2) Participation in a quasi-judicial proceeding involving the City or an independent agency (except that all ex-parte communication to a decision maker or non-lawyer city or independent agency employee constitutes lobbying).

Another approach to the first Jacksonville exception is the one Chicago takes: "an attorney shall not be considered a lobbyist while representing clients in a formal adversarial hearing." The Jacksonville term "legal discussions" could, for instance, include discussions about regulations or proposed regulations, with a lobbyist arguing that they raise legal or constitutional questions and, therefore, should be scrapped or not passed. This is lobbying.

The other most important exceptions are for the news media (see D.C.'s fifth exception) and for ministerial matters, such as asking a clerk for a form or scheduling an appointment, when nothing else is involved (this language constitutes City Ethics Model Lobbying Code's ministerial matters exception, §302.3(d).

There are problems with most of the other exceptions. Consider the D.C. exceptions above. Is written or even verbal, public testimony not part of lobbying? The preparation of such testimony is an important part of lobbying. It can consist of extensive arguments and documentation, including recommended language. It can have a serious effect on a body's decision to act and, if so, in what manner. The fact that citizens also do this, and that it is not then considered lobbying, is taken care of by the requirement that a lobbyist be paid to lobby, a requirement that a lobbyist spend a certain number of hours engaged in lobbying activities, or an exception for citizens stating their opinions (the model code's approach). There is no reason to differentiate the work that goes into public testimony from the work that goes into private or indirect communications. They are both part of the same lobbying effort and even though public testimony is public, it should be included in the disclosure of lobbying activities when it is part of a lobbying effort.

In some jurisdictions, the public meeting exception is limited to appearances by professionals, including attorneys and architects. If professionals are to be excepted, the

exception should be much more specific (see the section below on an exception for lawyers).

Similarly, the fact that a communication is a response to an inquiry from a government body or official does not mean that the communication is not lobbying. The inquiry may be part of an ongoing series of communications. In fact, the inquiry may have been made in response to lobbying. Affecting how, when, by whom, and to whom inquiries are made can be an important goal of lobbying. Excepting such communications from the definition of lobbying is an incentive to communicate in this manner, that is, to ensure that an inquiry is made early in a series of communications intended to influence officials. Inquiries that are part of surveys, investigations, or the like, where the inquiries are widespread and not involved with matters relevant to lobbying, will not be considered lobbying even without this exception.

Of course, inquiries concerning nothing but the status of specific actions should not be considered lobbying, but who does nothing but this? Considering how little time such inquiries take and the fact that such inquiries are usually directed toward officials without decision-making powers, is it really necessary to make an exception for them when there is already a ministerial acts exception? Monitoring is an important part of lobbying. Do we want lobbyists to exclude monitoring from their timesheets? If such inquiries do take any appreciable time, then something other than status is likely to have been part of the conversation. This exception seems like a good way to provide lobbyists with a good excuse for not reporting a communication or meeting: "I was seeking information about the status of an action, so I didn't report the meeting (or the call)." This is the sort of unnecessary loophole that allows the unscrupulous to be able to defend their lack of transparency.

New York City's exceptions are, with one exception (adjudicatory determinations), described in terms of the individual's role more than the activity. The excepted people and entities are lawyers (under all circumstances where there is no attempt to influence), the news media, witnesses in certain proceedings, parties to an adjudicatory proceeding, those who advertise with circulars or fliers, those who prepare responses for information or comments, and contractors in procurement matters (but not their representatives, unless they are providing technical or certain other professional services). Is all of this really necessary? If it is, is the list sufficient? No, there are many more types of people who communicate with officials but do not lobby them. But adding more roles is not the answer.

Each excepted role opens possible loopholes that allow lobbying to go on secretly. Each one should be scrutinized to determine if it is truly necessary and, if so, how the language can be drafted to prevent loopholes.

One result of having a very broad definition of "lobbying activities," like that in the City Ethics Model Lobbying Code, is the need for more exceptions than with a narrow definition (in this case, exceptions to the need to register, not exception to what are "lobbying activities" or who is a "lobbyist.") The most important additional exception is the first (§302.3(a)):

> An individual need not register as a lobbyist if the individual's only lobbying activities will be those described below.
>
> a. An individual expressing an opinion (including one inspired by a grassroots lobbying* effort), unless (1) it relates to a matter with respect to which the individual, an individual's business, business associate, or client, or an individual's immediate family member may, directly or indirectly, benefit financially in a way that is not shared with a large number of residents of the municipality or (2) the individual is representing a group or organization. Lobbying with respect to benefits to an individual's owner-occupied home does not require registration. Questions about whether a particular benefit is sufficiently widespread to require registration should be directed to the lobbying oversight office before a decision is made whether or not to register.

Distinguishing on the Basis of Compensation. This exception is required because, unlike most lobbying codes (the exceptions include Denver and Broward County, Florida), the Model Code does not distinguish in its definitions between those who are compensated for engaging in lobbying and those who are not. The reason for this is that citizens having their say about local policies are not the only individuals who are not compensated for their lobbying. Uncompensated lobbyists also include professionals performing pro bono, business and property owners, corporate officers and employees who are not primarily lobbyists, and nonprofit officers and board members.

In other words, the best basis for determining whether a citizen's lobbying should be disclosed is whether it relates to a matter involving special benefits that the citizen is seeking, beyond the citizen's residence, or, where there are no special benefits involved,

whether the citizen is representing an organization rather than himself. Most lobbying codes use compensation or time spent (or both) as the basis for this determination. But distinguishing on the basis of compensation allows, for example, business owners to lobby for a contract or university presidents to lobby for permits for a new building without having to register and disclose. This makes no sense, especially when another company or institution that hires a lobbyist or has an in-house lobbyist is required to register and disclose exactly the same lobbying activities. Distinguishing on the basis of compensation also allows a citizen's group or a coalition of local businesses to lobby against a development without having to register and disclose, while the developer has to register and disclose when speaking out on the very same matter.

Not only does this lessen lobbying transparency, but also none of these situations is fair, and this unfairness rightly makes lobbyists resentful about lobbying disclosure. This undermines support for a lobbying oversight program. Lobbyists try to get around the rules, justifying their cleverness on the basis of this unfairness, and lobbyists use their connections to influence local legislators to prevent such lobbying programs from being instituted, keep the definitions narrow, the prohibitions few, and the penalties low, and starve them of sufficient funds and staff to provide effective oversight.

In order to require the disclosure of the lobbying activities of these uncompensated individuals, it is necessary to distinguish between these individuals and those who are not compensated because they are merely giving their personal opinions on public issues or dealing with limited personal matters that affect their residence or their street, their personal taxes, their sports activities, and the like.

The City Ethics Model Lobbying Code has two additional exceptions focused on ordinary citizens. The first (§302.3(b)) deals with ordinary communications with the local government, seeking information or advice, or filing complaints or reports of problems, from potholes and garbage pickup problems to ethics complaints and tips about criminal behavior:

> An individual who files a complaint or tip, or seeks information or advice regarding a matter that does not involve a special financial benefit to a business with which the individual is involved or whose interests the individual is representing.

Exception for Constituent Services. The second additional exception deals with the related area of constituent services, which the Model Code defines as "help by elected officials provided to individual residents of the city/county in minor matters that will not benefit their or their family's business or special financial interests (other than the value of their home)." The second exception (see below) mirrors the definition by making clear the distinction between helping a citizen with a personal matter and helping a business with a matter that may benefit it financially. The exception also places on officials the obligation to tell business constituents to register as lobbyists. This is important, because these individuals do not see themselves as lobbyists and may not even be aware of the lobbying code, at least in the first years of a lobbying program.

> An individual resident of the city/county requesting information or seeking, or an official providing, constituent services. However, entities and individuals that have or are seeking special financial benefits from a government (local, regional, state, or federal), such as a contract, grant, loan, permit, or license, are deemed not to be seeking constituent services and are not excepted from registration. Officials should report any communication with such entities and individuals as lobbying contacts.

What is and is not a constituent service is a more complex distinction than most elected officials acknowledge. First, it is important to recognize that seeking constituent services *is* lobbying. It is an attempt to influence an official, in fact, it is an attempt to influence an official to use his position to influence other officials or employees. That's the place to start.

Then it is important to recognize that, even if elected officials were to treat every individual and entity exactly the same, most individuals ask for help with minor, procedural matters, while most businesses ask for help with matters that involve substantial financial benefits. And whereas most individuals who ask for help give nothing in return, except possibly a vote, many businesses that ask for help make large contributions and engage in an ongoing reciprocal relationship with the official.

Therefore, what is to be treated as seeking a constituent service (not required to be disclosed) as opposed to lobbying (required to be disclosed) should be limited to situations where officials help certain kinds of constituents in limited ways, in terms of who is helped, to what extent, and in conjunction with what sort of relationship.

It matters, for example, whether the service is provided to an individual or entity that resides in the official's district or jurisdiction. Out-of-towners are not constituents, even if their business might be seen as helpful to the community. In fact, businesses, organizations, and associations that have only a minor presence in the official's district or jurisdiction — a state association with an office in town, a chain with a store in town, a resident who represents an out-of-town company — are not necessarily constituents, either.

Another issue is whether the service being sought is personal or business. For example, does it involve the valuation of a home or the valuation of a business for tax purposes? Does it involve getting a job or getting a contract? One could argue that a business is capable of handling relations with an administration by itself or paying for the help an official might provide and, therefore, does not require the intercession of an official.

It also matters what sort of relationship the constituent has with the official. If the constituent, including its officers, employees, and representatives, have given large campaign contributions or provided gifts to the official, then what may be similar to a constituent service might appear to be preferential treatment based on an ongoing reciprocal relationship with the constituent, especially if the service financially benefits the constituent, or the constituent's business, family member, or business associate.

Even without any contributions or gifts, a business associate, or even a former business associate, can have, or appear to have, special influence. For example, in December 2014 it came out that the lobbyist for a company that obtained a $110 million no-bid contract from the Texas health agency was a former business partner of the chief counsel who put together the deal.

In the alternative, the issue of determining what is a constituent service could be dealt with effectively and professionally by a local legislative body handling constituent services collectively — via a citizen services office in the legislative body or the city manager's office — rather than individually by each member or by the mayor. This way, there is no reciprocal relationship between those helped and those providing the help, at least as long as the council president or mayor doesn't effectively control the citizens service office and use it to further his power.

Some jurisdictions have an exception for elected officials acting within their official duties, which includes lobbying for certain of their constituents. This is a reasonable exception, because it is impossible to distinguish between officials communicating with

other officials as part of their work or as part of a lobbying effort. It would be too hard to make these distinctions, and it would frankly seem inappropriate to require officials to disclose all of their attempts to influence other officials. See more about this exception below.

Exception for Nonprofits. Many nonprofits prefer not to register their lobbyists, and many governments are convinced by their arguments. These arguments generally relate to fees and difficulty of meeting disclosure requirements. In October 2015, the lobbyist for a Scottish nonprofits association objected to lobbyist disclosure, saying, "[O]f course lobbyists have to take responsibility for their actions but it's [legislators] who are representing the public and who are duty bound to be open and transparent. We shouldn't sit back and let them palm off this obligation on to lobbyists." But legislators only know the tip of the iceberg that is lobbying. They only know the actual contacts, and can be so overwhelmed with contacts at events that it would be very hard for them to record them all.

Exceptions for nonprofits involve either an activity or the identity of the person involved. Identity is an area where jurisdictions sometimes create inappropriate exceptions. For example, New York State excepts religious institutions and nonprofits seeking contracts. Chicago excepts anyone who is a "volunteer, employee, officer or director of a not-for-profit entity who seeks to influence legislative or administrative action solely on behalf of that entity," that is, not on behalf of for-profit members (nonprofits with for-profit members are primarily associations, such as a chamber of commerce or professional association). Chicago's lobbying code refers to nonprofits without for-profit members as "one-tiered nonprofits."

The problem is that many one-tiered nonprofits — such as social service organizations, hospitals, and universities — seek contracts, grants, and approvals from local governments just like any for-profit. They also deal with a special sort of matter: payments in lieu of property taxes, which can have a significant effect on a community's resources, and the community's personal and business taxes. Some nonprofits, especially universities and hospital complexes, are the most powerful player in local politics. They are often the most significant institution in modern "company towns," better known as "college towns." Excepting them from lobbying oversight is the wrong way to protect community groups from having to pay registration fees. It is better simply to have a nonprofit size limit for

registration fees, as in the City Ethics Model Lobbying Code.

Also among nonprofits are "astroturf organizations" formed by developers and others with large for-profit interests in municipal projects. Since it is difficult to distinguish between true grassroots and astroturf organizations, it is best to require both to register when their representatives lobby.

The District of Columbia differentiates between types of nonprofit in a different manner. Nonprofits "whose activities do not consist of lobbying, the result of which shall inure to the financial gain or benefit of the entity," do not have to register as lobbyists. This double negative means that any nonprofit that seeks a financial benefit must register. This is a much better way to differentiate than Chicago's. But this still allows nonprofits to do a great deal of lobbying on policy issues that, arguably, do not bring them financial gain without having to disclose, while the lobbyists they oppose are required to disclose. Also, although astroturf organizations do not benefit from lobbying, those who fund them do. The D.C. exception allows such organizations to keep their lobbying efforts secret.

Nonprofits should not be treated any different than for-profit companies or associations of for-profit companies. This is especially true when they're seeking special benefits from a government for themselves — usually grants and social service contracts — even when they are arguably also of benefit to the community. A jurisdiction may choose to, on an individual basis, waive revolving door rules when they involve an individual who will be lobbying strictly about policies, not about contracts, grants, or other financial benefits. But the lobbying of nonprofits should be just as transparent as any other lobbying. Lobbying programs should be fair as possible, and their registers should present as complete as possible a view of lobbying on any particular matter, not only the lobbying of for-profit companies.

Some jurisdictions have more narrow versions of this exception. For example, in Dallas there is an exception for a "neighborhood association, crime watch group, or homeowners association or its members when lobbying on a municipal question that affects the group or association as a whole." Neighborhood and homeowners associations can be very active in blocking developments, and they may be funded by businesses with a commercial interest in keeping competition out. If neighborhood groups do not have to disclose their lobbying, it is unfair to developers, and developers will reasonably oppose lobbying codes and do their best to get around lobbying rules. In addition, excepting these

groups will make it more likely that companies will try to buy their support.

Does it matter that a lobbyist is a volunteer for a nonprofit, acting for a cause rather than any financial gain? Whether or not the lobbyist himself benefits financially, he considers his organization an important part of his life, identity, and role in the community. His lobbying is also part of a larger lobbying effort that will likely involve paid in-house lobbyists and contract lobbyists. In addition, a nonprofit often engages in a lobbying effort for the personal benefit of its staff, to raise awareness of the organization and to raise funds for their salaries. The volunteer himself should not be required to register and disclose, but the nonprofit should register all of its lobbyists (except those who merely contact their representative or speak at government meetings) and disclose their lobbying activities.

Some nonprofit exceptions expressly refer to nonprofits seeking to influence on behalf of the entity, rather than with respect to policy. This is a misunderstanding based on the kind of lobbying that tends to occur at the federal and, to a lesser extent, at the state level, where nonprofits are more policy-oriented than at the local level. At the local level, the only nonprofits that are strictly policy-oriented tend to be good government, environmental, and anti-tax groups. Environmental groups often get involved in land use matters, where they lobby against lobbyists required to register and disclose; it's only fair for environmental groups to register and disclose, as well. Good government groups are usually happy to be transparent about their lobbying.

Why then shouldn't all nonprofits? What harm would occur were policy-oriented nonprofits required to disclose their lobbying activities? The burden of filing online disclosure forms has to be offset by the values of fairness and transparency. The issue of fairness in excluding nonprofits was, for example, raised by a council member during discussions of lobbying reform in San Jose in December 2015.

But when it is proposed that nonprofits register and disclose, they often oppose it strenuously, as happened, for example, in Providence, Rhode Island in September 2014. The reason that nonprofit good government groups are happy to register and disclose is that they recognize that transparency is valuable to the community, and that it is better to have more transparency, a more complete view of lobbying, and fair disclosure rules, than to save nonprofits a bit of time. The Providence nonprofits who protested registration wrote, "To hold a volunteer nonprofit board member to the same onerous standard as those for a multimillion-dollar corporation seeking to sway city policy and obtain contracts worth

millions of dollars borders on the unconscionable." But filling out a form is no harder for a volunteer than for a multimillion-dollar corporation. In fact, it's much easier, because there is little to write. It appears unconscionable for someone to want to be excluded from disclosing their lobbying to the community just to save themselves a bit of trouble.

Another argument that is made is that 501(c)(3) nonprofits are prohibited by law from engaging in much political activity, including lobbying. This is irrelevant. The fact is that nonprofits do lobby local officials both on policy matters and on matters involving contracts and grants that will go directly to the nonprofits.

There will be occasions when a nonprofit organization or a more informal group of individuals, as well as the officials it communicates with, do not want to disclose their communications because the organization is effectively a pariah and fears harassment or arrest, for example, a Communist organization or a group of undocumented immigrants. Such a group or organization should be permitted to seek from the lobbying oversight office a waiver from lobbying registration and disclosure. Through a formal, but not public, waiver process, the organization could either be excused from registering (with a letter to give to officials it lobbies), or it could be required to register and disclose, but all documents would be kept confidential, if this is legal under state freedom of information laws. Here is the City Ethics Model Lobbying Code exception for such groups and organizations (§302.3(n)):

> A principal, and anyone lobbying on the principal's behalf (to the extent of this representation alone), may seek to be excepted from the registration requirements of this code by demonstrating to the lobbying oversight office that there is a reasonable probability that the disclosure of identifying information will subject the principal and/or agent lobbyists to threats, harassment, arrest, or reprisals. This is the only situation where an exception or waiver may be provided by the lobbying oversight office without a public hearing and decision.

Los Angeles has good language that narrowly refers to what are essentially constituent services performed by legal services agencies and the like. What makes this provision especially valuable is that it contains an exception for contracts between the government and the organization (the City Ethics Model Lobbying Code has a version of this language):

> Any organization exempt from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code, which receives funding from any federal, state or local government agency for the purpose of representing the interests of indigent persons and whose primary purpose is to provide direct services to those persons, if the individual or individuals represented by the organization before any City agency provide no payment to the organization for that representation. This exemption shall not apply to direct contracts with a City official in other than a publicly noticed meeting, for the purpose of attempting to influence a City decision with regard to any City funding which the organization is seeking.

For information about IRS and other federal rules relating to lobbying by nonprofits, see *The Nonprofit Lobbying Guide* (1999), downloadable free from Independent Sector.

Exception for Grassroots Organizations. Most grassroots lobbying activities do not require lobbyists to register at the federal level, even though this has been a common form of lobbying for several decades. This exception is done not in the form of an express exception, but rather by limiting "lobbying" to direct communication with officials.

Such an exception is unacceptable at the local level, where grassroots lobbying is a common part of land use lobbying as well as public policy lobbying. Whether or not grassroots organizations are created by lobbyists, hire lobbyists, or do their own lobbying, they should disclose their lobbying activities.

The recent increase in political activity by organizations that are permitted to withhold the disclosure of their funders has led to a call that their officers be excepted from registering as lobbyists and disclosing the sources of their funds. This contention was, for example, made in 2014 in response to complaints filed against the head of two such organizations in Texas. Since these organizations do not have to report donors, there is no way for the public to know whether or not their officers are representing special interests as lobbyists, thousands of individuals as grassroots advocates, or both at different times. If they are communicating, directly or indirectly, with government officials, these organizations should register and disclose the information required by law.

Exception for Lawyers. It is important not to make an exception for lawyers. Many individuals who engage in lobbying activities are lawyers but, when they engage in these

activities, they are not acting as lawyers, they are not practicing law. If they were, then no one else could lobby, because there are strict rules about practicing law. To lobby, on the other hand, you do not have to have a law degree, not to mention be a member of any bar. Therefore, any exception for lawyers, as opposed to certain activities that only lawyers can engage in, such as litigation, is intended to make lawyers attractive as lobbyists by giving their clients an opportunity to hide their lobbying activities. Such an exception is essentially a way for lawyers to get more business from principals who want to keep their lobbying secret.

San Francisco has an exception that speaks not to the status of the lobbyist, but rather to the service being provided or the activity being engaged in. It makes an exception to the definition of "lobbyist" for "A person performing a duty or service that can be performed only by an attorney, an architect, or a professional engineer licensed to practice in the State of California, including any communication by an attorney in connection with litigation involving the City and County or a claim filed pursuant to Administrative Code Section 10.20-1 et seq."

Some jurisdictions — especially those that limit lobbying oversight to the procurement process (mostly independent agencies) — have an exception for lawyers negotiating existing contracts with a government. But this is not primarily a legal area. In fact, a great deal of the most costly favoritism that goes on in procurement involves the negotiation of existing contracts after the competitive bidding process, including change orders, extensions, renewals, and the handling of contract fulfillment problems. It is important that the public have some idea, from lobbying disclosures, that contract terms (including the amount of payment) are being changed, that past contract amounts may be extended into the future, or that the contractor may be having problems fulfilling contract requirements, so that questions can be asked. The fact that an attorney is working on these issues should not in any way affect transparency.

Lawyers sometimes contend that they cannot register and disclose their lobbying activities because due to lawyer-client confidentiality, which prevents them from disclosing the names of their clients or any information regarding their representation of clients. But everything an attorney does, even for a client, is not the practice of law. If a lawyer runs down to the local store to buy a sandwich for a neighbor-client, is that a confidential act? If he tries to get public representatives to publicly vote a certain way, is that an act that may

arguably be kept confidential? No, because it is not the practice of law. It is representation that can be done by anyone, including lawyers, and public representatives have said this representation must be made public.

When a lawyer engages in lobbying activities, that lawyer is not practicing law and, therefore, there is no lawyer-client confidentiality. Even if the lawyer could argue that a particular activity was both lobbying and legal practice, if a client asks a lawyer to lobby and the law that covers lobbying officials in that jurisdiction requires disclosure of lobbying activities engaged in on behalf of the client, then the client has a legal obligation to disclose, directly or through its lobbyist, and not to contend that the information is confidential. It is important to recognize that confidentiality is intended solely to protect clients, and that clients who lobby in a jurisdiction that requires the disclosure of lobbying activities have, by law, waived any confidentiality. In other words, where there are lobbying disclosure requirements, lobbying is not confidential information. Lobbying is the meeting of private and public, and the public (including those managing communities) need this information to make important decisions.

In fact, lawyer-client confidentiality is an important reason to require lobbying disclosure. Portland, Maine's "most active lobbyist" told the *Press-Herald* in December 2014 that when a council member asked him how much he was being paid to lobby the council, he said, "It's my business. I am influencing public policy and I understand why people would ask, but until such time that there's a requirement to disclose that stuff, I can't." With a lobbying oversight program, he would be permitted (and required) to answer this question, because the law would trump lawyer-client confidentiality. This is not because government is more powerful than profession; it is because when the profession, in supposed protection of its clients, refuses to distinguish between lobbying and the practice of law, the government is required to do so in order to bring transparency to this important public activity.

What a local government should do, in a lobbying code, is to expressly have a principal acknowledge that, by hiring a lawyer to lobby for it, it waives lawyer-client confidentiality with respect to required disclosures of lobbying activities and related expenditures. The City Ethics Model Lobbying Code deals with this important issue in four places. It includes such a waiver in the registration form provision, so that the waiver is on the registration form itself (§302.6):

> By engaging an attorney to lobby, a principal waives attorney-client confidentiality to the extent of disclosures required by this code. This waiver will appear on the registration form.

It repeats the first sentence in each of the provisions involving the two types of disclosure, ongoing disclosure and quarterly disclosure (§§303, 304). And in the exception for a "pending or imminent publicly noticed judicial or quasi-judicial proceeding" (§302.3(e)), it states:

> Whenever engaged in lobbying activities, attorneys and other professionals must register and follow all the rules in this code just like any other lobbyist and may not use lawyer-client or other professional confidentiality rules as a defense.

Requiring a principal to waive attorney-client confidentiality makes it clear that lobbying regulation is not regulation of attorneys, or even of lobbyists, as much as it is regulation of principals, because lobbyists and attorneys are only the agents of principals. Attorney-client confidentiality exists only to the extent a principal insists on it. If a principal waives it, then it does not exist and an attorney shares the principal's obligation to disclose.

Not only is it important not to make an exception for lawyers. It is important to expressly *include* lawyers, because otherwise there will be lawyers who insist they do not have to register not only due to lawyer-client confidentiality, but also because the bar provides oversight over their activities. When lawyers are excluded from lobbying oversight, non-lawyer lobbyists rightfully feel that lobbying oversight is unfair. The assumption should be that anyone providing lobbying services is a "lobbyist."

Pennsylvania expressly, and very simply, states in its definition of "lobbyist" that attorneys can be lobbyists: "The term includes an attorney at law while engaged in lobbying." This sort of inclusion is preferable to making an exception for lawyers when they are not lobbying.

In addition, the Pennsylvania Rules of Professional Conduct were amended in 2011 to expressly make lawyers acting as lobbyists subject to state and local lobbying rules:

> 1.19 Lawyers Acting as Lobbyists (a) A lawyer acting as lobbyist, as defined in any

> statute, resolution passed or adopted by either house of the Legislature, regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania, or ordinance enacted by a local government unit, shall comply with all regulation, disclosure, or other requirements of such statute, resolution, regulation or ordinance which are consistent with the Rules of Professional Conduct. (b) Any disclosure of information relating to representation of a client made by the Lawyer-lobbyist in order to comply with such statute, resolution, regulation or ordinance is a disclosure explicitly authorized to carry out the representation and does not violate Rule 1.6.

This is something every state's legal authorities should do. If a state has not done this and a local lobbying code is being considered, the local bar association should consider doing it, if it is permitted. Even if it cannot legally make a rule, it can recommend to its members that they comply with the disclosure requirements.

Perhaps local bar associations should act even if the state has already done so. In Pennsylvania, lawyers have argued that they are not subject to local lobbying laws despite the state rule. In 2011, the Philadelphia Bar Association opposed a Philadelphia ethics board lobbying regulation that would apply to lawyers. Here is what the association said, in part:

> Attorneys engaged in the practice of law are not subject to the requirements of the Lobbying Ordinance because Rule 1.19 of the Pennsylvania Rules of Professional Conduct does not apply to ordinances enacted by the City of Philadelphia. The Draft Regulations and the frequently asked questions ("FAQ") document should be amended to expressly make this clear.
>
> 2. The final regulations should expressly state that the exemption for participating in an "administrative adjudication" includes all aspects of matters that involve, or might lead to, a formal adjudication before a City board, commission or official or by a court. …
>
> Under Article V, Section 10(c) of the Pennsylvania Constitution, only the Supreme Court may regulate the practice of law. If the Lobbying Ordinance and the Draft Regulations (which simply copy the Ordinance's definition of "lobbyist") are interpreted as applying to attorneys, the Lobbying Ordinance and the Draft Regulations would unconstitutionally intrude upon the Supreme Court's exclusive constitutional authority to supervise the practice of law.

The bar association concluded that "attorneys are not 'lobbyists' and thus are not subject to the requirements and restrictions of the Lobbying Ordinance." The bar association could have recognized that what applied to state lobbying laws would also, reasonably, be applicable to local lobbying laws. But they chose to be purely technical about the issue, showing no interest at all in the policy implications of the new state Supreme Court rule or its embrace of the value of lobbying transparency over lawyer-client confidentiality. Nor did it show any interest in considering the distinction between regulating an activity and regulating a profession. The best response to the bar association's argument would have been that, if the city cannot regulate attorneys and it chooses to regulate lobbying, it will prohibit attorneys from lobbying. Then there would be no conflict between state and local law, and no constitutional problem.

In 2014, Colorado clarified the situation of lawyers acting as lobbyists by adding the following language to its lobbying code:

> Notwithstanding any other provision of this part, an attorney who is a professional lobbyist is required to disclose information about the clients for whom he or she lobbies in accordance with this part to the same extent as a professional lobbyist who is not an attorney.

The City Ethics Model Lobbying Code (§302.3(e)) has a limited exception for lawyers representing a client in a "pending or imminent publicly noticed judicial or quasi-judicial proceeding," a common provision. But this does not include ex-parte communications. Nor does it include *possible* proceedings. Because proceedings are always possible, every lawyer knows that the inclusion of possible proceedings creates a huge loophole. That is why the Philadelphia Bar Association included all matters that "might lead to" a formal adjudication.

With respect to "possible" proceedings, but in a different context, in 2014, former Rhode Island attorney general Patrick C. Lynch insisted he was not lobbying because he was representing his client only with respect to proposed or pending litigation — not "state policy." In fact, he was alleged to have been *proposing* that the state get involved in a suit that would benefit his client, in other words he was lobbying about a *possible* proceeding that did not even involve the state, at least not yet. This is lobbying.

Here is the City Ethics Model Lobbying Code exception for proceedings (§302.3(e)):

> An attorney, other professional, or *pro se* party when representing a client or self in a pending or imminent publicly noticed judicial or quasi-judicial proceeding. The attorney, other professional, or *pro se* party must register as a lobbyist before engaging in an ex-parte communication with a non-lawyer official or employee (other than a government lawyer's assistant or a judicial clerk) regarding the proceeding or its settlement. In fact, whenever engaged in lobbying activities, attorneys and other professionals must register and follow all the rules in this code just like any other lobbyist.

It is important to give other professionals and individuals representing themselves the same exception as attorneys, because the exception is not for the profession, but rather for the activity of being involved in a legal proceeding, because these proceedings have their own rules. It is notable that the lawyers who write local lobbying codes do not give *pro se* parties the same rights they give to parties who are represented by lawyers. This is unfair preferential treatment of one's own profession.

The Model Code mentions attorneys in other places as well. It includes them in the definition of "lobbyist": "'Lobbyist'" means any individual or entity, including an attorney…." And it includes attorneys in the following conflict of interest provision, which appears in the section on prohibitions and obligations:

> *City/County Lobbyists*. Any individual or entity that receives compensation pursuant to a contract or subcontract to lobby on behalf of, or otherwise represent (including as an attorney), the city/county may not lobby the city/county.

In other words, an attorney who is lobbying or *representing* the city/county may not lobby it.

Exception for Collective Bargaining. Government employee unions and their representatives are often omitted from local lobbying codes, even though they engage in a lot of lobbying and campaign activities. In fact, in many municipalities, it is difficult for officials to win elections without the support of unions, especially the uniformed unions. Some lobbying codes, such as Toronto's, except government employee unions from the code, at least when

their officers and employees are acting in their official capacity (in Toronto, the exception is limited to lobbying with regard to "labour relations"). This is too large an exception for such important players in local government. With respect to an exception for labor relations matters alone, the question needs to be asked whether the value of having this lobbying disclosed is greater than the bother to unions of disclosing it.

The communications of government employee union representatives with government officials take three principal forms (besides grievance proceedings): the negotiation of collective bargaining agreements, direct lobbying, and grassroots lobbying through the unions' membership and coalitions. Grassroots lobbying through membership should be an exception to the registration requirement, because it is what associations, including unions, are for: to set policy for members and let the members know the results, so they can act together to achieve group goals. Grassroots lobbying through coalitions, however, should be disclosed.

Collective bargaining should also be an exception, since although it involves constant communication between unions and officials, this communication is done in the ordinary course of government business. The benefits the unions are seeking involve only payment for and conditions of their employment.

Direct lobbying should not be excepted. It is no different than the lobbying done by companies, associations, and organizations.

The City Ethics Model Lobbying Code excepts unions' non-coalition grassroots lobbying in the grassroots lobbying part of its definition of "lobbying activities," and this exception is repeated in the union exception (§302.3(j)):

> Designated union representatives negotiating a collective bargaining agreement with designated city/county representatives and unions communicating with their members.

Exception for News Media. It would seem to go without saying that journalists should not have to register as lobbyists in order to interview local officials or to write editorials that try to influence local government decisions. But it is important to recognize that local news media, especially newspapers, are financially weak and lacking in personnel, which makes them open to manipulation by those seeking special benefits from a local government,

especially when they are, or have the support of, important advertisers. Stories are spun and planted and even stopped or neutralized. Opposing views, and those who seek to publicize them, are marginalized. The public relations role of professional lobbyists has become increasingly important, and many lobbyists have a journalism or public relations background.

The most difficult question is where to draw the line. This is especially important today when everyone publishes their opinions online. Can the internet be used to influence local officials without the need for disclosure?

San Diego takes the position that if it's online, it has been disclosed. It has an exception that reads as follows: "the publishing of any information on an Internet website that is accessible to the general public." This is in addition to a more common news media exception:

> any newspaper or other regularly published periodical, radio station, or television station (including any individual who owns, publishes, or is employed by any such newspaper, periodical, radio station, or television station) that in the ordinary course of business publishes news items, editorials, or other comments or paid advertisements that directly or indirectly urge action on a *municipal decision*, if such newspaper, periodical, radio station, television station, or individual engages in no other activities to *influence a municipal decision*

The last clause is important, because those who own media outlets often have other business interests that lead them to seek to influence local government decisions in other, less public ways. When they have these interests and act on them, directly or indirectly, they need to register as "lobbyists." Being in the journalism business does not mean that one's lobbying activities can be kept secret. It is the public nature of journalism that allows this exception to exist.

Here is the City Ethics Model Lobbying Code exception for news media (§302.3(i)):

> A communication made in the ordinary course of gathering and disseminating news, or a news item, editorial, commentary, or paid advertisement that directly or indirectly urges action on a city/county matter published in the ordinary course of business by a news medium of general circulation, a website or blog, or a publication whose primary audience is an organization's membership. However,

> there is no exception when a communication is only incidental to a lobbying effort and includes not only the gathering of information, but also an attempt to influence. Any individual associated with a news medium who engages in other lobbying activities must register as a lobbyist. An official or employee* who believes that such a communication was in fact intended to influence him or her for the personal benefit of the communicator or the communicator's principal*, or that such a news item, etc. was part of a lobbying campaign, should make a report of the communication or news item, etc. to the lobbying oversight office.

This exception goes further than most. One, it includes websites and blogs. Two, it does not provide an exception for a communication that "is only incidental to a lobbying effort and includes not only the gathering of information, but also an attempt to influence." Three, in order to determine what is incidental to a lobbying effort, when a lobbyist does not do so by registering, officials are encouraged to report such a communication to the lobbying oversight office. Knowing that this may happen should make it more likely that someone in the news world will register as a "lobbyist" when seeking to influence officials not only openly through editorials and articles (and the work that goes into preparing these), but also secretly through private communications and meetings.

It should also be recognized that lobbyists and public relations professionals engaged in a lobbying or grassroots lobbying effort frequently communicate with members of the news media in order to influence their reporting (including choice of what to report on) and editorial opinions, and to convince editorial page editors to run their op-ed pieces or those of others that take positions consistent with the lobbying effort. In January 2016, New York's state ethics commission issued an advisory opinion expressly requiring public relations professionals to disclose attempts to get media outlets to advance their clients' message. The opinion equates this kind of public relations with grassroots lobbying in the sentence that follows this requirement: "Any attempt by a consultant to induce a third-party – whether the public or the press – to deliver the client's lobbying message to a public official would constitute lobbying under these rules."

Examples of such lobbying efforts include those by developers seeking media support for their developments, by sports teams seeking media support for public subsidies for their new stadiums, and by universities seeking media support their efforts to expand.

Members of the news media, as well as PR professionals, often argue that such

communications are protected by the First Amendment. But the First Amendment is no reason not to require that such activities be included in definitions of lobbying activities and, therefore, that they be disclosed by lobbyists, along with related expenses. Disclosure is not a significant burden on speech.

Exception for Procurement. Not all communications regarding procurement are "lobbying activities." The bidding process requires the sending of documents, questions from both sides, and often meetings. Once a bid has been won, or a no-bid contract provided, the contractor has ongoing communications with the procurement office and with the department or agency for which the contractor works. Many of these communications may not be "lobbying activities."

There are two ways to make an exception for these communications. One is through the definition of "lobbying," as in New York City's provision:

> [attempts to influence] any determination made by an elected city official or an officer or employee of the city with respect to the procurement of goods, services or construction, including the preparation of contract specifications, or the solicitation, award or administration of a contract, or with respect the solicitation, award or administration of a grant, loan, or agreement involving the disbursement of public monies

What is left out of this provision is, presumably, not "lobbying."

It is much more clear to expressly state what is left out of such an exception, as in the City Ethics Model Lobbying Code's (§302.3(f)):

> An individual whose sole communications with the city/county are directed to an official formally designated in bid documents to receive such information and involve (1) the submission of a bid on a competitively bid contract or a written response to a request for proposals or qualifications; and/or (2) communications in connection with the administration of an existing contract, but excluding change orders, extensions, and anything else that involves further compensation under the contract.

Doing it this way ensures that a lobbyist need not register and disclose these

communications if they constitute his *only* lobbying activities. In other words, this exception is only for contractor personnel who work with the local government's procurement, public works, and other departments during the bidding process and throughout the work on a contract. The exception is not for executives and lobbyists who are both talking about the type of asphalt to be used on a particular road and, say, seeking a change order. And it is certainly not for those seeking a no-bid contract or trying to influence a contract's specifications.

One area of lobbying that most needs to be made public involves post-bid requests and negotiations regarding change orders, extensions, and other ways in which contractors seek to increase their compensation without having to go back to a competitive bidding process. These communications should not be kept secret by keeping them out of a definition (or allowing contractors to argue that they are not included in the definition). It is better to describe them expressly as exceptions to an exception.

Some lobbying codes have another procurement-related exception, for limited sales solicitations. In procurement, sales and lobbying can be hard to tell apart. But it is reasonable to allow *de minimis* sales solicitations, so that sales reps can do their job without having to register as "lobbyists." Here is the City Ethics Model Lobbying Code exception for minor sales solicitations (§302.3(h)):

> An individual who advertises the availability of goods or services with fliers, leaflets or other advertising circulars, or who makes no more than two sales-related inquiries or solicitations a year less than fifteen minutes each, if the individual engages in no other lobbying activities.

Exception for Specific Actions or Proceedings. Philadelphia has an exception for professionals (and principals that represent themselves) who deal with specific local government actions, as long as policy issues are not addressed:

> when a principal, or a consultant or professional … acting as the representative or agent of a principal or client, communicates with a City agency in a matter in which the principal or client is subject to or seeking a specific City agency action in which the principal's or client's interests, rights, or privileges are at issue, provided that such communication is in an effort to address those interests, rights, or privileges

> and is in the normal course for such matters. This exception shall not apply to efforts to influence general policy on behalf of an interest group, nor to direct communications with City officials or employees who the principal, representative, or agent knows or should know are not those who would ordinarily make determinations in the matter at issue.

The problem with this exception is that it starts with the inappropriate assumption that lobbying only involves policy, not specific matters. At the federal level, most lobbying is about policy, even though it may indirectly benefit the principal. But at the local level, most lobbying involves specific matters, such as contracts, grants, and land use.

An example Philadelphia gives to illustrates this exception is, however, reasonable. In the example, a taxpayer who receives a notice that it is in arrears on tax payments has its accountant contact the name listed on the notice of arrears and set up a meeting, at which the accountant documents the taxpayer's position. The ethics board says that as long as the accountant does not want to change the city's policy, her contact and meeting do not constitute "lobbying." I agree. But this exception is unnecessarily broad to allow such contacts to be excluded from the definition.

Another example from Philadelphia presents a situation where this exception would allow lobbying activities to be kept secret from the public:

> An engineer has been engaged by a college to represent its interests in the development of a proposed academic building. In order to proceed with the development, City Council ordinances will need to be obtained to: (i) relocate the underground Water Department right-of-way to another part of the college's property; and (ii) permit certain sidewalk encroachments. The college's engineer contacts and meets with the relevant officials of the Water Department, the Streets Department and the City Planning Commission and the applicable District Councilperson to facilitate the introduction and passage of the required ordinances.

The document goes on to note that if the college's representatives contact elected officials to influence the passage of these ordinances, then this would constitute "lobbying." But the lobbying started with the original contacts and the introduction of the ordinances. There is no reason to wait until the matter goes before the council, where it may be passed without discussion, to alert the public that the college is seeking to have these ordinances

passed.

The first example could be better dealt with by an exception limited to proceedings, in this case a proceeding to collect unpaid taxes. Here is the City Ethics Model Lobbying Code language (§302.3(e)):

> An attorney, other professional, or *pro se* party when representing a client or self in a pending or imminent publicly noticed quasi-judicial proceeding. The attorney, other professional, or *pro se* party must register as a lobbyist before engaging in an ex-parte communication with a non-lawyer official or employee (other than a government lawyer's assistant or a judicial clerk) regarding a proceeding or its settlement.

Exception for Government Officials. Lobbying by government officials goes on all the time. In fact, although it is somewhat controversial, more and more governments, agencies, and school districts are hiring in-house and contract lobbyists to lobby at all levels of government. And yet most local lobbying codes do not require any government official to register as a "lobbyist." A few limit the exception to the local government's own officials and employees

The principal argument in favor of excepting elected officials is that they are elected to act as their constituents' representatives, so that when they seek to influence other officials in their official capacity (as opposed to, for example, trying to get work for their law firms), they are not lobbying for anyone's personal interest, but for the public interest or, at least, the interests of their constituents. This is arguably not lobbying at all, because it does not involve any attempt to influence officials for a private interest. But the definition of "lobbying activities" does not make this distinction. It can, therefore, only be made in an exception.

As for unelected government officials and employees, the argument could be made that they are working for elected officials or for their appointees. They are, therefore, effectively agents for elected officials, even if they were not hired to lobby and take no direction from elected officials.

But public officials should not be so quick to except themselves from lobbying disclosure requirements, because they have a stronger obligation than private principals to be transparent. There is, after all, a public interest in knowing how much, for whom, and for what purpose public officials lobby other agencies.

Another consideration is that private sector lobbyists consider it unfair that they have to disclose their lobbying activities, while those who lobby for the public sector do not. This gives them a good reason to oppose disclosure. Fairness is important.

What adds insult to injury is that all the lobbying codes that except all government officials from having to register as "lobbyists" define "lobbyist" as someone who is compensated for lobbying. The only government officials who are compensated for lobbying are in-house lobbyists, mostly in larger cities and counties. The rest of them would be excepted anyway under the compensation exception. Why then are government officials excepted twice? And why is no distinction made between uncompensated and compensated officials, since this is essential to the definition of "lobbyist" in these jurisdictions?

So, actually, the only government officials the exception applies to are in-house and, depending on the definition of "official," contract lobbyists. It is unusual for these lobbyists to lobby local officials, because they tend to lobby up — to regional, state, and federal officials. The most likely situation would be contract lobbyists for city and town governments lobbying county officials. But most of these exceptions appear in city lobbying laws. That means that the government official exception would apply only to a mayoral aide hired to lobby the legislative body and other boards and commissions.

Therefore, it is difficult to make a case that the elected officials who pass these laws are not showing preferential treatment to themselves and their appointees. If the only ones who would actually need an exception are in-house lobbyists, why wouldn't the exceptions they draft focus on in-house lobbyists? Is this just an oversight, or do elected officials want to make absolutely sure they will not be required to register as lobbyists?

Since the City Ethics Model Lobbying Code does not make a distinction based on whether lobbyists are compensated or not, this is not an issue. But the issue for a non-compensation-based definition of lobbying is more difficult: where to draw the line. After all, every communication between government officials does not need to be disclosed. They are far too frequent, and sometimes they involve confidential information. Even the topic of their communications may not be disclosable.

On the other hand, if governments' in-house and contract lobbyists are not required to register and disclose, this will be rightly seen as unfair.

How wide should a government officials exception be? Should it also apply to unelected officials, employees, and contractors from other governments and independent

agencies who are seeking to influence one's officials and employees? Does it matter whether they are high-level officials talking to their peers? Is this an important distinction to make?

Another possible distinction involves lobbying up versus lobbying down, that is, lobbying to a higher or lower level of government. Most lobbying in government involves lobbying up, because that's where the money is. But at the local level, there is a different sort of lobbying down. State elected officials often try to influence local officials and county officials often try to influence city officials.

At the local level, there is also an important kind of government lobbying that is neither up nor down, but across. It involves lobbying between officials of a school district or independent agency or body (including public-private agencies and bodies) and a city or county government. There is a great deal of this, since lobbying usually goes toward where the money is (or money savings are), and school districts and independent agencies and bodies are often dependent on local governments for at least part of their funding, procurement, and the like. Should all this lobbying be kept hidden? What public policy does this further?

With so many possible distinctions to be made, how does one choose? The most reasonable solution would be to make an exception for all government officials, and then encourage them to disclose their lobbying communications voluntarily, to let them decide which activities are lobbying and which are informational, administrative, etc. This would be consistent with the government preference for lobbying transparency and would make the lobbying oversight process fair and complete, while recognizing that what they do is not, for the most part, what people considering "lobbying."

But this reasonable solution has, as far as I can tell, never been tried, and is not likely to be tried. If tried, it is likely to come out poorly, with many officials failing to report their lobbying, with people arguing about what is and is not lobbying and, therefore, with a negative appearance of hiding communications rather than a positive appearance of voluntarily disclosing communications. But this problem should only be a short-term problem, that is, it should last only until pressures lead to more disclosure. Thinking more of the long term, the City Ethics Model Lobbying Code has included a suggestion of voluntary compliance, at least in part.

Certainly internal communications should be excepted. And it is unlikely that elected officials would require other elected officials, or their aides, to register as lobbyists. It would

be a valuable thing to discuss whether state elected officials really have any business trying to secretly influence local officials, but this is not a discussion that is going to happen in many municipalities or at the state level, at least not within government.

And elected officials generally consider their appointees extensions of themselves, and their "lobbying activities" the way governments work. When the chair of a board calls a council member or the mayor's office about increasing the board's budget or selecting a new appointee, this is not seen as "lobbying," even though the chair is not representing anyone. In fact, the same thing applies to the head of an independent transit authority that is funded by the city and some of whose board members are appointed by the mayor. It would be valuable to the public to know everyone who is communicating about the authority's budget or appointments, but this is unlikely to happen.

Probably the only exception that is possible in most jurisdictions is one limited to professional lobbyists. Seattle is one jurisdiction that has excepted them from its government officials exception:

> Elected officials, officers and employees of any local, state or federal government agency acting within the scope of their representation of or employment with such agency; provided, however, that this subsection A(4) shall not apply to persons specifically employed or retained by a government agency to lobby.

No one can argue that these individuals are not lobbying. Why should their lobbying be treated different than anyone else's? Since contract lobbyists may also lobby the government for other clients (if this is permitted, which is not recommended), raising conflicts of interest situations, it is important, from a government ethics point of view, that they be required to register and be as transparent as possible. But this does not apply to in-house governmental lobbyists.

Government agencies should lead the way by making it clear in their bidding materials for lobbying contracts that the job is for "lobbying," not for one of the many circumlocutions that give contract lobbyists an excuse not to register because they are not engaged in lobbying activities. Government agencies should also lead the way by providing sufficient oversight so that their lobbyists not only follow lobbying laws, but treat them as minimum requirements.

There are some jurisdictions that make an exception only for their own officials and

employees. It's interesting that two of these — Denver and Broward County, Florida — also, like the Model Code, do not distinguish between compensated and uncompensated lobbyists. The others I have come across are also Florida counties. Towns in Broward County, as well as the sheriff's office, show up in the online county commission visitors list. This does not harm them in any way, and furthers both transparency and the fairness of the lobbying oversight program.

The City Ethics Model Lobbying Code follows the lead of Seattle, in addition to requiring registration and disclosure by town officials lobbying up to a county government and encouraging the voluntary disclosure of officials' lobbying, especially when it involves special benefits such as grants and land use permits, that is, the same areas where most local lobbying is done. Here is the Model Code language (§302.3(l)):

> Officials and employees of any government or independent agency, including consultants, lobbying another official or employee in his or her official capacity or within the scope of his or her employment. However, this exception does not apply to individuals specifically employed, internally or by contract, to lobby (at least in part), or to individuals representing political subdivisions of the county [*this last phrase applies only to* county *lobbying programs*]. . Despite this exception, in the interest of full transparency, all officials and employees who seek special benefits for their department or agency from the city/county are encouraged to register as lobbyists and disclose their lobbying activities.

Exception for Political Party Officers. One of the most difficult exceptions, in terms of considering whether or not to include it, is communications with government officials by political party officers or other party representatives. Elected officials communicate with their parties all the time, and they are often influenced by what party officers and committees tell them. And at the state and federal levels especially, political parties sometimes expend substantial funds lobbying, especially in the form of grassroots lobbying and advertising for particular legislation.

But political parties are not generally considered "principals," and party officers are not generally considered "lobbyists." In fact, lobbyists try to influence political parties through their officers (another area of lobbying that is not disclosed), and sometimes take positions as party officers to increase both their personal connections with officials and the

obligations officials have to the lobbyist and her principals.

Although political party officers are not generally given their own lobbying code exception, they usually get excepted by not having been compensated to lobby. But they may be lobbying for their own or others' benefit, rather than for the party. That is, they may be lobbying at the same time as they communicate the party's opinions (or they may only be pushing personal goals, using their party position as a form of access and leverage).

This is what makes it seem inappropriate to give party officers a blanket exception. In fact, many party officers are also professional lobbyists, principals, or employees of principals that are seeking benefits from the local government. Many individuals get involved in political parties because they have something to gain financially from this activity. It may mean government contracts, grants, or jobs for them and their family members, or more legal, consulting, or real estate work from those who want to influence the party and its officials or feel that they may suffer if they don't provide the work as well as the contributions. In short, party officers who communicate with and seek to influence local officials often wear multiple hats.

Therefore, since it cannot be known whose interests party officers are communicating, their communications should not be excluded from the definition of "lobbying" or from registration requirements. What should never be excluded is party officers lobbying appointees and employees. In fact, this should be prohibited, because a local government's administration should not be politicized. Here is the City Ethics Model Lobbying Code prohibition (§305.2(l)): " no political party officer or other representative may lobby a local official or employee other than an elected official."

It is difficult to prohibit party officers from lobbying elected officials who are members of their party. The reason is the same as the problem: a party officer needs to communicate often, and it is impossible to know what the officer and the official are discussing and, even if it is a topic that may affect the officer, it is impossible to know which hat he is wearing. This is a serious conflict of interest that is difficult to regulate.

The best way would be to encourage party officers to register as a lobbyist whenever they have an involvement in a matter coming before officials they are in communication with, whether or not they are communicating about that matter and whether or not, if they are communicating about that matter, they believe they are pushing their personal interest. As a check, government officials could be encouraged to voluntarily disclose contacts with

party officers that appear to them to involve the party officer's personal interest, including the interests of the party officer's clients, family members, business associates, or others with whom the party officer has a special relationship.

It is the private interests involved that matter most in this situation, not the individual's party position. Hence the City Ethics Model Lobbying Code's exception for political party officers and representatives (§302.3(k)):

> A political party officer or other representative communicating with an elected official or candidate for an elected position, to the extent the communication does not relate to a matter that may specially benefit the party officer or a family member, business associate, or client of the party officer or other representative.

Exception for Expert Witnesses. Many lobbying codes include an exception for expert witnesses invited by a government body or agency to give testimony. This seems completely uncontroversial until one realizes that lobbyists insist that their principal role is providing needed expertise. Once this is recognized, who is taking the initiative could be considered the important issue in determining whether an expert is engaged in lobbying or not. If the expert is invited to testify, then it is not "lobbying." If the expert goes to the official, then it is "lobbying." However, as I argue above, in an ongoing, reciprocal relationship, it doesn't matter who takes the initiative.

What actually matters here is whether the expert witness is also engaged in lobbying activities, either as a principal or as an agent. Here is the City Ethics Model Lobbying Code exception that allows experts who do not otherwise lobby to not have to register as a "lobbyist" (§302.3(g)):

> An individual who is invited by a city/county body or agency to give expert testimony relating to scientific, technical, or other specialized information or to make a required oral presentation, if the individual, or a colleague, employer, or agent, engages in no other lobbying activities.

Time Spent Lobbying

There are two ways to define "lobbyist." One is as someone who participates in enough paid lobbying to require registration. The other way is to define "lobbyist" simply as someone

who participates in lobbying activities, however much and whether paid or not (this is the approach employed in jurisdictions such as Denver and Broward County, FL, as well as in the City Ethics Model Lobbying Code).

According to the latter approach, (1) any amount of lobbying is enough to require disclosure and (2) even individuals who are not required to register would be prohibited from, for example, making gifts to officials or holding certain positions. That is, anyone who engages in lobbying activities, even if not enough to have to register, would still be a "lobbyist" and, therefore, be subject to the lobbying code and able to seek training and advice from the lobbying oversight program.

Most jurisdictions take the first approach. They define "lobbyist" in ways that go beyond the individual's activities. The principal additional elements of being a "lobbyist" are (1) time spent lobbying, (2) compensation for lobbying, and (3) lobbying-related expenditures. The first element shows how much time an individual spends on lobbying activities during a reporting period. The second element is supposed to do this, as well (presumably, the more lobbying one does, the more one is paid), but it also makes the assumption that it is necessary for someone to make money from lobbying in order to either be a "lobbyist" or, more commonly, to register as a "lobbyist." The third element shows how much an entity and its representatives spend on lobbying and the gift-giving and entertaining that often accompany it. Different jurisdictions use different combinations of these elements or, occasionally, none of them.

It is reasonable not to require the registration and regulation of individuals and entities that do only a small amount of lobbying. These can be considered ordinary citizens seeking something minor that requires limited preparation, communication, and other lobbying activities. It can be assumed that neither they nor their agents (if any) are likely to be involved in reciprocal relationships with the officials they lobby, and since they do so little lobbying, lobbyists will not feel it is unfair that they are not required to disclose.

A requirement of a certain amount of lobbying adds a *de minimis* element to the definition of "lobbyist." The policy behind this requirement is that a small amount of lobbying is not worth anyone's time to deal with. To ensure that the activities are truly *de minimis*, there must (1) be a broad definition of "lobbying activities" and (2) a longer period of time (that is, a lot more than one reporting period). Consider, for example, someone who, after years of working on a reciprocal relationship with a mayor, has only one short

meeting with the mayor in a period, followed by the mayor's quick call or text to a department head, resulting in an important change to a contract or the speeding up of the permit process. As I argue at length in *Local Government Ethics Programs*, *de minimis* considerations should apply only to enforcement, not to ethical standards, including the definition of a "lobbyist."

It is more common to define *de minimis* in terms of compensation than in terms of time spent. However, in Los Angeles, a lobbyist is "any individual who is compensated to spend 30 or more hours in any consecutive three-month period engaged in lobbying activities, directly or via an agent." In Philadelphia, the minimum is 20 hours; in Portland, OR, the minimum is 5 hours, which does not include travel time. In San Jose, the minimum is 10 hours a year for "in-house lobbyists."

In San Diego, the minimum is stated in terms of contacts rather than hours; "organization lobbyists" are those who have at least 10 contacts with one or more officials in a 60-day period.

The rule at the federal level is spending 20% of one's time lobbying, which is almost impossible for anyone to know. In any event, it is completely inappropriate at the local level, where almost no one spends 20% of his time lobbying one local government.

The number of hours is sometimes included in an exception to registration, rather than in the definition of "lobbyist." If there is to be a *de minimis* requirement in the Definitions section, it is better that it be included in both places so that someone looking for it will be sure to find it.

This example from the Philadelphia ethics board's Regulation 9 shows (1) how complicated *de minimis* requirements for registration can be and (2) how such requirements can keep lobbying activity secret from the public:

> **Example:** On January 10, 2012, Vice President Jones of Business Firm X meets with the local District Councilman concerning a pending bill in Council. Jones spends a total of 5 hours of his time preparing for and participating in this meeting, and the Firm's only expense is Jones' time, which, for the 5 hours, is valued at less than $1000. On February 15, 2012, Business Firm X contracts with the lobbying firm of Y to do all lobbying for the firm for the year beginning on that date. Under the contract, Lobbying Firm Y will bill Business Firm X on a monthly basis. On March 5, 2012, Lobbying Firm Y begins contacting City Councilmembers on behalf of Business Firm X. On April 6, 2012, Lobbying Firm Y bills Business Firm X $3000

for lobbying in March. Who must register and when?

Result: The thresholds for registration are stated in Paragraph 9.24 and Code Section 20-1204. Under these thresholds, an employee who engages in lobbying for his employer of less than 20 hours is exempt from registering as a lobbyist, so Vice President Jones' 5 hours of lobbying on January 10 does not require him to register. Nor must Firm X register as a principal based on Jones' work, since the expense does not exceed the threshold of $2500. Since Lobbying Firm Y did $3000 worth of lobbying, the dollar threshold is passed and Business Firm X must register as a principal and Lobbying Firm Y must register as a lobbying firm. But these registrations need not occur until ten days after the thresholds are exceeded, or by April 16.

Since the next quarterly report for Business Firm X is not due until July 30, this lobbying effort, which began on January 12, would not be disclosed at all until April 16, and the details of the effort (less, presumably, VP Jones' lobbying), and any related expenditures, would not be disclosed for nearly seven months after the effort began. It is likely that, by this time, action will already have been taken on the "pending bill" and the disclosures will be purely historical.

Having no *de minimis* amount means that business people, lawyers, and others who only occasionally contact an official for themselves or for a client are required to register as "lobbyists." They may see this as an inappropriate burden, and it is also a burden on whoever oversees lobbyist registration, not only due to more reports to look at, but also due to more valid complaints of failure to file. But it leads to the greatest amount of disclosure, the greatest amount of training about what constitutes lobbying and why it is important for it to be done transparently and with some restrictions, and the fewest number of people who can evade lobbying oversight and keep their work secret at least until after a matter has been decided.

If the lobbying oversight office finds that a lobbyist failed to file and that only a small amount of minor lobbying, with little possible effect and no accompanying expenditures, occurred, the office can take this information into account as mitigating circumstances in determining the fine or other sanction (if any) on the violator, or even deciding not to pursue the matter at all. This is where the *de minimis* nature of lobbying should be taken into account, not in determining whether lobbying occurred.

Lobbying-Related Income and Expenditures

The *de minimis* requirement that is more frequently used to determine whether an individual or entity is a "lobbyist" involves lobbying-related income and, sometimes, lobbying-related expenditures, gifts, or reimbursements. However, many jurisdictions do not have a minimum income requirement and do not even mention expenditures, gifts, or reimbursements. They simply require that "lobbyists" be compensated to engage in lobbying activities.

Tampa has a good definition of compensation: "compensation of any kind, including but not limited to, salary, payment, retainer, commission, consideration of any type, forbearance, forgiveness or any combination thereof, either received or expected." Baltimore has language that can be applied to situations where an employee or lawyer lobbies part-time for a principal: "If lobbying is only part of a person's employment, 'compensation' means a prorated amount of the person's total compensation … that is based on the time devoted by the person to lobbying compared to the time devoted to other employment duties."

When a minimum income, expenditure, or reimbursement is required for an individual to be considered a "lobbyist," things can get pretty complicated. Nearly every combination of minimums can be found. The relevant income or expenditure period is either a month, a quarter, or a year. And the sources of income can also be important. Here, for example, are the registration requirements in the city that hosts more lobbyists than any other, our nation's capital:

> (a) Receives compensation of $250 or more in any 3 consecutive calendar month period for lobbying;
>
> (b) Receives compensation from more than one source which totals $250 or more in any 3 consecutive month period for lobbying; or
>
> (c) Expends funds of $250 or more in any 3 consecutive calendar month period for lobbying.

The dollar figures vary greatly. In Dallas, registration is required of a lobbyist only if he gets $200 in compensation or reimbursement in a quarter, or if he is the agent or

employee of someone who is required to register as a lobbyist. In San Jose, the figure is $1,000. In Philadelphia, the figure, per quarter, is $2,500 for individuals (income from all principals combined) and for principals (expenditures on lobbying). San Francisco had a minimum of $3,000, but in 2014 changed the definition so that being a lobbyist is based on contacts instead of compensation.

In Baltimore, the minimum to require registration for "legislative lobbying" is, annually, $100 for gifts made, $500 for expenses, or $2,500 in compensation. For "executive lobbying" the only minimum is $100 for gifts made, which appears to mean that those who do not make gifts to executive officials may lobby them without registering.

New York City has an annual minimum for registration, a total of compensation and expenses in the amount of $5,000, except when the lobbyist is an architect or engineer, or an architecture or engineering firm; then the minimum is $10,000 (those professions, or those who hire them (that is, developers), likely had the best lobbyists when the lobbying code was being drafted).

If a lobbying code has a minimum threshold, it is valuable to provide that, in addition, anyone whose duties include lobbying and is salaried is considered a "lobbyist." Otherwise, the entity for whom the lobbyist works can argue that its compensation for the employee's lobbying activities (as opposed to her other activities) is below the minimum. Where it has multiple lobbyists, it can argue that it spreads lobbying duties around, so that none of them meets the minimum requirement. Therefore, for salaried, in-house lobbyists, there should be no minimum income. Here is Oakland's language:

> any person … whose duties as a salaried employee, officer or director of any corporation, organization or association include [lobbying activities]

Missouri has good language for one of the five ways in which someone can be considered a lobbyist (the others involve compensation or expenditures): "Is designated to act as a lobbyist by any person, business entity, governmental entity, religious organization, nonprofit corporation, association or other entity."

Honolulu has no minimum income for registration. It also has an interesting addition to the definition of what constitutes lobbying for payment, which makes it clear that nonprofits lobby too:

> A person [including an organization] who accepts membership dues or contributions made, or a fee or salary paid, with the understanding that the person accepting the same intends to devote a portion of the funds contributed or the time for which the salary is paid to lobbying activities shall be deemed to have "engaged oneself" [for pay] to conduct such activities.

Los Angeles has a complex definition of "compensation" that excludes reimbursement for reasonable travel expenses, but includes situations where compensation is not made *solely* for lobbying (although only that amount intended for lobbying goes to determining if the minimum income has been met). It defines a different level of compensation, that is, when an individual "becomes entitled to receive compensation," as the moment the lobbyist agrees to provide lobbying services or performs those services. Los Angeles also includes as compensation an investment in an entity for which an individual engages in lobbying activity. This seems far too complicated for a consideration that is arguably unnecessary.

A major problem with minimum requirements is that individuals and entities seeking special benefits from a government can lobby without registering by finding loopholes in the requirements. This is why Dallas requires certain people who engage in lobbying activities to disclose even though they are not required to register (§12A-15.7). Those who lobby with respect to zoning cases or matters involving public subsidies must file what is called a non-registrant disclosure statement within five days after contacting a city council member or member of the city plan commission for lobbying purposes. It is best to require more people to register as lobbyists, but where traditional definitions are used, leaving out many people who engage in lobbying activities, the Dallas solution is a good fallback.

One way to get around minimum compensation requirements is to structure compensation to an inside lobbyist or external attorney so that nearly all the compensation is directed toward non-lobbying activities. San Antonio's lobbying handbook makes it clear that this is not acceptable:

> If a person engages in both lobbying activities and other activities on behalf of a client, the person may not structure the receipt of compensation in a way that unreasonably minimizes the value of the lobbying activities. Compensation structured in such a way constitutes compensation in connection with lobbying activities.

The biggest group left out of registering due to a compensation requirement is business owners who are representing themselves, a large percentage of those who lobby at the local level. The requirement of compensation also opens up a loophole for board members of nonprofits to lobby without registering, simply because they are not paid, even though their interest in a matter is equivalent to that of a paid executive director or lobbyist. The head of a state good government group told me that, since he is paid, he is a registered lobbyist. But when his group's board members lobby, he registers them as lobbyists, even though it is not legally required. The reason is that good government groups value transparency, and they find no reason not to let the public know about their lobbying efforts.

Another major problem with all minimum requirements is that lobbyists do not have to register or disclose until they've met the requirements. This may allow them to go for months without disclosing, even if they expect to go beyond the minimum requirements. The longer the report period and higher the minimum, the longer it will be before lobbying activities are disclosed. This is especially true if the definition of "compensation" requires that money actually be paid.

Contract, In-House, Expenditure, and Pro Bono Lobbyists, and Their Principals

The common picture people have of the lobbyist is of someone who represents numerous companies and associations in their interactions with government officials. According to this picture, there are lobbyists and there are clients, and never the twain shall meet.

But this describes only one kind of lobbyist: the "contract lobbyist." In 2015, Transparency International determined that limiting registration to contract lobbyists in the U.K. meant that less than 5% of actual lobbyists are required to register, and that is at the national level.

Those who work for, own, or manage companies, organizations, or associations can be lobbyists just as much as outside representatives. In fact, many full-time lobbyists work inside companies, organizations, and associations. Many companies, organizations, and associations don't bother hiring inside or outside lobbyists, but instead make use of their executives and public relations personnel. These internal lobbyists are known as "in-house

lobbyists."

Then there are the companies, organizations, or associations themselves, known as "clients" or "principals." They can lobby through external agents –contract lobbyists – or through their employees – in-house lobbyists. The City Ethics Model Lobbying Code refers to both contract and in-house lobbyists as "agent lobbyists" and to the individual or entity on whose behalf they lobby as "principal lobbyists." Sole proprietors and partners who lobby on their own behalf are also "principal lobbyists." This makes it clear that there is no essential difference between these two ways of being represented, and that those who employ lobbyists are also lobbying, not directly, but indirectly, through an agent. In fact, principals are the true lobbyists, because it is their interests that are being pursued. When principals or their owners do lobby directly, they are still "principal lobbyists," lobbyists not making use of an agent. Principal lobbyists should be required to register and be held responsible for following lobbying rules separately from the individuals and lobbying firms they engage in lobbying activities on their behalf. This makes it clear that the responsibility is shared, and provides a check on disclosure.

Many local lobbying codes or provisions follow the common picture of lobbying by applying their rules only to the agents who do the work, ignoring those for whom they are working. When this is the case, the real lobbyists — clients and employers — are left unregulated. They do not have to disclose (or vouch for their agents' disclosures), and their actions and their non-lobbyist officers and employees are neither regulated nor restricted.

You end up with absurd distinctions, like this one from Oakland's lobbying manual:

> *I own a small consulting business. Several months ago I submitted a response to an RFP (request for proposal) that was favorably reviewed by staff and now is going before the City Council for approval. Can I contact City Council members about the proposal without having to register as a lobbyist?*
>
> It depends on the organization of the business. If you are organized as a sole proprietor or partnership, where the interests of the business are essentially your personal interests, then you probably do not need to register. However, if your business is a corporation and you serve as a "salaried employee, officer or director" of that company whose duty it would be to influence that decision, then you must register before contacting any City Councilmember.

According to Oakland's lobbying code, what matters is how a company is organized, not how it lobbies. A company's organization, and who is doing its lobbying, should have no effect on the disclosure of its lobbying activities or on the obligations and restrictions a lobbying code places on lobbyists.

Principal Lobbyists. Many jurisdictions recognize this and do include employers and/or clients as lobbyists. They often do so with a simple sentence. Here is Miami-Dade County's: "'Lobbyist' specifically includes the principal as well as any employee whose normal scope of employment includes lobbying activities." Miami-Dade County then makes the principal responsible for filing a form prior to "conducting any lobbying" (which recognizes that it is actually the principal, not the agent, that is doing the lobbying). The form states that the lobbyist is authorized to represent the principal. Of course, the lobbyist may fill out the form, but it is the principal who takes responsibility for the lobbyist's activities and for the lobbyist's compliance with the lobbying code.

Orange County, Florida (§2-354(b)) get principals as well as boards involved by requiring that principals file "specific project expenditure reports," which pull together all their expenditures, possibly through multiple contract and in-house lobbyists, with respect to each particular project or issue before the government, and submit them to the board before the matter is placed on the board's agenda for review and approval. This is a good complement to lobbyists' reports, which may not give a full picture of the lobbying done on a particular matter. It also provides a check on lobbyists' reports, so that it is more likely that everything is disclosed.

The District of Columbia is one jurisdiction that requires principals to register by including in the definition of "lobbyist" not only those who are compensated for lobbying activities, but also those who expend money for lobbying activities. But it is important to make it clear that this does not just mean money expended by individual lobbyists — for gifts, entertainment, transportation, and the like — but also expenditures made directly by the principal to its agents and employees. When this isn't clear, clients will have reason not to file.

Dallas takes a different approach, defining companies with in-house lobbyists as "lobbying firms."

Some lobbying codes, like the City Ethics Model Lobbying Code, do not differentiate between contract and in-house lobbyists, that is, between employees and contractors, but

do differentiate between lobbyist and principal/client. Los Angeles, for example, defines "client" as follows:

> (1) the person who compensates a lobbyist or lobbying firm for the purpose of attempting to influence municipal legislation and
>
> (2) the person on whose behalf a lobbyist or lobbying firm attempts to influence such municipal legislation, even if the lobbyist or lobbying firm is compensated by another person for such representation.

New York City's better definition of "client" is more simple and does not require compensation or even compensation specially for the purpose of lobbying:

> every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client.

San Jose's definition of "client" in its ethics code is equally simple and also does not require compensation (oddly, the definition in the lobbying code does require compensation):

> the real party in interest for whose benefit the services of a local governmental lobbyist are actually performed.

"The real party in interest" is a great way to make it clear that lobbying is less about the lobbyist and more about the principal.

Here's another approach, from Tampa:

> ***Lobbying principal*** means any person providing compensation to a lobbyist in consideration of his or her performance of lobbying activities, regardless of the technical or legal form of the relationship between the principal and the lobbyist. *Principal* specifically includes a person whose employee or agent lobbies on behalf of the employer for the benefit, or in the name of the employer.

Portland, Oregon defines "employer of a lobbyist" as a "person or agency by whom the lobbyist is employed or in whose interest the lobbyist appears or works." Portland's

lobbying prohibitions apply expressly to both lobbyists and their "employer."

Indirect Compensation. The above definitions separate the principal from the "lobbyist" who may either be an employee or a contractor, so that both can be regulated. What is special about such definitions is that the best of them appropriately include as a principal any individual or entity on whose behalf a lobbyist lobbies, even if the lobbyist is not specifically compensated for lobbying or the lobbyist is compensated, but not directly by the principal.

It is important to include the latter situation because, as with any contractor, there are often subcontractors who are paid not by the principal but by the contractor. For example, a lobbyist might hire a public relations firm to set up a letter-writing campaign, a local fixer to set up meetings, or a polling company to do a poll. Or the lobbyist may subcontract work across the state to a lobbying firm or an unregistered lobbyist that has better connections there. The principal should be made aware of the subcontractor's work and take responsibility for it and for its disclosure, just as for an employee's or contractor's work. And both the contractor and any subcontractors should be expressly required to register as lobbyists or at least to have their work disclosed as part of a lobbying effort, no matter how they divvy up their work. It's better to expressly require this, not to just imply it.

Another kind of indirect compensation of a lobbyist is where members of an association do not pay directly for lobbying. The Los Angeles lobbying code expressly states that a member of an association that employs a lobbyist is not itself considered a client of that lobbyist unless "the member makes a payment for such representation in addition to usual membership fees." But in many cases, some association members (usually the ones doing business with or regulated by governments) do make additional payments for lobbying, to give them a larger voice in this process. They too should be considered clients.

Separate Registration Requirements. Differentiating agent from principal makes it easier to describe lobbying activities. For example, one activity in Los Angeles's list is "providing advice or recommending strategy to a client or others."

Differentiating agent from principal also allows a city or county to require separate filings by each of them. For example, New York City requires annual disclosures from clients in addition to more frequent disclosures from lobbyists. Separate filings provide a check on the information provided, and also bring clients into the ethics program, so that they can be trained, restricted, and recognize and fulfill their responsibilities, rather than

leaving everything to their lobbyists. After all, lobbyists are only agents or employees. They should not carry the entire burden of disclosure and compliance with lobbying and other ethics laws. The major burden should fall on principals, the ones whose interests are being pushed, the ones who are most likely to benefit the most from lobbying.

Toronto (which calls contract lobbyists "consultant lobbyists") has a separate registration requirement for in-house lobbyists. In fact, it is not the in-house lobbyist's obligation to register and report; it is instead the obligation of the "senior officer" designated to do this. In other words, it is the obligation of the entity rather than of each employee involved. Toronto's definition of "in-house lobbyist" is especially significant in that it includes sole proprietors and partners, a different approach from the City Ethics Model Lobbying Code, but also valuable:

> A. An individual who is employed by an individual, corporation, organization or other person, or a partnership, a part of whose duties as an employee is to lobby on behalf of the employer or, if the employer is a corporation, on behalf of any subsidiary of the employer or any corporation of which the employer is a subsidiary.
>
> B. An individual who is the sole proprietor of a business, when the individual is lobbying on behalf of that business.
>
> C. An individual who is a partner in a business, when the individual is lobbying on behalf of the partnership.

Parents and Subsidiaries. It is important to note that an employee may be an in-house lobbyist even if the employee works not for the principal, but for the principal's parent or a subsidiary of the principal or the parent. San Diego states this directly in its definition of what it calls an "organization lobbyist": "An employee of any parent or subsidiary of the business or organization is considered an employee of that entity." One difference between the typical in-house lobbyist and San Diego's "organization lobbyist" is that, as in Toronto, it is the company or organization that is the lobbyist and has the obligation to register and follow the laws, not the individual lobbyists working for the entity. This is a best practice.

Expenditure Lobbyists and Grassroots Lobbying. San Jose's lobbying code has a third kind of lobbyist, which is too often ignored: the "expenditure lobbyist," which it defines as follows:

> A person who makes payments or incurs expenditures in the aggregate amount of $5,000 or more during any calendar year in connection with carrying out public relations, advertising or similar activities with the intent of soliciting or urging, directly or indirectly, other persons to communicate directly with any city official in order to attempt to influence a legislative or administrative action. The $5,000 threshold does not include:
>
> > 1. Compensation paid to contract lobbyists or in-house lobbyists for lobbying activity; or
> >
> > 2. Dues, donations, or other economic consideration paid to an organization, regardless of whether the dues, donations or other economic consideration are used in whole or in part for lobbying activity.

It is valuable to differentiate this kind of lobbying, often referred to as "grassroots lobbying,"which does not involve direct communication with officials, but rather fostering the communication of others, through various forms of promotion, including petition drives, phone calls, mailers, coalition building, and websites. This work is often done not directly by lobbyists, but by individuals, grassroots, and "astroturf" organizations that are supported by a principal or agent lobbyist's money, labor, and advice.

In fact, it was a scandalous case of astroturf lobbying that led to the first federal lobbying code. It involved public utilities sending fake telegrams from "constituents" to members of Congress in order to defeat a bill that the utilities opposed. With modern technology, there is less need to fake phone calls and e-mails. It is astroturf organizations that are now fake, funded almost entirely by special interests rather than by members. A congressional report on the first federal lobbying act described a distinct group of lobbyists as follows:

> Those who do not visit the Capitol but initiate propaganda from all over the country, in the form of letters and telegrams, many of which have been based entirely upon misinformation as to facts. This class of persons and organizations will be required under the title, not to cease or curtail their activities in any respect, but merely to disclose the sources of their collections and the methods in which they are disbursed.

Astroturf lobbying ("an artificially stimulated letter writing campaign") was also mentioned

in the important U.S. Supreme Court decision on lobbying, *United States* v. *Harriss*, 347 U.S. 612 (1954). It is nothing new.

San Diego's definition of "expenditure lobbyist" is more detailed, but is broader rather than focused on indirect, grassroots lobbying:

> any person who makes expenditures for public relations, media relations, advertising, public outreach, research, investigation, reports, analyses, studies, or similar activities designed to influence one or more *municipal decisions*

One thing to watch out for is differentiating expenditure lobbyists from other lobbyists by not requiring them to disclose their lobbying activities, as was done by San Francisco's legislative body in 2010. This decision was overridden by the public in a 2015 ballot initiative, Proposition C.

Pro Bono Lobbyists: The federal government and many other governments do not require pro bono lobbyists to register and disclose their lobbying activities. According to Beth L. Leech's book *Lobbyists at Work* (Apress, 2013), the national lobbyists' association itself did not register its pro bono lobbyist when it lobbied with respect to lobbying regulation, until its contract lobbyist thought this was embarrassing. It should be embarrassing for anyone, since the disclosure of lobbying activities should not be dependent on how willing individuals are to do the lobbying without payment, especially when you consider that they may benefit indirectly.

Toronto's lobbying code recognizes the voluntary unpaid lobbyist for a for-profit entity as a separate category of lobbyists. This category includes people such as company and association directors, shareholders, and members who lobby on behalf of a company or association, who may have a financial interest in the company or association, but who are not compensated for their lobbying activities. Here is the definition of this odd-bird lobbyist:

> A. An individual, corporation, organization or other person, or a partnership, who or that, without payment, lobbies or causes an employee to lobby a public office holder on behalf of or for the benefit of the interests of a for-profit entity or organization.
>
> B. A director of a for-profit entity or organization, who is not an inhouse lobbyist …, when he, she or it lobbies or causes an employee to lobby a public office holder

on behalf of, or for benefit of the interests of, the for-profit entity or organization.

C. A shareholder of a for-profit entity, when he, she or it lobbies or causes an employee to lobby a public office holder on behalf of, or for benefit of the interests of, the for-profit entity.

Toronto's recognition of the voluntary unpaid lobbyist points to a problem with defining "lobbyist" in terms of compensation and expenditure. Very effective lobbying can come from individuals whose rationale for lobbying, in a particular matter or for a particular entity, is based on something other than direct compensation, including such things as the long-term value of the entity, loyalty to an organization and its leaders (this is especially true of board members), the policy position in the matter, obligations to a family member, business associate, or close friend, or an act in reciprocity for something done for the individual in the past or expected to be done for the individual in the future. "Voluntary" makes lobbying sound like a sacrifice. Calling it "pro bono" is more accurate, because it often involves professional work by a professional (often an attorney) for reasons other than direct monetary compensation.

Anita D. Stearns Mayo, an attorney whom the San Francisco Board of Supervisors, in 2014, asked to comment on the proposed amendments to the lobbying code, suggested an additional amendment (it was not proposed):

> It is my understanding that former elected officers and department heads routinely lobby City Hall, but do not register and file reports because they claim that they are not being paid to lobby. Because such individuals still have such a great influence on City officials and employees, in the interest of transparency and fairness, the law could be amended to include former elected officers and department heads as volunteer lobbyists who are not paid but who engage in contacts with City officials and employees for the purpose of influencing local legislative or administrative action.

Perhaps the pro bono lobbyist should not carry the burden of registering. It would be more appropriate for the principal to handle the paperwork, at least if the lobbying were approved by the entity. But the paperwork should be done, and the lobbying activities given the same degree of transparency as any other lobbying activities.

Law Firms' Lobbying Firms. One important definitional problem involving lobbyists has to do with lobbying firms that are closely related to but not part of a law firm or, less often, a public relations firm. Usually the top partner or partners of a law firm are the owner(s) or top partners of the lobbying firm. Creating separate legal entities allows an official to legally work for a law firm that lobbies his government and insist that his law firm does no lobbying. But only a lawyer would believe that a legal differentiation of entities matters in this situation. Once this setup has been discovered, it actually undermines the public's trust even more than where the law firm itself lobbies the official's government. Legalistic distinctions that are not, in practice, real, and do not appear real to the public, are harmful to any area of government ethics.

Public Sector Lobbyists

Public sector lobbying —that is, lobbying by and on behalf of governments, school districts, and independent agencies and authorities — has been, in recent years, among the fastest growing areas of lobbying. However, this growth, fueled by competition for county, state, and federal funds, has led to some backlash against the expenditure of public funds for what the public sees as wasteful bickering over how their tax dollars are spent. Since this book focuses on the lobbying of local governments, the only public sector lobbying that is important is cities, towns, agencies, school districts, independent agencies, special districts and authorities, and public-private authorities lobbying cities and counties.

Local governments are represented by three kinds of lobbyist: ordinary government officials and employees who lobby as part of their work; designated in-house lobbyists; and contract lobbyists. It is easy to require the last two kinds of lobbyist to register and disclose their lobbying activities, and follow all the lobbying rules. But it is not so easy with officials and employees who do not see themselves as lobbyists, and do not want to be trained (not to mention fined) regarding the obligations of and limitations on someone who lobbies. One can set a minimum of, say, 25 hours a year, but then the occasional lobbyist will be lobbying without knowing that he is a lobbyist, the individuals lobbied will also not know how to handle the transaction, and the public will not know about their own government's lobbying until long after it has been done and, in many instances, the matter has passed into history. In short, it is difficult to deal responsibly with occasional lobbying once when acknowledges that it is just as much lobbying, and the public has a right to know about it just as much as the

lobbying of a professional.

Since the value of transparency is central to government and public service, it is appropriate that a government official provide the utmost transparency possible. And government officials (and contract lobbyists for governments, like any consultant or contractor, are effectively acting as government officials) have a stronger obligation to disclose and follow laws than ordinary citizens. This greater obligation also applies to the use of inappropriate tactics such as withholding information or presenting it in an overly selective or an exaggerated, distorted, or misleading manner. The greater obligation also means that a local government lobbyist should present the same information and arguments to all officials. They should inform officials and let them know the position of the community being represented (which might include grassroots lobbying by members of the community or with others through a coalition with other communities), but do nothing more.

This greater obligation, based on a fiduciary duty to the community, places contract lobbyists, who also represent private clients, in an uncomfortable position. They cannot simply take off one hat and put on another when they engage in lobbying activities, because what they do for private clients, especially with respect to participation in campaign-related activities, affects their work for public clients.

No matter what the limitations are on private sector lobbyists, public sector lobbyists should not be permitted to solicit, make, or bundle campaign contributions for anyone at the level at which they lobby. That is, a lobbyist who works for a city and lobbies the county commission should not be permitted to be involved in the campaign of any county commissioner or anyone running for the county commission (if a county commissioner is running for county executive or even for state representative, this prohibition should still apply). It is a conflict of interest for someone being paid out of one group of taxpayers' funds to be involved in elections that involve a different constituency, even if the lobbyist's constituency is part of the other one. The only situation where this would be allowable is where a county commissioner represented the lobbyist's city, and no one else. But then there would be no need to be involved in an election campaign in order to get that commissioner to support the interests of the city, since that was already the commissioner's turf.

Similarly, public sector lobbyists should not be involved in the campaigns of those

they lobby. When contract lobbyists are employed by local governments, even if they do not represent their public sector clients in the campaigns, they still engage in campaign activities and use the relationships they develop to gain special access and obtain preferential treatment for their requests, especially when they do not involve issues being debated in the news media. In fact, like all clients, local governments often seek out contract lobbyists who have developed and continue to develop personal relationships based on family and business relationships, past public service, and campaign services. It is inappropriate for local governments to do this, but difficult for them not to when those with whom they compete for funds are employing such lobbyists.

The reliance on personal relationships with the officials that are lobbied is an aspect of lobbying that has always been seen as inappropriate. After all, government ethics is based on the idea that government decisions should be made in the public interest, based on facts and objective analysis, and unaffected by personal relationships and obligations. And yet some governments hire multiple lobbyists to take advantage of their personal relationships with multiple government officials. This sort of strategy should not be employed.

It is difficult to solve this problem raised by public sector contract lobbyists. Should it be prohibited for local governments to hire contract lobbyists? They do not have a right to seek redress of their grievances, but they do have an obligation to their residents to seek and obtain available government funds, and contract lobbyists are often more effective, especially for smaller governments that cannot afford in-house expertise.

The goal should be to obtain funds by means of local officials themselves and in-house lobbyists who are prohibited from getting involved in political campaigns and engaging in other conduct intended not to get a message across, but to develop (or make use of) personal relationships with county, state, and federal officials. Without such prohibitions, local officials should recognize the inappropriateness of certain lobbyists and activities, and work through their local government associations to get an agreement not to hire contract lobbyists or engage in inappropriate activities, so that competition for funds can be done as fairly as possible.

It is important that public sector lobbyists who are not otherwise officials be excepted neither from definitions of "lobbyist" nor from registering and following the rules, no matter what sort of lobbyist they are or what their profession is when they are not lobbying (many lobbyists are lawyers, but one does not need to be a member of the bar to lobby; therefore,

lawyer-lobbyists are not practicing law when they are lobbying, and have no obligation to claim lawyer-client confidentiality for their clients, especially for their public clients).

It is also important that, no matter what the obligations of principals, local governments, agencies, etc. be required to register as lobbyists when they hire lobbyists, without any minimum. Since governments have a fiduciary duty, they should take full responsibility for disclosing, as frequently as possible, their lobbying activities and expenditures on lobbying and, if permitted, their and their lobbyists' gifts and contributions to officials.

A report — "Because That's Where the Money Is: Why the Public Sector Lobbies," by the Citizens League's Public Sector Lobbying Committee (1990) — recommends that local governments' contracts with lobbyists "specify the purpose of the contract, the legislative issues, compensation, and duration of the contract, and require periodic reports from their lobbyists analyzing the outcomes with respect to each matter on which they lobbied. The report also recommends that state legislatures (so why not county commissions?) should examine those of its practices that encourage public sector lobbying, such as the processes for distributing funds and services.

Anything that applies to individual local government lobbying should also apply to associations of local governments, such as county leagues of cities and associations of particular positions, such as clerks or assessors. It is important to recognize that these associations are funded primarily by taxpayer funds, through dues and payments for conferences and training programs, and that, therefore, they have the same fiduciary duty to be transparent and follow government ethics laws.

One advantage public sector lobbyists have is in grassroots lobbying, because their principals' leaders not only have extensive contacts through governing and campaigning, but they can both speak for the public and have great influence on citizens' willingness to contact their higher-level representatives, to write letters and op-ed pieces, and to engage in public demonstrations. Simply the act of getting elected on a platform of obtaining something from a higher level of government (e.g., a larger state education payment or the ability to tax a university) can make that goal easier to obtain, especially if the higher level of government is controlled by the same political party.

As Alan N. Fernandes points out in "Ethical Considerations of the Public Sector Lobbyist," 41 *McGeorge Law Review* 183 (2009), when a public meeting "results in direction to

advocate a policy position, a public official on the receiving end of this advocacy may give the position greater weight given the fact that it is a point of view generated in the public's view from a shared constituency."

An agency or special district has no elected leadership. But their directors and board members are usually appointees of elected officials and, therefore, have special influence with them or their successors, unless the successor is an opponent of the appointing individual or body. Their lobbying activities should be disclosed.

Examples

The definition of what constitutes "lobbying" and who is a "lobbyist" is so complex that it is irresponsible for a lobbying program not to provide extensive examples to make the definition more concrete and, therefore, easier for individuals and entities to comply with. It is sad that so few jurisdictions provide examples.

Philadelphia's lobbying Regulation 9 contains nine examples within its text. They consist of a detailed description of a situation followed by a paragraph entitled "Result." L.A. Metro has many short examples in its extensive lobbyist manual, and Oakland's shorter lobbying manual has eleven questions and answers. New York City has the most extensive list of examples on its lobbying FAQ pages. Dallas has a good FAQ page, and Massachusetts has a few examples on its FAQ page, as well.

I have sprinkled examples throughout this text, but here are a couple more, which come from online examples, real life, my imagination, or a combination of the three.

The first example is from the Los Angeles Unified School District's (LAUSD) lobbying brochure. Culver Consulting Firm is paid by Grape Cola Inc. to prepare presentations and recommend a strategy to help Grape Cola Inc. promote their products at LAUSD out of the scope of a bid process. Culver needs to register, because the school district's lobbying code includes among "lobbying activities" "providing advice or recommending a strategy to a client or others on LAUSD matters." This is a lobbying activity that most lobbying codes omit, because the drafters settle for the popular view of lobbyists, rather than researching what actual lobbyists do.

Two related cases from Philadelphia shed some light on what it means to "influence" government officials. Both involve the same principal, the William Penn Foundation, which funded (1) a consulting company hired by the city's school district to make

recommendations to it regarding issues ranging from financial planning to charter schools, as well as (2) organizations seeking particular changes to the city's education program, including charter schools, an especially controversial issue in Philadelphia. Allegations against the William Penn Foundation of lobbying without registering were dismissed by the Philadelphia ethics board because, although witnesses said that the foundation's role as a funding source gave it significant access to and influence with school district officials, the foundation did not seek to influence "a specific administrative or legislative action" and did not provide money "to enable the public entity to carry out that action." In other words, communications and payments intended to influence constitute lobbying activities only when it can be shown that they were focused on specific outcomes. Indeed, this is a common view of lobbying because lobbying is usually considered as piecework, that is, it is viewed in its parts rather than in terms of the whole relationship, which may include a variety of current issues and possible, future issues, especially when the principal or the lobbyist is involved in several long-term issues. This is why it is better to have lobbying viewed more holistically.

The other issue, although not discussed in the decision, appears to have been that the foundation's principal activity was funding a consulting company that made recommendations that the foundation may have itself made, but instead did it under a city contract funded by the foundation. This indirect way of making specific political recommendations protected the foundation from being considered a lobbying principal. And this is a common form of lobbying, because "independent" studies and recommendations are worth more than those made directly by a business, association, or organization. It is better, then, to commission a report than do it in-house.

So the question is, should a organization funding a report that makes recommendations in the area of its political or personal interests register as a principal lobbyist, in the recognition that this setup was intended to influence the government? I think it should.

In the second case, the ethics board reached a settlement with an organization funded by the same foundation. The organization makes grants to charter and other schools in Philadelphia. Although the settlement does not discuss the nature of the lobbying activities, it appears that the organization was acting directly as a lobbyist rather than via a consulting company writing a report, and that it was communicating with respect to specific outcomes

rather than a range of issues.

4. **Registration and Disclosure**

Lobbying codes are mainly about disclosure. One reason for this is the common belief that, because lobbying is protected by the First Amendment of the U.S. Constitution, as well as equivalent language in state constitutions, it cannot be restricted, only disclosed. As discussed above, however, this belief is not based on judicial opinions, and it has not always been the common belief. It is more to the point to say that it has become increasingly unquestioned as the First Amendment has risen in stature, at least with respect to political speech. But most local lobbying does not involve political speech, as it is commonly understood.

Disclosure of lobbying activities is important for several reasons. One is that it allows citizens to know the extent of lobbying aimed directly and indirectly at those who govern their community. Even when residents do not personally visit the website where this information is made available, news media and local bloggers can do this for them. The result is articles such as one from the San Diego *Reader*, which lists the lobbying activities of one local lobbyist (later accused of campaign finance infractions), including whom he met, representing which client, on which topic, as well as a fundraiser he hosted and how much money he raised for which candidate. Over time, such information shows the patterns of communication at city or county hall, the kinds of matters lobbying seeks to influence, the extent of fundraising done by lobbyists and, combined with knowledge of outcomes, the effects lobbying has. What is not included in the *Reader* article, however, is grassroots lobbying, which can be even more important than direct lobbying, because when it comes to local matters nothing is more important than the views and participation of sizeable numbers of constituents.

Another reason disclosure of lobbying activities is important — especially when combined with a requirement that lobbyists identify themselves, their client, and the purpose of their lobbying to every official they contact — is that it allows officials to know who is seeking to influence them and their colleagues, and why. In addition, officials can see the extent of lobbying by the individuals and clients they and their staff have contact with, as well as those who pass them by while lobbying their colleagues. Some believe the value of

lobbying disclosure to government officials is as great or greater than its value to their constituents, because officials can better understand the disclosures and they care more about a wide range of matters than citizens do. If more officials recognized the value to them of timely lobbying disclosure, there would probably be a lot more of it.

What is often overlooked is that, without disclosure, even those who employ in-house or contract lobbyists do not know what their lobbyists are actually doing. This is important not only to determine if they are worth their keep, but also to make sure that they are not doing anything that their principals would not want them to do.

Another reason disclosure is important is that making all this information public makes misconduct more difficult and, therefore, less likely. When people know their activities are being watched, they are far more likely to believe they might be caught if they do something wrong. Yes, they might choose not to register and disclose, but then they are guilty of misconduct simply by failing to register. An investigation into the extent of their failure may very well turn up other kinds of misconduct. As long the disclosure of indirect lobbying, such as grassroots lobbying, is required, and as long as there are no big loopholes in the exceptions to the registration requirement, it is difficult to get around disclosure rules for long or with respect to important matters.

Disclosure of lobbying activities also makes it easier to investigate a matter. For example, in December 2014 the registration of a Texas company's lobbyist allowed the press to investigate connections between that lobbyist and the chief counsel who gave the company a $110 million no-bid contract. Had their relations been secret, the fact that they had been business partners would likely never have been discovered.

Another reason for the importance of lobbying disclosure is that it prevents local legislative and other bodies from making decisions without input from those who might make arguments in opposition to or different from the lobbyist for the company, say, pushing a land use development. The reason is that, if they only listen to the developer, they will be seen as biased and as not doing their job, not looking out for the public interest. Of course, this only works when disclosure is both broadly required and ongoing, as it is with conflicts of interest and campaign contributions.

For example, consider what happened in Warren County, Kentucky in December 2014 (the county had no lobbying oversight program). A right-to-work ordinance (which prohibits labor unions from requiring their members to pay fees to the union), drafted by a

national organization, came before the local legislative body for a vote with no lobbying disclosure and with a description of the bill that was so broad, it gave no notice to local labor unions that it would even apply to them. Therefore, no union representative was present to argue against the bill and, therefore, none sought to lobby the county legislators. A lobbying disclosure requirement would have let the unions know about the lobbying, thereby allowing them to lobbying against the ordinance. If disclosure were not made, the discovery of this omission may have led to the law being voided and may have placed involved local legislators in violation of the law.

This example shows how other lobbyists, and their principals, also benefit from lobbying disclosure. When disclosure is ongoing, principals can see how much lobbying activity their lobbyists (and their competitors' lobbyists) have been engaging in, lobbyists can see which officials have been meeting with other lobbyists, potential contractors can be alerted by others' lobbying to get started lobbying themselves, and the lobbyists for community, environmental, and good government groups can see how much work they would have to do to offset the lobbying efforts of, say, developers or would-be no-bid contractors. If lobbying is a good thing, its disclosure on an ongoing basis will ensure more of a good thing by more people and entities and in a fairer fashion.

This was one of Anita S. Krishnakumar's major goals in her essay "Towards A Madisonian 'Interest-Group' Approach To Lobbying Regulation" (St. John's University School of Law Legal Studies Research Paper Series #07-0064, January 2007). She wrote, "The key to more effective lobbying regulation may be to embrace the fact that interest groups are the entities with the greatest incentive to take advantage of lobbying disclosures and, accordingly, to structure lobbying regulations in a manner that encourages organized interests, in order to maximize their own positions, also to further public goals." She considers the public goal here to be more lobbying from all sides, which would lead, presumably, to more balanced decision-making, which is, in turn, more in the public interest than in the interest of particular companies.

Krishnakumar was talking here about public policy lobbying, which is less important locally than at the federal level she was focused on. But there are also competing contractors and grantees, and those who oppose development projects. Timely information about lobbying will spur them to get involved and provide information from a variety of points of view, so that government decision-makers can be more informed and their views less

narrow or biased. There will then be a greater likelihood that their decisions will be made in the public interest rather than in the private interest of those who have the connections to get access early in the process and make their mark before the matter comes not only to the public's knowledge, but even to the knowledge of their less well-connected competitors.

In order to ensure disclosure, certain individuals and entities are required to register with the office that oversees the lobbying program (which I call "the lobbying oversight office") and, usually, to pay a fee to help fund the program. The registration and disclosure provisions of a lobbying code determine who must register, when they must register, how much they must pay to register, and what disclosures they must make, when, and in what manner. Related issues include public access to disclosures and who is in charge of overseeing and enforcing disclosure requirements.

Some officials have opposed disclosure with the argument that their city or county will lose business to other localities, because businesses will not want it known to the public that they were lobbying local officials. Businesses that are working with public-private development commissions can usually keep their interest in building or investing in a community confidential. But businesses seeking to influence government officials are engaged in public actions. Most of their communications are public record. Lobbying disclosure only organizes and makes the basic facts (although not the content) of these communications more easily accessible to the public.

Registration is so central to lobbying codes that some are even given titles such as "Lobbyist Registration Ordinance." But beware: since registration is essentially a bureaucratic process, the purpose of a lobbying code can be lost in the minutiae of registration and disclosure requirements. There is more to a lobbying code than registration and disclosure.

Who Must Register

The simple answer to the question, Who must register?, is "lobbyists." This takes us right back to the last section, on definitions. Most lobbying codes define "lobbyist" to include only those who directly engage in lobbying activities, that is, the agent or employee of an individual or entity seeking to influence local officials. However, there are some jurisdictions, as well as the City Ethics Model Lobbying Code, that do require clients and employers of lobbyists ("principal lobbyists") to register and make disclosures, as well as

those who lobby on their own behalf or on behalf of a company they own or on whose board they sit. This is preferable, because principals are the true lobbyists, the ones whose interests are being pursued. It is not appropriate for all the responsibility to be placed on agents and employees, especially since they are sometimes required by their principals to argue that they are not, in fact, lobbyists (and fined for not registering). This argument should be made by the principal, not by the agent.

The Registration of Principals. There are two ways to require principals to register. One is to include them in the definition of "lobbyist" or as one of a number of different kinds of "lobbyist." See the discussion in the preceding section on the various ways local governments do this.

The second way, where principals are not considered "lobbyists," is to require them to register or be involved in the registration process as "principals." For example, Philadelphia requires lobbyists *and* their principals to register and file reports. One unforseen consequence when this approach is used only in some jurisdictions is that principals who have hired lobbyists in jurisdictions that do not require them to register can be blindsided when they hire a lobbyist in a jurisdiction that does require them to register. The lobbyist should inform them, but the lobbyist may not realize that the client doesn't know about the requirement. The best thing is for all jurisdictions to require registration by principals, not only to prevent this problem, but, more important, because it's best to have principals trained, seek advice, and take responsibility for their lobbyists' activities.

In New York City, in order for lobbyists to register, "clients" (a term that includes both employers and those who hire contract lobbyists) must provide their lobbyists with "a written authorization [or] a written agreement of retainer or employment," which must be filed as part of the registration process. And even before a lobbyist registers, both the lobbyist and the client are required to enroll in the electronic filing system (since clients must file annual reports). This ensures that principals are aware of their role in a lobbying oversight program.

Similarly, such jurisdictions as Seattle require "a written authorization from each of the lobbyist's employers confirming such employment." Seattle defines "employer" to include both clients and employers.

Seattle and Denver place a special obligation on employers of individual lobbyists to make sure that they are registered or agree to register before their employment commences.

Seattle's language is, "It is a violation of this chapter for any person to employ a lobbyist who is required to register, but is not registered under this chapter."

The Oregon Metro Council (Portland area) has an extra registration requirement for employers of lobbyists. Annually, they must report "the name of any Metro official who attended a fund raising event for a non-profit tax exempt entity as a guest of the employer of a lobbyist." One wonders why this is only an annual requirement.

Exceptions. While most lobbying codes make exceptions to the definition of "lobbyist," some instead, or in addition, make exceptions with respect to who must register. This is the approach taken by the City Ethics Model Lobbying Code. These exceptions may apply to certain individuals and entities, or they may apply to certain activities. The Model Code has both kinds of exception.

Seattle puts all of its exceptions under the registration requirement, excepting four kinds of person from registering, including those who only appear before public sessions, those who do not engage in lobbying activities for more than four days each quarter (or parts thereof; this is an unusual way of describing time spent lobbying), and government officials and employees, unless they are specifically hired to lobby. Philadelphia also places its fifteen exceptions in the registration part of its lobbying code.

One could argue that this is not the best place to put exceptions, because these are really exceptions to who is a "lobbyist" or what are considered "lobbying activities," and it is in the definitions of these terms that people will look for exceptions. But if exceptions are placed in the registration section, those who look to see if they are a "lobbyist" will find that they are. I think it is important that people recognize that many more people lobby than they think — including themselves.

This is a response to a serious problem with the popular image of lobbyists: that they are professional hired guns. At the local level, this is usually not the case. Many people lobby local governments. They let their council member know how they feel about an issue, they get involved with a local organization that lobbies against a property development or tax increase, they sit on the board of a social service agency that lobbies for a contract extension, they try to help their child get a city job, they do what they can to get some work for their accounting firm or electrician business. It is better to recognize that all of this is lobbying, even if not all these people are required to register.

When Registration Is Required

It is important to make it clear when a lobbyist has to register. A lobbying code that fails to provide this guidance complicates enforcement of registration and disclosure requirements, leading to scandals that the oversight office cannot prevent.

The best practice is to require registration before an individual or entity engages in lobbying activities, either directly or through an agent. This way, the lobbyist not only notifies the public and government officials, but also focuses her attention on the lobbying rules and requirements, so that from the very beginning she will be aware of a lobbyist's responsibilities and limitations. The importance of this awareness can be seen in El Paso County's rule that an individual cannot register (and, therefore, act) as a lobbyist before taking a lobbying training course. This county places the horse before the cart.

The City Ethics Model Lobbying Code uses the following language (§301.1):

> Except as provided below, in order to legally engage in lobbying activities, directly or through the acts of another, an individual or entity must register with the lobbying oversight office by filling in and filing a Registration Form.

The alternative is to provide a minimum (*de minimis*) requirement, that is, an individual or entity does not become a lobbyist until it has engaged in lobbying activities for so many hours, has been compensated so much for lobbying work, or has expended so much money on lobbying over a month, quarter, or even longer. Before these limits have been reached, anyone can lobby without registering, without disclosure, and without any obligations or prohibitions.

De minimis requirements save some occasional lobbyists the trouble of registering, but they also allow people to lobby without having to make themselves aware of the rules and requirements, not to mention making timely disclosures. *De minimis* requirements are acceptable only when they are truly minimal, for example, excluding single, uncompensated contacts. Any expenditure of money or multiple contacts (even if by different individuals on behalf of a single principal) should require registration and disclosure.

Where there are *de minimis* requirements, the best thing is for each individual or entity to register upon realizing the minimum will likely be reached during the current period, rather than after the minimum is actually reached. But this is impossible to enforce and, therefore, no one has this requirement. The norm is Philadelphia's requirement that

individuals or entities register 10 days after "engaging in lobbying," which means after going beyond the 20-hour minimum (in Portland a lobbyist must register 3 days after reaching the hourly minimum).

In many cases, this means that there is no registration until the lobbying has been done and the matter decided. It also means that officials will not know they are going to be lobbied, because the lobbyist will not be required to say she is a lobbyist when seeking an appointment, will not be wearing an identification badge to the meeting, and will not have to sign a lobbying log, if being registered lobbyist is a requirement for signing (this is not a best practice). This puts an official in an awkward position. When a lobbyist is subject to a lobbying code from the very beginning, the official can say, "Excuse me, but since you have not registered, you cannot lobby me. Please register and then make another appointment." If this means that the lobbyist's message will be too late, then think how late her disclosure would come, if at all. For more on *de minimis* registration requirements, see the section above.

The bottom line question is, who is it more important not to inconvenience, the lobbyist or the community?

When there is no minimum, it is best to require that a person register before engaging in lobbying activities, as the City Ethics Model Lobbying Code does. Jurisdictions that require this include Seattle, San Jose, Jacksonville, Oakland, Toronto, and Florida's Palm Beach and Broward counties.

El Paso's requirement of a brief training course before engaging in lobbying activities is a good idea. But it is only fair to make this requirement where there is an online course. Otherwise, the lobbyist may have to wait some time before lobbying, that is, until the next training course is scheduled.

Role of Local Officials and the Lobbying Oversight Office in Lobbying Registration

What most distinguishes lobbying oversight from the rest of government ethics is that, while government ethics primarily regulates the activities of government officials, lobbying oversight primarily regulates the activities of non-officials. Only government officials have a fiduciary duty to their community.

Officials' Role in Lobbying Disclosure. Peter Martin Jaworski's "Blame the Politicians: A

Government Failure Approach to Political Ethics," *Georgetown Journal of Law & Public Policy* (2014), focuses not on lobbying oversight, but on the blame for ethical misconduct that accompanies businesses' attempt to get a piece of a government's "goodies." But Jaworski makes a good point in arguing that, "When it comes to the moral evaluation of lobbying, cronyism, and rent seeking more broadly, our attention should be directed primarily at government actors—from politicians to regulators—rather than market actors." He notes that it is government officials who choose to listen to lobbyists, and choose not to seek out other experts, hold hearings, or ask psychologists about blind spots. He also notes that political actors are not only gatekeepers, which comes with a fiduciary duty to the community, but also the rule makers, the ones who can set the rules to best prevent ethical misconduct and provide the transparency necessary to gain the public's trust in their actions.

So then, why is it that, in the great majority of jurisdictions, lobbyists and principals have all the obligations, and officials have none? Might it, one wonders, be that elected officials are the rule makers who use this authority to place the burden totally on others?

In her essay "Towards A Madisonian 'Interest-Group' Approach To Lobbying Regulation" (St. John's University School of Law Legal Studies Research Paper Series #07-0064, January 2007), Anita S. Krishnakumar emphasizes the importance of requiring disclosure from officials as well as from lobbyists. The check that official disclosure provides to keep lobbyists and their principals honest is extremely valuable to the accuracy of disclosures, which are otherwise difficult for a (usually understaffed) lobbying oversight office to ensure. And when officials are required to disclose their contacts, they will have to obtain more information about lobbyists' clients, which they often lack (for them, it can be enough that they know the lobbyist).

In addition, people looking for information are more likely to search for lobbying contacts by the name of the official rather than by the name of the lobbyist, which few will recognize. Even though lobbying is spoken of in terms of lobbyists, if a lobbying oversight program is effective, it will also give a picture of who government officials are spending their time with.

Elected officials are accustomed to disclose their campaign contributions. At the local level, lobbying contacts are not much different, because most of a local candidate's campaign funds come from lobbyists, principals, and the PACs they give to or sponsor. The major difference is that, with respect to lobbyist contacts, officials don't have a campaign

committee to depend on. But they do have aides or assistants. If they're in a smaller town, then they probably don't have too many lobbyist contacts, so disclosure wouldn't be burdensome.

The best approach is to have officials keep a log of all their meetings and communications with lobbyists, whether registered or not (that is, the log should include all meetings with individuals who are representing entities or individually seeking special benefits for themselves). For example, Hallandale Beach, Florida, a city in Broward County, requires officials to disclose all lobbying activity that involves them by filling in an online form that is reported on an ongoing basis on the city commission's website (updated every 72 hours). This online database shows that even a small city (pop. 37,000) can afford to handle lobbying logs online, where they are most easily accessible to the public.

This is greatly preferable to what some other jurisdictions, such as El Paso County, do: require officials to keep a daily log, but submit it only twice a year. If the log is to be kept daily, it should be submitted as often as lobbying contacts are made, by making filling out a form and submission a single process, via an online form that either goes automatically into a database or, if that is too expensive, can be easily and frequently joined together into single, searchable PDF for each lobbyist, principal, and matter (an area's lobbying oversight offices could even cooperate in order to bring together disclosures by principals that lobby throughout the area, often with respect to one matter, for example, a transportation project).

Officials' obligations can go further than filling out forms. They can also be required to help get lobbyists and principals registered. For example, Hawthorne, California places an obligation on city departments "to identify individuals and entities who may be subject to [the lobbying code] and to advise them of the information contained" in it. In addition, departments are required to get a "a signed certification by contractors and applicants for permits, licenses, grants, and franchises that they are familiar with the requirements of [the lobbying code]."

In Jacksonville, the lobbying code expressly allows government officials and employees to require an individual to register as a lobbyist before addressing the official or employee. This is another valuable way to get government officials involved in lobbying registration, and to protect themselves from being accused of being complicit in the failure of lobbyists to register and disclose their lobbying activities.

Miami-Dade County takes a different approach. It requires its officials and employees to "be diligent to ascertain whether persons required to register … have complied." It also prohibits officials and employees from knowingly permitting an unregistered person to lobby them or their agency or body. But a Miami-Dade case involving soccer team owner David Beckham, which is discussed above, shows that it is best that officials go beyond the law, or ask for advice from an ethics officer, when they know they will be meeting with an interested party. In this case, the mayor's office initiated the meeting, and it wasn't clear that each individual at the meeting needed to be registered as a lobbyist. When the meeting was proposed, the mayor's office should have said to Beckham or his representative, "We may be initiating this meeting, but since we are going to be discussing possible business between you and the government (or, at least, that's what the public will reasonably assume), everyone attending should register as lobbyists before the meeting. The law does not clearly require this, but it is the right thing to do. Since you are a celebrity and anything you do is front-page news, the front-page ethics rule — would you want to see this on the front page? — is not a thought experiment; it's a fact. It would look best for everyone if it were noted that you had offered to register as a lobbyist even though it may not clearly be required."

El Paso County is more explicit in the requirement it places on its officials. Its code says that officials "shall not permit any Lobbyist … to communicate with him regarding any official matter before being presented with a current lobbyist registration card verifying that the Lobbyist is registered."

Ottawa requires council members to take the initiative of "review[ing] the Lobbyist Registry on a monthly basis to confirm that instances where they have been lobbied on a particular matter, including the specific matter and date, have been registered. Where lobbying activity has not been disclosed, the Member shall first remind the lobbyist of the requirement to disclose and, should the activity remain undisclosed, advise the Integrity Commissioner of the failure to disclose." This is the strongest requirement I have found. It ensures that everyone involved in lobbying is responsible for its disclosure.

City Ethics Model Lobbying Code (§303) requires that "all elected officials, board and commission members, and departments and agencies must log all lobbying activities that involve them and their employees, to be placed online on no more than a weekly basis."

When considering disclosure requirements for officials, the legislative body should

also consider the possibility of placing limitations on contacts, so that no lobbyist or principal is given more than a certain amount of access to government officials, at least in terms of time (including calls, meetings, and the time spent reading communications, including reports). This would make it easier for officials to refuse to take calls and set up meetings with big campaign contributors and their lobbyists when they demand too much of the official's time. First Amendment arguments against limitations on independent spending are not relevant to limitations on a government official's limited time. For example, no one seems to find it an unconstitutional limitation to place extremely short limits on the time citizens may speak at public meetings.

Voluntary Disclosure. Even where local officials have no legal obligation with respect to lobbying, they may choose to be involved (1) by letting people know that they cannot be lobbied by anyone who has not registered as a lobbyist (this is better than, as sometimes happens, finding out later that the lobbyist wasn't registered and filing a complaint against them), and (2) by keeping an online log of their meetings and other communications with individuals seeking special benefits (it's better to do this on a database, but if there isn't one, it can be done on an official's homepage). A calendar is insufficient (1) because usually it only provides names of those the official is scheduled to meet with, not information about whom they represent, who actually comes to the meeting, what the topic of the meeting was, and what results were sought, and (2) because meetings are only one of several forms of communication, direct and indirect, by which people seek to influence officials.

Voluntary disclosure of lobbying by officials — even if everyone were to participate — is not a replacement for making disclosure part of a formal lobbying or conflicts of interest program, because a voluntary procedure usually lacks detailed definitions and requirements, training, neutral advice, and independent enforcement, and requires a great deal more work for the public to get an overall picture of lobbying activity. It is also limited to direct lobbying; officials do not have much information about grassroots and other kinds of indirect lobbying. Voluntary disclosure can also be subject to loopholes, such as New York mayor Bill DeBlasio's decision to disclose only "substantive" meetings, not including those he initiated and not including any other communications. Voluntary disclosure is best when it is done to set an example, by the highest-level officials, as a step toward the goal of institutionalizing disclosure.

Lobbying Oversight Office Registration Role. Lobbying oversight offices should do their

best to accumulate information that will help them identify and contact those who might be required to register as lobbyists. In 2014, the New York City council gave the clerk's office, which oversees the city's lobbying oversight program, the express responsibility "to develop a protocol to review sources of information" that may provide evidence of lobbying misconduct. The new provision (§3-212(e)(1)) even provides some examples of such "sources of information":

> 1. state lobbying registration documents;
>
> 2. notices of appearances before city agencies that identify the representative of an applicant; and
>
> 3. the city's "doing business" database.

Every lobbying oversight office should develop such a protocol, looking at the examples on this list, as well as newspaper articles and blog posts about public meetings and lobbyists.

The 2014 New York City reforms also required the clerk's office to work with the council and city agencies "to develop notices and advertisements to be placed in print and electronic media intended to reach persons and organizations doing business with the city that will inform them of the requirements set forth in this subchapter." The goal is to identify lobbyists and get them into the lobbying program, or to have them and their principals identify themselves by seeking advice or registering as lobbyists.

Registration Forms

Most jurisdictions require that contract lobbyists make a separate registration, and pay a separate fee, for each principal represented, and that each in-house lobbyist also make a separate registration. Many jurisdictions also require principals to register.

Most jurisdictions require lobbyists to re-register and update their registration forms annually (calendar year or anniversary of original filing date), or at least pay a fee for remaining registered.

Most jurisdictions also require that lobbyists file a termination form stating that they have stopped lobbying the government and, therefore, are canceling their registration. In Oakland, for example, lobbyists file a notice of termination form in order to be relieved of

further obligations until they begin lobbying again. Termination is also important in determining revolving door timelines in jurisdictions that require a waiting period before lobbyists can be appointed to or hired for government positions.

The best idea is to provide a single Amendment of Registration form, such as California's Form 690, which agent and principal lobbyists can fill out and file any time one of the following events occurs:

1. Lobbying firm adds or loses a lobbyist employee.
2. Lobbying firm adds or loses a lobbyist client.
3. Lobbyist employer adds or loses an in-house lobbyist.
4. Lobbyist client adds or drops a lobbying firm.
5. Changes to information on registration form, such as changing the responsible officer, address, or contact information.
6. Termination of lobbying activities, with no likelihood of recommencing them again in the near future.

The City Ethics Model Lobbying Code provides for a similar all-in-one form.

Registration Fees

Most lobbying programs (and their website databases) are funded, at least in part, by fees charged to lobbyists and principals when they file a registration form, when they renew their registration and, sometimes, when they file other forms. Fees range widely. In Florida alone, they range from $10 in Orange County to $490 in Miami-Dade County ($500 seems to be the upper limit).

Equally important is whether a lobbyist is charged a single annual fee, as in Miami-Dade County, or an annual fee per principal represented, as in Broward and Palm Beach Counties. Thus, Broward County's $50 fee per registration can cost a busy lobbyist more than Miami-Dade County's large one-time fee.

Chicago charges $350 per registration, plus $75 for each additional client after the first client. Los Angeles fees are $450 plus $75 per additional client. In 2015, San Diego increased the fee on lobbyists from $40 to $150, and on principals from $15 to $30. Not a

single lobbyist appeared at the San Diego Council meeting when the fee increase was discussed and unanimously approved.

Jurisdictions should not charge fees greater than needed to cover the costs of the lobbying oversight program, taking into consideration other sources. Fees that are too high, as well as compliance that is too difficult, will lead many who engage in lobbying activities to employ loopholes (sometimes changing the way they lobby) that allow them not to register, as has happened at the federal level. In the alternative, they may lobby to change the rules or to get regulations promulgated that open loopholes. They may even file suits, for example to have a fee declared an unconstitutional tax on lobbying (see, most recently, *ACLU of Illinois v. White*, 692 F. Supp.2d 896 (N.D. Ill. 2010)). This issue also arose in 2015 in Austin, Texas, where some lobbying fees go into the city's Fair Campaign Finance Fund, to be used by council candidates in their campaigns.

Another source of funding for a lobbying oversight office is fines, especially those for late filings. However, this source is difficult to estimate, even after a few years of experience.

Because it is difficult to know in advance where to set fees so that they, along with fines, pay for a lobbying program (over and above what is allocated in the government's budget), some lobbying codes (and the City Ethics Model Lobbying Code at §302.5) pragmatically state that the oversight office may set reasonable fees, allowing it to learn what fee level works best. For example, Baltimore's ethics code states that "the Ethics Board may charge reasonable filing fees for statements, reports, and other documents filed under this article." Denver's lobbying code states that "the clerk shall establish the fee structure so that, on the average, a lobbyist's fee expenses will be proportional to the city's expense for that lobbyist." The resulting fees are $50 a year for individual lobbyists and $75 for organization lobbyists. The Model Code language is, "The amount of each fee will be set by the lobbying oversight office with the approval of the local legislative body." This allows the fee to be changed as the office learns what fee is most appropriate, without having to amend the ordinance, which may open up a can of worms.

Some jurisdictions allow the oversight office to waive a fee due to financial hardship (not surprisingly, Miami-Dade County is one such jurisdiction). Some jurisdictions also provide exemptions or lower fees (for example, $50 rather than $250 in the District of Columbia) for representatives of nonprofits (sometimes a lower fee is allowed only to those

not paid specially for their lobbying work).

An across-the-board nonprofit discount or exemption is inappropriate, because there are many rich nonprofits, including professional and government associations, chambers of commerce, universities and hospital groups, and large national organizations for which lobbying is a principal purpose. It is better that the discount be given only to nonprofits with an annual budget under a certain amount, or that seek no financial benefit from the government. Another good alternative is to have a consistent and quick waiver process to provide waivers to small community groups, which are usually the only ones that deserve a waiver.

The City Ethics Model Lobbying Code provision has language for both alternatives (see below). For more on this topic, see the longer discussion above.

A fee provision should include language about the penalty for failure to pay a fee. If a fee is not paid for the first year of registration, there should be no registration and, therefore, no lobbying. The same thing should be true in later years. This is why the City Ethics Model Lobbying Code does not allow someone who has not re-registered and paid a fee by February 1 to lobby or have someone lobby on their behalf. They are treated as if they had filed a statement terminating their registration.

Below is the City Ethics Model Lobbying Code provision on registration fees. The provision ensures that registration fees will be used solely for the lobbying program, rather than placed into the general fund.

> Upon registering and every January 1 thereafter while active, a lobbyist will pay an annual fee, pro-rated according to the registration date, plus a fee for each additional principal. A principal will pay a fee for each in-house employee, officer, or board member who lobbies on its behalf. The amount of each fee will be set by the lobbying oversight office with the approval of the local legislative body. A lobbying firm must pay the registration fee for each employee or partner who lobbies, but it need pay only once for each principal represented by the firm. The registration fee will be waived for all those lobbying on behalf of nonprofit organizations with annual expenditures of less than $100,000 and all those lobbying on behalf of governments and governmental agencies. Other nonprofits, as well as individuals, may apply for a waiver on the grounds of inability to pay. Those who have not paid their fees by February 1, or at the time of filing a first registration form, may not engage in lobbying activities nor may anyone engage in lobbying

activities on their behalf until the fees have been paid, with penalty as determined by the lobbying oversight office. All registration fees will be deposited into the account of the lobbying oversight office and used solely by that office to perform its duties.

What Must Be Disclosed and When

Since disclosure is the principal act required by a lobbying code, "What must be disclosed?" is the second most important question after the basic definitional question, "Who is required to disclose?" In fact, if disclosure requirements are very limited, then it really doesn't matter who has to register and disclose, because there will be very little transparency in any case, and the public, not to mention government officials, the press, and other lobbyists, will have little information about lobbying activities. Disclosure must, therefore, be sufficiently detailed, including the names of officials and staff contacted, the specific subject and length of meetings and calls (including requests and recommendations made), the date and amount of all contributions (including indirect ones through PACs and the like), lobbying work other than contacts (including preparation, monitoring, grassroots lobbying, and strategic advising about lobbying), and payments to and by lobbyists. The Centre for European Studies (CEPS), a Brussels-based think tank, refers to this sort of full disclosure as a "legislative footprint," and Transparency International is working to make it a European Union requirement.

The other most important question is "When must information be disclosed?" If disclosure is not made on a timely basis, it will be of little but historical value to anyone.

With respect to the content of disclosure statements, there are two principal forms of disclosure (in addition to the disclosure that accompanies registration, and its updates): ongoing and periodic disclosure or, put another way, disclosure of activities and disclosure of expenditures.

Ongoing Disclosure. The best approach is to provide an ongoing flow of information online about lobbying activities and campaign contributions. To do this best requires a reasonably sophisticated database, something few local government can afford. However, it might be possible to piggyback on the database of the state or of a big city or county in the state. Once a database has been created, it is not much trouble to let other jurisdictions use it for free or for a reasonable charge.

There is a less expensive alternative, however: searchable PDF forms filled out for

each lobbying activity, which can be merged together into single PDF files relating to each lobbyist, principal, and matter. This requires no technical expertise and no database. But it does require more ongoing clerical labor by the lobbying oversight program, a perfect job for student interns.

Some lobbyists and officials insist that ongoing disclosure is too burdensome, and that it will discriminate against small and nonprofit lobbyists, because they lack the resources. But the fact is that only a small proportion of lobbyists frequently engage in lobbying activities, and these individuals and firms have the resources to provide ongoing disclosure. Contract and in-house lobbyists already keep time records for billing and reporting to their clients, and officials keep calendars listing their appointments. Reporting contacts builds on these. And since they are seeking special benefits from the government, it is certainly worth lobbyists' while to expend these resources.

In any event, filling a short online form out even every day is hardly burdensome or difficult even for small and nonprofit lobbyists. It's just part of the work. Volunteer lobbyists can have someone from the organization file for them.

One federal agency that employs ongoing disclosure for certain lobbying communications is the Federal Communications Commission. It requires anyone who makes an oral or written presentation to the FCC to send a copy or summary of the presentation to the FCC by the following business day, and the FCC issues a public notice of these presentations twice a week.

In fact, many lobbyists support ongoing disclosure. For example, Idaho Association of Commerce and Industry lobbyist Alex LaBeau said in January 2014, "I've long advocated that everything should be immediate, 100 percent disclosed every time you spend a dime. Whether it's taking somebody out to lunch or hiring a lawyer to help you do an analysis."

For more on ongoing disclosure, see the subsection below.

Barring ongoing disclosure, quarterly reports provide somewhat timely information at least with respect to long-term matters. Anything less provides disclosure only of history. It is a better practice to combine ongoing disclosure with quarterly reports, focusing ongoing disclosure on lobbying activities and campaign contributions, with quarterly reports focused on compensation and expenditures, which do not require the same timeliness.

Registration Disclosure. The greatest burden is disclosure at registration. This disclosure of personal, business, and employment relationships, including past campaign contributions

and other activities, is important not only for the public, but also for officials, principals, and lobbyists to see what their possible conflicts of interest may be, so that they can deal with them responsibly. Registration disclosure is a good reminder that lobbying oversight is primarily a government ethics process.

One argument officials make against disclosure is that the public will misinterpret what is disclosed. But the public already interprets the secret relations between lobbyist and official to the point where lobbyists are at the very bottom of the list of professions. More transparency can only make lobbyists look more professional and less sneaky.

The best way officials can satisfy the public is to have disclosures show that they meet not only with businesses that, seeking special benefits, give them – and bundle – large campaign contributions or sit on party committees, but also with a wide range of potential contractors, grantees, and permittees, as well as with community groups, environmental and good government groups, and the like.

It isn't that the public hates lobbying per se. People feel that it is unfair, with special access for friends and supporters, and that it is done in secret, which means that there is something to hide. More balance and transparency will go a long way to lessen the hatred the public has for lobbying.

a. **Disclosure at Registration.** Below is a list of the information that jurisdictions should consider requiring lobbyists, and their principals, to disclose at the time of registration, with at least annual updates thereafter. It is best to have a requirement that important new information be filed at the time changes are made, in the form of an amendment to the registration form, rather than waiting for the annual update. It should be required that such an amendment be filed within no more than thirty days.

It is best to place disclosure requirements in the lobbying code, while allowing the lobbying oversight office to create forms according to the requirements. When the oversight office finds statutory requirements inadequate or insufficiently clear, it should be permitted to supplement them via regulation. Los Angeles does this in its list of required information: "Any other information required by regulation of the City Ethics Commission, consistent with the purposes and provisions of this Article." The City Ethics Model Lobbying Code has a similar provision, §302.6(n).

In those jurisdictions that have hourly or compensation minimums before one must

register as a lobbyist, lobbying will occur before registration. Therefore, these jurisdictions should treat registration disclosure as the first quarterly report and require much more information at registration. See the section on quarterly disclosure below.

1. Lobbyist Information: Contact information for each lobbyist and his or her spouse or domestic partner [*for possible conflict of interest purposes*]; the date the lobbyist was initially (or, if previously registered, once again) retained or began to engage in lobbying activities [*where registration is not required prior to lobbying*]; whether the lobbyist is an employee, consultant that provides more than lobbying services, or a contract lobbyist; and the name and acronym of any affiliated political action committee or campaign committee [*many lobbying and law firms have PACs, and their members are officers of campaign committees; it is important to have this information, to determine if there might be a violation of a lobbying provision and for conflict of interest purposes*]. If a lobbyist is an entity, the contact information for each officer or employee (1) who engages in lobbying activities, (2) who is employed in the division of the entity that engages in lobbying activities, (3) who has engaged in fundraising activities or provided campaign-related services for a current city/county official or campaign committee in the past two years (with the name of the candidate(s)), or (4) who has provided services under a contract with the city/county in the past two years (with the name of the department, agency, or board for which the services were provided) [*in (4), "services" includes lobbying, legal, and other services*]. This information should be reported in four separate lists, and the spouse or domestic partner of each individual should be included. Include home addresses, for the purpose of checking against campaign contribution databases; however, these addresses will not be made public. [*Philadelphia requires a recent photograph of each lobbyist*.]

2.Principal Information: Contact information for each principal, that is, for anyone by whom or on whose behalf the lobbyist is directly or indirectly retained, employed, designated, supervised, compensated, or reimbursed, with a description of the principal's business in sufficient detail to inform the public of the nature and purpose of the lobbying. This includes a principal's parent company, subsidiaries, affiliates, and related companies with a financial interest in the outcome of the lobbying activities or which control a principal's activities or contribute funds or advice with respect to the lobbying activities; this

applies to both for-profit and nonprofit entities. [*Who is a principal is not always an easy question. Sometimes the ostensible principal is not the one paying for or reimbursing the lobbyist, or is not supervising the lobbyist. Or the individual or entity that would benefit from the lobbying is not the one for whom the lobbyist works. For example, the company that hires the lobbyist may be an affiliate of the company for which the lobbyist works. Both the company and its affiliate should be listed. Or a trade association's in-house lobbyist may be lobbying for a project that would benefit only one or two of its members. These members should also be listed as principals.*] For a corporation or association, the name of the chief executive officer; for a general partnership or joint venture, the names of all general partners; for a limited partnership, the names of the general and limited partners; for a trust, the names of all trustees and beneficiaries. In addition, except where a publicly traded company, the names of all individuals holding, directly or indirectly, at least 5% or more ownership interest in the entity. [*It is important in any public matter for the public to know the beneficiaries of lobbying activities. Often a company's name has no meaning. In fact, companies can be created for one land use matter. No one has seen the name before and there is no information available about it. Only the owners of the company can give the public a picture of the beneficiary of lobbying activities.*] If the principal is an association or membership organization, the number of members, the methods by which members make decisions about positions on policy, and the name of any member who pays an extra fee for lobbying, directly or as part of a membership category. If the principal is an informal group or coalition of individuals or entities, contact information for each member of the group (a single registration form may be filed for all of them). If the principal is an organization, the contact information for the organization and for any individual or entity that, in any of the past three years, paid more than 20% of the organization's revenues. Also, the name and acronym of all political action committees affiliated with the principal. [*Some jurisdictions ask that it be identified whether the client is for-profit or nonprofit. With respect to the issue of lawyer-client confidentiality, which sometimes arises when a lobbyist is a member of the bar, see* *the discussion above.*]

3. Lobbying Agreement: Contract lobbyists must attach a written agreement of engagement or a statement of the substance of an oral agreement, as well as any relevant motion, minutes, or other documentation of the action authorizing the lobbyist's engagement. The agreement or statement must include the terms of compensation; whether the lobbyist is authorized to incur expenditures (and, if so, of what nature); whether any such expenditures

will be reimbursed by the principal or by another individual or entity, in part or in whole; and a statement that the principal has not offered and the lobbyist has not agreed to accept a contingency fee from anyone. If the lobbyist is an employee, officer, board member, or volunteer of the principal, and no extra compensation will be provided based on the lobbyist's lobbying activities, attach a written authorization from the principal's chief executive officer or someone delegated by the CEO or the board of directors, and a statement whether the relationship is expected to involve compensation, expenditures, or both.

4. Subjects of Lobbying: A description of the subjects and matters about which the lobbyist expects to lobby, including information sufficient to identify the local law or resolution, contract, grant, loan, subsidy, program, decision, permit, license, regulation, report, real property or building project, rule, proceeding, board, commission, or agency determination or recommendation, or other matter, as well as specific parts or aspects with which the lobbyist will be concerned. Also, which side of the issue the principal(s) are on, how the principal(s) might benefit, and any other specific outcomes sought. [*For example, if the lobbyist expects to oppose a development, is it because the principal owns a nearby business or land whose value may be negatively affected or is it because the principal is a group of people in the neighborhood who do not want the nature of the neighborhood to change?*]

5. Objects of Lobbying: The name of the city/county officials, employees, and departments, boards, and agencies each principal lobbyist expects to lobby, directly or indirectly, and that each agent lobbyist is authorized to lobby, expects to lobby, or expects to engage another person to lobby. The name and position of each city/county official or employee or member of a city/county official's immediate family who has a business or professional services relationship with the registrant, with a lobbyist or lobbying firm of the registrant, with an employee or office of the registrant, or with any entity related to the registrant or the registrant's principal (also describe the nature of the relationship).

6. Grassroots Lobbying: If the registrant or a lobbyist* on behalf of the registrant expects to engage in grassroots lobbying*, the contact information of any entity with which the registrant or lobbyist expects work, the media which the registrant, lobbyist, or entity expects to employ, and the names of the officials and employees*, and a description of the

members of the public, to be targeted by the grassroots appeal.

7. Relationship with Principal: If the lobbyist, or a member of his or her immediate family, has a direct or indirect financial interest in or relationship (other than as lobbyist) with the principal or with the principal's contract, project, or other matter about which the principal is seeking a special benefit from the government or agency to be lobbied, information as to the extent of such interest or relationship and the date on which it was acquired or begun. [*Since a principal element of lobbying involves the seeking of personal benefits from local government, it is important to know whether a lobbyist, or an immediate family member, also has a personal interest other than as a lobbyist.*]

8. Possible Conflicts of Interest: Any familial relationship or business or professional association of any executive, officer, board member, partner, or owner of a principal or its parent, subsidiary, or affiliate, or of a lobbyist, with a high-level city/county official, or his or her aide, or with any official of the department, board, or agency the lobbyist expects to lobby or expects to influence through lobbying others, or with the spouse or domestic partner of any of these. [*Cook County, Illinois (which includes Chicago) requires disclosure of a wide range of familial relationships to any elected official in the county or in any municipality within the county, because there have been so many nepotism-based scandals in the county. It would be best to include not only municipalities, but any governmental agencies or units, since these are often overlooked when it comes to lobbying disclosure. This disclosure is the most burdensome, but it is information that every company seeking special benefits from a government should be collecting itself to ensure that it is not caught up in a scandal. The smaller the company, the less burdensome is this requirement.]*

9. Campaign Contributions: All contributions (funds or in-kind) made or delivered in the past two years by any principal, by an owner or officer of a principal, by any lobbyist or by the lobbyist's firm, by any lobbyist firm partner or employee who engages in lobbying activities, by the spouse, domestic partner, or dependent child of any of these, or by a political action committee affiliated with a principal, lobbyist, or lobbying firm, to a candidate for city/county office, an elected official, a candidate for another office who is currently a city/county official or employee, or to a committee that provides campaign funds to such a candidate or official (including for non-campaign-related travel and other gifts) or is controlled by such a candidate or official, even if that committee was organized to

support or oppose a ballot measure or other candidates, or to an organization that independently supports such a candidate or opposes such a candidate's opponent. Also any such contribution arranged by a principal or by an agent lobbyist representing a principal, or with respect to which the lobbyist acted as an agent or intermediary. For each contribution, the following information must be provided:

(a) The amount of the contribution;

(b) The date of the contribution;

(c) The name of the contributor;

(d) The occupation of the contributor, if not the principal;

(e) The employer of the contributor; if self-employed, the contributor's business;

(f) The name of the committee or organization to which the contribution was made.

(g) The principal and/or lobbyist's role with respect to the contribution, other than contributor;

(h) A description of the ballot measure, where this is relevant.

[*It is not enough to disclose only campaign contributions made after lobbying registration, because a principal or lobbyist may then choose to make all its contributions before lobbying commences or, in many jurisdictions, during the period before the amount of lobbying meets the minimum. Even though many of these contributions may be public record, it is difficult or impossible to tie these contributions to the principal or lobbyist, not to mention to the lobbying activities.*]

10. Other Campaign-Related Activities: A full description of all other campaign-related services provided in the past two years by a principal, one or more of its officers, or a lobbyist or other agent for the principal, to a candidate or candidate-controlled committee, and any compensation promised or received.

11. Government Employment History: Any position with the city/county government held within the past three years by the lobbyist, by a member of the lobbyist's firm, by an owner, officer, or board member of the lobbyist's principal (or its parent, subsidiary, or affiliate), or by a member of the immediate family of any of the above. If there has been any such

employment, an affirmation that the registrant's lobbying activities will not violate any provision of this lobbying code or of the city/county or state's ethics codes.

12. Additional Funding: With respect to any funding received from the city/county government by the principal, directly or indirectly, within the past five years, information about the amount and nature of the funds and each office, agency, or program that provided the funding. This includes federal or state funds that are handed out by the city/county government or by an agency affiliated with it.

13. Responsibility for Disclosure: Each principal who lobbies through an agent lobbyist must state who will be charged with the responsibility of providing ongoing and quarterly disclosure reports.

14. Further Disclosure: Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

15. Affirmation Statement: A statement that the registrant has reviewed and understands the requirements of the city/county's lobbying and ethics codes, has reviewed the contents of the Registration Form, and verifies that, based on personal knowledge or on information and belief, he or she believes the information on the Registration Form is true, correct, and complete. For first-time registrants, a statement that no lobbying activities have been engaged in (if lobbying activities were engaged in, full disclosure of the activities must accompany the Registration Form).

b. **Ongoing Disclosure.** Disclosure of lobbying activities is of little value if it is not done on a timely basis, while issues, development projects, and the distribution of public funds to contractors and grantees are being planned, discussed, bid, amended, approved, and changed after approval. Sometimes things happen fast, like the lobbying effort that apparently helped kill a GMO ban by the Los Angeles council in December 2014. This effort took just days.

Or take a more typical example. On June 23, 2015, the San Jose, California council voted to allow ride-booking companies such as Uber and Lyft to pick up passengers at the San Jose airport. However, lobbyist disclosures for the quarter April 1 to June 30 did not go

online until July 15, three weeks after the vote. It was too late for the public or for officials to see the extent of the lobbying that had occurred.

The norm is disclosure on a quarterly basis, every three months. However, San Francisco and Denver require monthly reports. And in December 2015, San Jose's mayor proposed to require weekly online reporting of contacts with council members.

The best practice, however, is (1) ongoing, "real-time" public logs of lobbying activities — including contacts, gifts (if permitted), and contributions to political campaigns (if permitted) — prepared both by lobbyists and by the officials they lobby, and (2) quarterly reports of lobbying expenditures and compensation, prepared by principals with the help of the lobbyists who represent them. Monthly disclosure reports could dispense with the need to report gifts and contributions on an ongoing basis.

In deciding how frequently to require disclosure, one must first consider the goals of lobbying disclosure. This kind of disclosure is a way for the public to understand and track the dynamics of influence (and pay to play) in their community: who is seeking to influence those who manage their community, which officials are providing access to what range of lobbyists and in what ways (meetings, telephone conversations, e-mails, texts, etc.?), how often the access is being provided, on what topics, and when in relation to decision-making, campaign contributions, appointments, and employment offers, and what relationships exist that may give rise to conflicts of interest, which need to be dealt with responsibly by all parties involved. This information is of far less use if it is made available only after laws and regulations have been passed or blocked, specifications written and distributed, contracts and grants made or changed, and permits and licenses provided or rejected.

Consider other kinds of disclosure. Conflicts of interest disclosure is done as conflicts arise, especially at public meetings. The frequency of campaign finance disclosure varies, but is done at least quarterly, and sometimes online on an ongoing basis.

As for the burden of disclosure, it is fortunate that digital technology has greatly lessened this burden, and that most people are used to frequent digital communications. Ongoing disclosure of lobbying activities, especially with apps, digital databases, and fillable PDFs, is no more burdensome than keeping time sheets, which contract and in-house lobbyists do anyway. With the ease of digital communications, the burden of disclosure is minimal. And the less someone lobbies, the less the burden.

The Sunlight Foundation calls for real-time disclosure of lobbying activities and

lobbyist expenditures. For the federal government, it has drafted a Real Time Online Lobbying Transparency Act. For local governments, it has drafted a Municipal Lobbying Data Guidebook (which I found helpful in thinking through issues relating to lobbying disclosure). It notes on its website that "disclosures can be as simple as reporting a meeting with an elected official by checking-in to a location using a mobile app, just as many people already do using Foursquare or Facebook."

The best way to create such an app would be to seek out college students seeking to do an interesting and valuable project. Lobbying oversight programs could work together on the project, so that one general app could be designed, with specific apps made to work with each database. Perhaps a basic database could be part of the project, so that new lobbying oversight programs could take the database and the app off the shelf and save themselves a great deal of trouble.

In his book *The Business of America is Lobbying: How Corporations Became Politicized and Politics Became More Corporate* (Oxford University Press, 2015), Lee Drutman calls for a more complete form of ongoing disclosure (at the federal level), which would include not only disclosure of lobbying activities, but also the posting online of "any white papers, draft legislation, or other leave-behinds" that formed part of the advocacy involved. This would allow those with other interests to offer their own input and responses "in an organized and traceable way," and would also ensure that there would be timely notice of any attempts to include special language in legislation, reports, contracts, grants, or project plans. As Drutman wrote, this would "reduce the number of purely selective benefits in corporate lobbying."

Real-time disclosure consists of lobbyists and officials keeping logs of lobbying activities, preferably online. Broward County, Florida, and the cities within the county, require lobbyists to report each meeting they have with an elected official by filling out a physical Contact Log. However, this applies only to in-person meetings at city or county hall, a small percentage of lobbying communications and an even smaller percentage of lobbying activities. In addition, most of the municipalities do not make the information available online.

The best thing about logs such as this is that they don't have to be limited to people who meet the legal definition of "lobbyist." In Palm Beach County, Florida, for instance, everyone who meets with an official can be asked to sign the log. Here's the language the

county uses:

> The person shall provide his or her name, whether or not the person is a lobbyist as defined in this article, the name of each principal, if any, represented in the course of the particular contact, and the subject matter of the lobbying contact.

Thus, if someone keeps meeting with officials, but does not register as a lobbyist, that individual can be asked by the lobbying oversight office to explain why he should not register as a lobbyist.

In Orange County, Florida, input of meetings with county commissioners, the mayor, and their staff is done at "electronic sign-in kiosks" located in reception areas. You may not have Disney World in your jurisdiction, but your offices do have computers and your lobbyists do carry smartphones and tablets. Signing in electronically is not a problem.

If this were extended so that, when a meeting occurred away from city hall and when the official communicated with a lobbyist electronically, an official were required to have the lobbyist fill out an online form, or fill out a PDF and e-mail it, before the communication began or right after it ended, there would be a complete, real-time record of at least in-person lobbying communications with officials.

Orange County, Florida adds to its county hall log requirement the following:

> In the event that a lobbyist or principal engages in lobbying which is initiated outside of county offices, the lobbyist or principal shall provide the information required above to the county department or office designated by the county mayor chairman within seven calendar days of such lobbying contact.

Although not required by ordinance, Orange County has an online database that provides up-to-date information on lobbyists' meetings with officials (although not other forms of contact or lobbying activity).

The Greater Orlando Aviation Authority (in Orange County) expressly advises in its lobbying code, "In an effort to streamline the availability of lobbying information, members of the Board and employees, excluding the Mayors of the City of Orlando and Orange County, are urged to hold all Lobbying meetings with Lobbyists at the Authority offices." This is a good policy. Officials who meet with lobbyists elsewhere should be asked, as part of

their disclosure report, why they could not have held their meeting at their agency (volunteer board members who do not work near a government office have a good reason to meet elsewhere).

But better yet is to require logs to cover all lobbying communications, not just meetings in government offices. The Orlando authority does this as well, giving lobbyists seven days to file a Notice of Lobbying for any contacts made outside authority offices.

Orange County, Florida also requires the filing of what it calls a Specific Project Expenditure Report. This report is filed as part of the application process for a permit, grant, or contract. It contains all the lobbying expenditures made by the applicant and its lobbyists, contractors, and consultants. The report must be updated as more expenditures are made. The report must be filed with the board of county commissioners at least two weeks before it meets to deal with the application and, at the meeting, the applicant must verbally tell the board whether there have been any further lobbying expenditures.

It is an excellent idea to incorporate lobbying disclosure not only into the meeting agenda of local legislative bodies, but also into the agenda of other boards and commissions, and of agency and departmental meetings. The best way is to make this part of the more common request for disclosure of possible conflicts of interest when a matter arises. It is important to recognize that this form of applicant disclosure is a supplement to ongoing disclosure of lobbying activities and periodic disclosure of expenditures and compensation. See the subsection on disclosure at meetings below.

Hallandale Beach, Florida, a city in Broward County, supplements its lobbying meeting logs by requiring *officials* to disclose all lobbying activity that involves them, by filling in an online form that is reported on an ongoing basis on the city commission's website (updated every 72 hours). This online database shows that even a small city (pop. 37,000) can afford to handle lobbying logs online, where they are most easily accessible to the public. This is greatly preferable to what some other jurisdictions, such as El Paso County do: requiring officials to keep a daily log, but submit it only twice a year.

If a log is to be kept daily, it should be submitted as often as lobbying contacts are made, by making filling out and submission one process, via an online form that goes automatically into a database. If that is too expensive, fillable PDFs can be easily and frequently joined together into single, searchable PDFs for each lobbyist, principal, and matter (area ethics commissions could even cooperate in order to bring together lobbying by

principals that lobby throughout the area, often with respect to one matter, for example, a transportation project).

The most effective way to ensure timely transparency is to require both lobbyists and officials to disclose all their mutual contacts online on a real-time basis, and to have lobbyists disclose all their other lobbying activities in the same manner. Requiring both to disclose what they both are involved in provides an excellent check, and also makes both sides take responsibility for disclosing the level of access given to those seeking special benefits from the local government.

In December 2015, the San Jose council voted to change from quarterly to weekly disclosure of lobbying activities.

Among the states, New Mexico is one jurisdiction that requires disclosure within 48 hours while the state legislature is in session. New Mexico requires lobbyists and their employers to disclose, online on a real-time basis, all expenditures — including campaign contributions, gifts, events, and bundling. Many states require monthly disclosure, especially when the legislature is in session. Local legislative bodies tend to always be in session.

Online Databases. Ottawa provides ongoing lobbying information in an online database. Its lobbyist registry is more sophisticated than Hallandale's both in the information provided and in the search mechanism (here's a link to the webpage on using this registry). It is valuable to have multiple kinds of searchability.

Also see Toronto's lobbyist registry, which is part of its Open Data system. Open data laws and programs can make an important contribution to a lobbying program by allowing it to be part of a larger, more sophisticated database and program than a lobbying program could afford on its own. Also, incorporating lobbying disclosures into a larger government ethics database allows all aspects of lobbying activity, including gifts, campaign contributions, events, and bundling, to be viewed easily together.

Open, structured data (available to search through, in bulk, and downloadable), in which each lobbyist has a unique identifier, is the best way to make information publicly available, because it can not only be easily accessed and searched, but also analyzed and shared in creative ways, such as through databases and apps that make lobbying data even more accessible and easier for lobbyists and officials to provide, and that can combine or cross-reference lobbying information with procurement, zoning, grant, campaign finance,

meeting agenda/minutes, ethics disclosure, and revolving door information. In a big city, one can imagine an app that would allow people to visually watch lobbyists come and go through City Hall. This would only require that lobbyists download an app, open it when they enter City Hall, and turn on their location service.

Chicago is one place where this sort of thing (although not quite an app like that) is happening. Although Chicago requires only quarterly reports, its Electronic Lobbyist Filing System is available in sortable and downloadable formats. A project of the nonprofit Open City, called Chicago Lobbyists, has taken this data and made the information easier for the public to work with. But the information had first to be required, provided, and made available in a sortable, downloadable way by the city government.

Online filing and databases make life easier for those providing disclosure, for those seeking access to it, and for the governments providing it. There is no reason to require the time, expense, and access problems that accompany the filing of paper forms, the combination of searchable PDFs, and public records requests.

How expensive is non-online disclosure? In 2011, the National Institute on Money in State Politics, with a grant from the Sunlight Foundation, did a study of the costs and availability of non-digital state lobbying expenditure data. It found that the cost of getting 2010 lobbying data from Alabama would be $25,220 (and there would be additional personnel costs to go through all the pages of data, which would not be required where there is an online database). This is the cost each citizen or organization would have to pay, unless one of them would themselves make it available online (it still would not be a database, and the expenditure would have to be made every year). Thus, over time, the cost of one organization obtaining and reviewing the data would be less than the cost of a database. Alabama's number is a high one, due to the per page cost of supplying the data, but the figure is still several thousand dollars for states that lack an online database.

The best, least expensive approach would be for local governments, through a state municipal association, the National League of Cities, or the National Association of Counties, with foundation funding, to develop an app, which could be tied to online databases, that would allow lobbyists and officials to report each contact or meeting on their cellphones, as if it were just another social media transaction (in fact, it is the most important sort of social media transaction: making a public matter public).

Some jurisdictions, such as Lee County, Florida, that require officials to keep written

lobbying logs, but only make them public every quarter, could make life easier for everyone by having them fill out an online form or app page that goes into a database. This is easier than having to keep finding and filling out a paper log sheet. It is certainly easier for information provided online to be made accessible to the lobbying oversight office and to the public.

If lobbying logs are not to be easily accessible, on a timely basis, there would seem to be no reason to keep them other than to make it easier for officials to make quarterly reports. Making the ease of officials more important than the ease of the public creates exactly the wrong appearance and undermines the public's trust that officials want the public to know about their lobbying contacts when it matters.

Another reason for ongoing rather than quarterly disclosure is that more frequent disclosure is a better deterrent to ethical misconduct. If lobbyists, their clients, and officials know that information on their contacts, contributions, events, and fundraising will become public immediately, they will be far less likely to engage in conduct that might get them in trouble.

When lobbying activity is disclosed on an ongoing basis, it is best that it be disclosed by whoever is most likely to have engaged in the activity. At the local level, this usually means the owner or officer of a company or the CEO of an organization or association. Contract lobbyists are the exception at the local level, and employees are usually charged with lobbying only by large companies and institutions. But when a contract lobbyist is used, the lobbyist should be the one disclosing.

When disclosure is quarterly or less often, it is best, as in Philadelphia, to require principals rather than lobbyists to file disclosure reports. Since, in any event, the principal does most of the lobbying at the local level, this makes sense. When the owner or CEO is not doing the lobbying, the lobbyist (whether employed or contracted with by the principal) is just the principal's agent, and may, as an agent, provide information to the principal or fill out the disclosure form on the principal's behalf. But it is the principal's responsibility to file it and to make sure it is complete and accurate.

Philadelphia's approach is unusual primarily because the models for most local lobbying codes tend to be state and federal lobbying codes, where contract lobbyists are the norm. Since this is not the norm at the local level, when disclosure is not made on ongoing basis, disclosure by principals is the best, most appropriate approach. Even when there is

both ongoing and quarterly disclosure, it is best for principals to be responsible for quarterly disclosure.

City Ethics Model Lobbying Code §303 requires that whoever is charged by the principal with the responsibility of providing disclosure of lobbying activities, expenditures, and campaign contributions, as stated on the Registration Form, will enter, or have someone else enter, information electronically within three business days after any communication, meeting, grassroots lobbying activity, expenditure, or campaign contribution.

Section 303 also requires that all elected officials, board and commission members, and departments and agencies must log all lobbying activities that involve them and their employees, and that their logs be placed online on no more than a weekly basis. And it acknowledges that sometimes databases don't work. In that event, a filer must file a report in paper format with the lobbying oversight office.

Below is a list of the information that jurisdictions should consider requiring lobbyists to disclose on an ongoing basis. When the principal is charged with filing ongoing reports, it is useful to have a provision like this one, from the Common Cause model local lobbying ordinance:

> Each person about whose activities a registrant is required to report … shall provide a full account of such activities to the registrant at least five days before such registrant's report is due to be filed.

The following list assumes that the financials reporting period is at least three months (real-time disclosure of contacts generally does not include financial data, although it should include campaign contributions). It is best to place these minimum disclosure requirements in the lobbying code (this list appears in City Ethics Model Lobbying Code §303). When the oversight office finds statutory requirements inadequate or insufficiently clear, it can supplement them via regulation.

1. Lobbyists. The name, unique identifying number, and role of all lobbyists engaged in the lobbying activity or campaign contribution. (If any unregistered individual was involved in the activity or contribution, in anything more than a support position, provide that individual's name and have that individual register as a lobbyist within three business days.) [*If any individual or firm does not have a registration number, this is a sign that the individual or firm*

must immediately register and pay a fine for late filing, if applicable.]

2. Date and Time Spent. The date of the lobbying activity or campaign contribution. With respect to meetings, the number of contacts and the approximate time spent with each official or employee. If the activity extended over more than a day, enter the range of dates. If an activity extends more than three days, disclose the activity at least every three days.

3. Subject and Object of Lobbying. A list of the names and positions of all officials and employees, including the name of their office, agency, or board, who were lobbied; a description of the topics about which the lobbyists lobbied; information sufficient to identify the local law or resolution, contract, grant, loan, program, decision, permit, license, regulation, report, real property or building project, tax matter, rule, proceeding, board or commission determination, or other matter to which the lobbying activity related; and the outcomes sought. [*Oakland uses this language: "A brief narrative description of the position advocated by the lobbyist."*]

3. Lobbying Activities. A description of the lobbying activity, including the techniques of communication, whether direct or indirect (and, if indirect, through what processes and intermediaries, and targeted at which officials and which members of the public), research, materials provided, etc. Also, a description of any activities, and the identities, of individuals and entities hired by the lobbyist or principal to support the lobbying effort ("lobbying supporters"), which activities include research, planning, advising, monitoring, facilitating contacts, public and media relations, polling, coalition building, and legal actions, whether or not they have registered as lobbyists. Any event held or sponsored, in whole or in part, by the lobbyist or principal, must be described, including the venue and date, and a list of all officials and employees in attendance.

4. Campaign Contributions. All contributions (funds or in-kind) made or delivered by a lobbyist, the lobbyist's firm, or by any lobbyist firm partner or employee who engages in lobbying activities, by a lobbyist's principal, by an owner or officer of the principal, or by the spouse, domestic partner, or dependent child of any of these, to a candidate for city/county office, a city/county elected official, a candidate for another office who is currently a city/county official or employee, or to a committee that provides funds to such a

candidate or official (including for non-campaign-related travel and other gifts) or is controlled by such a candidate or official, even if that committee was organized to support or oppose a ballot measure or other candidates. Also any such contribution arranged by a lobbyist or by the lobbyist's principal or with respect to which the lobbyist acted as an agent or intermediary. [*Jurisdictions can go further and, like Oakland, require lobbyists to report the name of every person they solicit for a campaign contribution and the name of the candidates for whose benefit the solicitations were made. One valuable piece of information that contribution disclosure provides is how often a lobbyist makes a contribution to a particular candidate. One way for a lobbyist to ensure frequent communications with an elected official is to give many smaller contributions, so that the official will keep contacting the lobbyist to ask for more. Aggregate numbers do not show this.*] For each contribution, the following information must be provided:

a. The amount of the contribution;

b. The date of the contribution;

c. The name of the committee to which the contribution was made

d. The name of the contributor, and the contributor's relationship to the lobbyist or principal;

e. The occupation and employer of the contributor, if not the principal; if self-employed, the contributor's business;

f. A description of the ballot measure, where relevant.

5. Further Disclosure. Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

c. Quarterly Disclosure. Ongoing disclosure is limited to the disclosure of lobbying activities and campaign contributions. When there is ongoing disclosure, periodic (preferably quarterly) disclosure involves more the financial side of lobbying: compensation to lobbyists, lobbying expenditures, known as "activity expenses," and the expenses that accompany lobbying activities (usually reimbursed except where a principal or a principal's officer engages in lobbying activities). Quarterly disclosure is also a way of pulling together campaign contributions, to give a better picture of who has given them and to whom over a period of time.

In jurisdictions that allow gifts from restricted sources (which includes both principals and lobbyists), it is good to disclose these gifts at least quarterly. It can be valuable for officials who have received gifts to see a copy of lobbyist disclosure reports before they have filed their own gift disclosure forms. Philadelphia requires that, at least seven days prior to submitting their report to the ethics board, principals send each city official and employee "information that will enable the City official or employee to comply with" the applicable disclosure requirements.

Some jurisdictions provide dollar ranges rather than requiring exact dollar figures for total compensation, expenditure, and reimbursement figures (campaign-related figures are more frequently exact, as they are in campaign finance disclosures). This makes it easier on those filling out forms. However, it is important that the dollar ranges not be too large, especially at the more common, lower end. At the higher end, what comes across quickly is that the numbers are especially high. For example, for quarterly compensation figures, which are generally low, the ranges might be $0-250, 251-500, 501-1000, 1001-1500, 1501-5000, 5001-10000, with an exact figure required when the number is over $10,000. Filers should also be given the choice of providing exact figures when an amount is on the low point of the range or when they prefer to do this. The point is to make the process easier, not to make filers look like they received or paid more than they did.

Disclosure reports should be required to be made within seven days after the end of the period. It is useful to suggest that, if lobbying activities are completed for the quarter at an earlier date, information be entered at that time, so that the information is as timely as possible. Filers should be able to request an extension of time from the lobbying oversight office, but only before the seven-day period ends.

As discussed above, it is a best practice to have principals be responsible for quarterly reports, even if they are filled out by a contract lobbyist. If a jurisdiction prefers to have disclosure reports filed by each lobbyist or lobbyist firm, the language of the list below can easily be changed to reflect this difference.

Below is a list of the information that jurisdictions should consider requiring principals to disclose on a quarterly basis. The list includes information that would be disclosed on an ongoing basis, so that it might be used by jurisdictions that are unwilling to require ongoing disclosure of lobbying activities.

1. Lobbyists. A list of all individuals and firms (with their unique identifying numbers) that engaged in lobbying activities for the principal during the period, including the principal, officers, employees, and members of the principal, and contractors and subcontractors.

2. Subjects of Lobbying. A description of the subjects about which these lobbyists lobbied during the period, including the names of all officials, employees, consultants, and advisers, and of their offices, boards, and agencies, who were lobbied, the date of each lobbying activity and approximate time spent with each official (if multiple contacts occur in a short space of time, a range of dates may be disclosed, along with the total number of contacts during the period), and information sufficient to identify the local law or resolution, contract, grant, loan, subsidy, program, decision, permit, license, regulation, report, real property or building project, tax matter, rule, proceeding, board or commission determination, or other matter to which the lobbying activity related. Also, the outcomes sought.

3. Lobbying Activities. A description of the lobbyists' lobbying activities during the period, including the techniques of communication, whether direct or indirect (and, if indirect, through what processes and intermediaries), research, materials, etc. Also, a description of the activities, and the identities, of individuals and entities used by a lobbyist or principal to support the lobbying effort ("lobbying supporters"), which activities include research, planning, advising, monitoring, facilitating contacts, public and media relations, polling, coalition building, and legal actions, whether or not they are registered as lobbyists. A description of any grassroots lobbying activities during the period, including the format, the time period, and the public office holders lobbied or to be lobbied, and a description of the officials and employees, and of the members of the public, who were the target of the grassroots lobbying effort.

4. Compensation and Expenses. Compensation and reimbursement that each lobbyist, lobbyist's firm, or lobbying supporter was entitled to receive for his or her lobbying-related activities engaged in during the period (even if not to be paid until a later time), and expenses expended, received, or incurred by the lobbyist, the lobbyist's firm, or the lobbying supporter for the purpose of this lobbying. The expenses of the lobbyist, the lobbyist's firm, or the lobbying supporter related to lobbying city/county officials or

employees must be detailed as to the amount, the payee (and beneficiary, if different from the payee), and the purpose of the payment and, if over $50, must not be paid in cash and must be substantiated by a check copy or a receipt upon request. Expenses should be listed in categories as determined by the lobbying oversight office, including the categories of direct and indirect communications, reimbursements to lobbyists and to others, compensation to lobbyists and to others, and office expenses. Expenses less than $50 each may be listed in the aggregate, but must be listed under the payee's name. Expenses for the lobbyist's or lobbying supporter's personal sustenance, lodging, and travel must also be listed in the form of aggregate per diems, without the need to list the payees. If a lobbyist engages in both lobbying activities and other activities on behalf of a principal or other lobbyist, compensation for lobbying includes all amounts received from that person, if the lobbyist has structured the receipt of compensation in a way that unreasonably minimizes the value of the lobbying activities. [*Some lobbyists will insist that compensation information is "proprietary." It is not.*]

5. Activity Expenses. The date, amount, and description of any payment (except routine purchases from a commercial retailer) made during the reporting period to, or on behalf of, any official or employee, member of an official or employee's immediate family, or business entity in which the registrant knows, or should know, the official or employee has a financial interest or serves as a director, officer, or in another policy-making position, by the principal, a lobbyist, the lobbyist's firm, or by anyone acting on behalf of any of these, including but not limited to, to the extent permitted, gifts, meals, fees, salaries, and reimbursements, with the exception of campaign contributions ("activity expense"). The name, title, and agency of the official or employee, and of the payee (if different), and the name of each lobbyist and/or other individual who participated in making the payment. The date, description, invitation list (and list of officials and employees who attended), and cost of any special event to which officials or employees were invited (if all members of a body or agency were invited, the invitation list may state the name of the body or agency instead of its members). An activity expense shall be considered to be made on behalf of a principal if the principal requested or authorized the expense or if the expense was made in connection with an event at which the lobbyist attempted to influence the official on behalf of the principal. Officials and employees mentioned in disclosures of activity expenses may, within

sixty days after the disclosure is made online, file a written exception to inclusion of their name or that of a member of their immediate family or a business they are involved with. [*Jurisdictions that require only lobbyists to file quarterly reports should make it clear what they mean by making activity expenses on behalf of or that benefit a certain client or principal. When lobbyists represent multiple clients, it is not clear from the expenditure of fungible money where that money originated or on whose behalf the expenditure is being made. San Francisco has an interesting requirement: that a developer disclose any contributions of over $5,000 made to a nonprofit that lobbies with respect to the developer's project. In the alternative, such nonprofits could be considered under the rubric of "lobbying supporters." Another possibility is to require the disclosure of contributions to nonprofits from lobbyists and their clients. If this were limited only to contract lobbyists, it would be more reasonable, but it would also be useless, since contributions would then come only from principals. To broaden the disclosure requirement to principals would mean the disclosure of large numbers of contributions from contractors and developers. When a requirement for lobbyists to disclose their contributions to nonprofits was included in a draft lobbying code in Chula Vista, California, lobbyists said this would chill contributions. I don't agree. But when principals are included, it might be considered an invasion of privacy and might actually limit their contributions.*]

6. Campaign-Related Activities. A full description of all non-prohibited campaign-related services provided by the principal, one or more of its officers, or a lobbyist or other agent for the principal to a candidate or candidate-controlled committee during the reporting period, other than campaign contributions, and any compensation promised or received.

7. Background Support. The identity and activities of any individual or entity that, during the period, has made an expenditure of $1,000 or more to a lobbyist or principal or that has actively participated in the planning, supervision, or control of the lobbying activities of the principal or its lobbyists. Also, the identity of anyone who, during the past two periods, has contributed to such an entity in an amount greater than $5,000. [*One of the major reasons that nonprofits cannot be left out of lobbying disclosure is that often their lobbying activities are done on behalf of an individual or entity that has a financial interest in a matter, even though the nonprofit principal does not. Sometimes the nonprofit is an "astroturf" organization, created solely for the purpose of hiding the true principal behind an apparently grassroots lobbying effort. It is important that the existence of both background supporters and creators of fraudulent organizations be disclosed so that the*

public's and officials' views of lobbying are complete. The first part of this disclosure is required by the federal lobbying code, and the second part by New York State.].

8. Business with Officials or Employees [*if permitted*]. Any business transaction or series of business transactions during the period by the principal, one or more of its officers, or a lobbyist or other agent for the principal with any of the following individuals or entities:

a. the spouse, parent, child, or sibling of an official or employee*;

b. a business entity in which an official or employee* is an proprietor or partner; or

c. a business entity in which an official or employee* has an ownership interest of 10% or more.

The date or dates of the transaction or series of transactions, the name and title of the official(s) or employee(s) involved in the transaction or series of transactions, the nature of the transaction or series of transactions, and the nature and value of anything exchanged in the transaction or series of transactions.

9. Further Disclosure. Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

10. Affirmation Statement. A statement by the filer or by an authorized owner or officer of the filer that he or she has reviewed and understands the requirements of the lobbying and ethics codes, has reviewed the contents of the report, and verifies that, based on personal knowledge or on information and belief, he or she believes such contents to be true, correct, and complete. A similar statement by the principal (if different), which may attach a statement to the report describing the limits of its knowledge concerning the information contained in the report. If it engaged in lobbying activity during the reporting period which was not reported by a lobbyist, the principal must file its own report.

d. Disclosure at Meetings. An additional form of disclosure that may be useful is disclosure that accompanies the placement on a board's agenda of a matter that one or more parties have lobbied about. Disclosure may also be required of speakers addressing the

board. It is also useful to include such disclosure at agency and departmental meetings. A good approach is to bring up lobbying disclosure as part of the more common request for disclosure of possible conflicts of interest when a matter arises. Disclosure should not be limited to those who are paid to lobby or speak at meetings; it should include everyone who has lobbied or is speaking, or could be seen to have lobbied or be speaking, on behalf of anyone but him- or herself as a citizen, including everyone who has a special financial interest in the matter. Not only is this information valuable to the public, but it is also valuable to board members and their staff to know the origin of the opinions and testimony they hear. The only individuals this would not include are those who are members of grassroots or astroturf organizations, who are not officially representing the organization. However, even when many people speak because their interest has been sparked by a grassroots lobbying campaign, the disclosure of grassroots lobbying expenses will show the true state of lobbying in the matter.

Even when quarterly disclosure is required, a matter may come up before the lobbyist has even registered, or before the quarterly disclosure has been made. Since disclosure reports can be filed late — there is nothing to prevent principals and lobbyists treating late fees as a cost of doing business — the effective period in which lobbying is secret may be greater than the required three months. Requiring an additional disclosure to be made by any official who has been lobbied on the matter and by any party to a matter that has lobbied, especially if it is speaking at the meeting, ensures that disclosure is made before the matter has been decided, so that all participants, as well as the public at public meetings, know what lobbying activities have gone on.

This additional disclosure could be limited to situations where the matter involves a specific benefit, such as a contract, permit, grant, loan, or license, but it could also include more general issues where parties have lobbied a great deal. Here is language from San José (§12.12.800):

> Before taking any legislative or administrative action, the mayor, each member of the city council, the chair and each member of the San José redevelopment agency board of directors, 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. This section does not limit any disclosure obligations that may be required by this code or city policy.

While valuable, disclosure tied to a matter getting on a meeting agenda is not a replacement for ordinary lobbying disclosure, because lobbying is often used to keep a matter off a board's agenda and with respect to matters that never get on any public board's agenda (for example, most contracts). There would come no time to disclose this sort of lobbying if meetings were the only forum.

Also, by the time a contract or grant comes before a board, so much effort has already been invested in the bidding and selection process, that it is very late in the process for the public or its representatives to take into account whatever lobbying has been done. And lobbying that continues after a contract is approved would not be disclosed at all. In any event, the disclosure of lobbying is not intended primarily to affect the decisions of a legislative body; therefore this is not the most appropriate forum. Disclosure at meetings is only a way of ensuring the timeliness of information that may not otherwise be disclosed in a timely manner.

This sort of disclosure can be especially valuable when disclosure is made on an annual or semi-annual basis, that is, where information becomes public only after the relevant matter has been fully dealt with. But even big matters, where there is the most lobbying, may not come before a legislative body for years, or at all. The point where a matter goes onto a legislative body's agenda is not an appropriate determinant of the timeliness of disclosure.

Therefore, this is an excellent additional form of disclosure, but not a replacement for quarterly or ongoing disclosure.

e. Disclosure in Return for a Tax Deduction. In "Business Lobbying as an Informational Public Good: Can Tax Deductions for Lobbying Expenses Promote Transparency?" 13 Election Law Journal 1 (2014), Michael Halberstam and Stuart Lazar propose an interesting way to try to increase lobbying transparency at a time when lobbyists have managed to get around at least the limited federal disclosure rules. Their idea is to allow businesses to deduct, for tax purposes, any expenditure they make that "educates

lawmakers on policy issues. In other words, business lobbying can be considered to supply an informational public good only where such information is made available to all participants in the legislative process through full and timely publication. It cannot be said to supply an informational public good where it is inserted strategically into the legislative process at a time, and in such manner, that excludes others from using the information to assess the merits of proposed legislation or promote contrary interests."

In other words, Halberstam and Lazar are calling lobbyists on their insistence that they are providing a public good in the form of useful information. If the information is publicly useful, why shouldn't it be public? If it's made public in a timely manner, then they should be allowed to deduct the cost of providing the information. Both the businesses that lobby and the public would benefit from having this information made public.

Of course, it's unlikely that such a win-win situation would be instituted, but it would be an interesting experiment for a local government to do, with the carrot of property tax or fee reductions, perhaps. But such a solution would apply less to local lobbying, because less of it involves the sort of policy issues that lead lobbyists to provide information to government officials.

f. Smaller Communities. The best way to institute a lobbying oversight program in smaller communities is to do it at the county level, but include all the county's municipalities and agencies. Palm Beach County, Florida is an example of a county that has instituted such a program.

Without such a program, small towns, as well as small counties, are unlikely to set up their own lobbying oversight program, unless they are required to by state law. Yale law professor David Schleicher suggested to me that small municipalities may instead leave it to high-level officials to place their calendars online, so that there is some transparency regarding whom they meet with (assuming that they provide sufficient information about the individuals they meet and otherwise have contacts with, and about the topics they discuss). Small communities can also require the sort of disclosure at meetings discussed in section d. of this chapter, just above. Neither form of disclosure requires a formal registration and disclosure program, nor are there costs beyond a one-time IT cost for putting calendars on the municipal website.

One sort of small community that is especially unlikely to institute a lobbying

oversight program is a company town. Company towns are no longer just communities controlled by a factory that employs, and often houses, most of the town's citizens. Today, the biggest institution in a company town is more likely to be a college or a hospital (or combination of the two). Such an institution's representatives will not want to be constantly disclosing their contacts with government officials. And in many cases the officials will be employees of the institution, or married to an employee, and therefore, in a good program, would not be able to be lobbied by the institution. In such an instance, it is better to have officials handle the disclosure and to remind citizens at government meetings which officials work for the institution or have a member of their immediate family who works for it, and in what capacity. There will often be no withdrawal from participation, because that would mean the body would not be able to act. But at least there would be transparency.

g. Disclosure at the State Level. Some very important local lobbying occurs at the state level, because state legislatures and agencies make many decisions that affect local governments. Areas where this is true include education (for example, limits on and funding of charter schools), taxes (including tax breaks for local developers), and grants to local governments and agencies, which are passed on to local companies and organizations.

Therefore, a complete picture of local lobbying requires an effective lobbying oversight program at the state level. Such a program should separate out lobbying done to directly or indirectly affect local matters. For example, in 2015 one of the largest lobbying efforts in New York state involved New York City's affordable housing production program, which provides a partial tax exemption for developers of certain residential buildings. It should not take too much work to determine who spent how much and what lobbying activities were engaged in on this matter.

5. **Prohibitions and Obligations**

Although overall, the disclosure of lobbying activities is good for our democratic system, which thrives on transparency, there is a downside. When there is only disclosure, without prohibitions and obligations, a lobbying oversight program can make ethical misconduct related to lobbying not only legal, but common and respectable.

It is, therefore, important that lobbying codes also contain prohibitions, restrictions, and obligations relating to such things as gifts, campaign contributions, business transactions, and the revolving door. These prohibitions and obligations should apply not only to lobbyists, but also to their principals, that is, to those who seek special benefits from a local government. Principals and lobbyists as a whole are commonly referred to as "restricted sources," because government ethics codes restrict or prohibit these people's gifts to and other aspects of their relationships with government officials. The prohibitions and restrictions in an ethics or campaign finance code should apply whether or not restricted sources engage in lobbying activities. The ones that are included in a lobbying code focus on those who do engage in lobbying activities, and the obligations in a lobbying code relate to these activities.

An important problem regarding these prohibitions, when they are applied only to lobbyists, is that some courts have recently been finding them unconstitutional limitations on the First Amendment right to seek redress of grievances. Since these prohibitions have nothing to do with the redress of grievances, there is no reason to limit them to lobbyists. Doing so makes it appear that the target is the redress of grievances rather than the protection of the public from conflicted officials and reciprocal gift-giving. This has nothing to do with free speech, freedom of association, or the redress of grievances. It is about ensuring the independence of government officials so that they can make decisions in the best interest of their community rather than in their personal interests or in the interests of those who seek to financially benefit from their decisions.

Although I will look at prohibitions and obligations that appear in city and county lobbying codes, I will question whether each sort of prohibition or obligation actually belongs in a lobbying code. Some of them don't belong anywhere except, perhaps, in an aspirational section, because they are unenforceable. Others belong in an ethics code or

campaign finance law.

Wherever rules appear, including in a state law, it is good to include in a lobbying code every rule that applies to all or some local lobbyists. It is only fair to lobbyists to make it easy for them to see what laws they must follow and what obligations they have, without having to hire a lawyer to make sure there's a law somewhere else that they're not aware of.

a. **Deception**. From the government's point of view, the principal value of lobbying is said to be the communication of expert information. Those who have something to gain from government action or inaction often have the expertise government officials need to educate themselves about the facts and issues involved in the matter before them, especially legislation, regulation, and development and transportation projects. Lobbyists provide a service to a community by sharing their expertise and training officials.

This is why the most frequent prohibitions in lobbying codes involve deception, lies, and fraud. Lobbying has only a negative value if it involves deception, if a lobbyist is fraudulently putting forward supposed expertise in order to deceive rather than enlighten officials.

However, it is very difficult to describe and to prove deception. Therefore, this rule is more aspirational than enforceable. It is a way for a community to let lobbyists know that they are expected to be truthful with those who manage the community and make its policies. That is why I think it is best to use positive rather than negative language, as Toronto does:

> Lobbyists shall conduct with integrity and honesty all relations with public office holders, clients, employers, the public and other lobbyists.

It's interesting that Toronto extends the honesty requirement to a lobbyist's principals, the public, and other lobbyists. This is clearly an aspirational rule, and it appears in the Lobbyists' Code of Conduct section of the city's lobbying code. In fact, it is very similar to the Association of Government Relations Professionals' (the U.S. lobbyist association) Lobbyist Code of Ethics, whose first two provisions are as follows:

> A lobbyist should be truthful in communicating with public officials and with other interested persons and should seek to provide factually correct, current and accurate

information.

> If a lobbyist determines that the lobbyist has provided a public official or other interested person with factually inaccurate information of a significant, relevant, and material nature, the lobbyist should promptly provide the factually accurate information to the interested person.

The second subprovision is an important addendum to the first, because it departs from the intentional aspect of any honesty requirement and, thereby, acknowledges that even unintentionally inaccurate information is harmful and requires correction. It also gives a lobbyist a way of correcting a problem without having to admit that intention was involved. In fact, there is a third subprovision in the Lobbyist Code of Ethics that extends the requirement to correct inaccurate information to situations where there has been a change that has made the information inaccurate.

> If a material change in factual information that the lobbyist provided previously to a public official [*Note: "other interested persons" are not mentioned here*] causes the information to become inaccurate and the lobbyist knows the public official may still be relying upon the information, the lobbyist should provide accurate and updated information to the public official.

San Diego is the only jurisdiction I know of that requires lobbyists to correct misinformation, focusing on accuracy rather than deception. The City Ethics Model Lobbying Code has taken this approach as well (§305.2(b)):

> *Correcting Misinformation*. If he or she discovers that information provided to an official or employee is not materially correct, a lobbyist should provide accurate and updated information to the official or employee, specifying the nature of the misinformation.

But even San Diego has a negative deception provision, dependent on intent and almost impossible to enforce:

> Every lobbyist shall …. not deceive or attempt to deceive a City Official as to any material fact pertinent to any pending or proposed municipal decision

Los Angeles's deception provision goes one step further by including the word "fraudulently":

> No lobbyist or lobbying firm … shall … Fraudulently deceive or attempt to deceive any City official with regard to any material fact pertinent to any pending or proposed municipal legislation.

This language is legalistic, requires intent to deceive (other jurisdictions use the word "knowingly" instead of "fraudulently"), and is limited to legislation. This provision, therefore, effectively encourages lobbyists to lie about information relating to contracts, permits, grants, and regulations that are not instituted by legislative bodies. It also provides no guidance to lobbyists when they discover that they have provided misinformation unintentionally or when they discover that a colleague, or opponent, has provided misinformation. Better that lobbyists get each other to correct misinformation than that they file complaints against opponents or help colleagues hide the untruthfulness of information they have already provided.

When it comes to enforcing rather than encouraging truthfulness, First Amendment free speech concerns arise, along with issues relating to the slipperiness of truth. Who wants to deal with the distinctions between half-truths, distortions, mistakes, misspeakings, and false inferences? Who wants to get into the mind of someone who might or might not be deceiving someone else, fraudulent or otherwise? Who wants to get into the difference between intent and incompetence in phrasing or researching? Who wants to insist that truth in lobbying is more important than free speech protections, not to mention the First Amendment right to seek a redress of grievances, which every lobbyist's lawyer will raise? In addition, defending a misrepresentation leads to more misrepresentations and other forms of dishonesty. It can get really ugly. When it comes down to it, truth is too precious a thing to enforce. But it is certainly worth encouraging truth, as well as corrections.

If a truthfulness provision is to be enforceable, it must require proof of actual malice, that is, evidence that the violator acted with knowledge of the falsity of stated facts or in reckless disregard of the truth, and that, when asked to make a correction, refused. This is the standard of proof for defamation.

False appearances provisions, which deal with a different sort of deception, are

discussed below.

b. **Contingency Fees**. The second most frequent prohibition in lobbying codes is of contingency fees (43 states have laws that include this prohibition), that is, of contracts between principal and lobbyist that benefit the lobbyist based on the success of the lobbyist's endeavors, in the form of a contract won, a permit or grant obtained, legislation passed, etc. In Australia, they're called "success fees." Outside of lobbying and law, the common term for a contingency fee is payment on a "commission" basis.

When you consider the situation in which commissions are the norm — sales — it is clear that this form of compensation is not appropriate to the influence of government officials. It is one thing to place an hourly value on the work of a lobbyist; it is another to place a monetary value on stopping a piece of legislation or getting a grant. If lobbyists do not want to be accused of "buying" officials, they should not be paid on a commission basis. Contingency fees embody exactly what American society has found most objectionable about lobbying from the start.

Lobbying is supposed to be a citizen-to-official informational process (a stating of grievances, according to the Constitution), not a sales job. Lobbyists are supposed to be professionals representing principals who have information and views to share with government officials. They are not supposed to be salespeople with a personal financial interest in the outcome of their work.

In fact, in some jurisdictions, contingency fee prohibitions are not limited to lobbyists. These jurisdictions also prohibit contractors from making a contingency fee arrangement with anyone who represents them before a government, including attorneys (see the section of *Local Government Ethics Programs* on this kind of prohibition).

Courts have for a long time considered contingency fees to lobbyists as contrary to public policy, because they focus the attention of lobbyists not on informing and seeking to influence, but rather on obtaining concrete results, by any means possible, including means that are improper or corrupt, including inappropriate gifts, bribery, promises of kickbacks, and undisclosed conflicts of interest, such as representing multiple bidders for the same contract, so that the lobbyist has a higher chance of getting paid. The courts therefore saw contingency fees as "inflaming the avarice" of people whom they already felt were not acting in the public interest.

According to Zephyr Teachout's 2014 essay "The Forgotten Law of Lobbying" (which was incorporated into her 2014 book, *Corruption in America* (Harvard Univ. Press)), contingency fees were referred to as "bribes," because they encouraged bribery as the most direct way to ensure payment. This is why, Teachout states, "contingent fee arrangements for political influence were almost always void."

The argument in favor of allowing contingency fees is that, as with lawyers, they enable individuals and groups with fewer resources to obtain lobbying services. However, most cities and several states allow contingency fees for lobbyists, and it does not appear that this is benefiting those with fewer resources. The main reason is that there isn't much money in it. An individual or community group is not going to benefit in any major financial way that can be shared with a lobbyist on a commission basis. To improve access to lobbying services, a pro bono lobbying policy and/or government subsidies would be preferable to allowing contingency fee arrangements.

Some local jurisdictions expressly allow contingency fee arrangements, but require that they be disclosed. Disclosure is not an effective way to cure an arrangement that has for so long been illegal, and for good reason. Making payment dependent on governmental action encourages misconduct and leads to more pressure on government officials. Just letting officials know about the arrangement is not going to lessen the pressure.

Here is the language of Chicago's contingency fee prohibition:

> **2-156-300.** No person shall retain or employ a lobbyist for compensation contingent in whole or in part upon the approval or disapproval of any legislative or administrative matter, and no person shall accept any such employment or render any service for compensation contingent upon the approval or disapproval of any legislative or administrative matter.

But "legislative or administrative" may be seen not to apply to the decisions of boards and commissions. It is best to make it clear that contingency fee arrangements apply across the board. For example, Miami-Dade County uses this language in its lobbying code:

> "contingency fee" means a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent on or in any way contingent on the passage, defeat, or modification of: (1) an ordinance, resolution, action or decision of the County Commission; (2) any action, decision or recommendation of the County

> Manager or any County board or committee; or (3) any action, decision or recommendation of County personnel during the time period of the entire decisionmaking process regarding such action, decision or recommendation which foreseeably will be heard or reviewed by the County Commission, or a County board or committee.

Philadelphia has an exception that recognizes that sales representatives are often paid on a commission basis:

> It shall not be a violation of this Chapter for an individual who is paid on a contingent or commission basis for the sale of goods or services to contact a City official or employee regarding the purchase by the City of such goods or services, provided that such individual is contacting only those City officials or employees who have responsibility for making purchasing decisions regarding such goods or services in the normal course.

The 2011 ABA Task Force on Federal Lobbying Laws report proposed a compromise federal contingency fee prohibition limited to situations where the subject of the lobbying involved a narrow financial benefit, such as a contract, grant, permit, earmark, or tax relief. Its argument was that this is where the temptations for ethical misconduct are the greatest. As it turns out, this would apply to the great majority of local lobbying.

The most likely occasion for contingency fees at the local level would be with big contracts, grants, and development projects. Richard Briffault suggests in his paper "The Anxiety of Influence: The Evolving Regulation of Lobbying," Columbia Public Law Research Paper No. 14-367 (January 2014), that the incentive for misconduct would be greater the larger the fee, rather than the more specific the financial benefit. Since contingency fees at the local level would only be used with large expected fees, and these fees would only apply to unusually large matters, and since the same public policy issues apply no matter what the type of matter, it is best that contingency fee bans be across the board.

It should be recognized that there will be lobbyists who, due to a contingency provision in their agreement, will fail to register as a lobbyist by employing loopholes or simply not registering, especially in jurisdictions that have low fines or poor oversight bodies, making it unlikely that they will be caught.

One interesting question is whom contingency fee prohibitions are intended to

protect. In a 2014, the Massachusetts attorney general entered into a settlement agreement with a lobbyist whom, the AG alleged, had a contingency fee arrangement with a hospital. The settlement required the lobbying firm to return 27% of the lobbying fees it had been paid by the hospital. There was no fine. This implies that contingency fee prohibitions are intended only to protect the principal. In fact, a contingency fee prohibition is intended to protect the public and its representatives, and the principal only secondarily. The biggest problem a principal would have is with a lobbyist who insists she has special connections, and will make use of them only in return for a contingency fee.

It is true that some lobbyists might enter into such arrangements without letting principals know there may be legality issues involved. But this too is a secondary issue, and not at all the purpose of the prohibition. It should be assumed that a principal's attorney has consulted the lobbying code before allowing her client to enter into a lobbying agreement. If the principal did not run the contract by its attorney, it is not the role of the government to compensate it for its negligence.

The City Ethics Model Lobbying Code follows the Miami-Dade County language in its definition of "contingency fee":

> a fee, bonus, commission, or nonmonetary benefit as compensation which is dependent on or in any way contingent on any action or inaction, or on the passage, defeat, or modification of any decision or recommendation, by any official or employee* during the time period of the entire decision-making process regarding such action, decision, or recommendation.

And the Model Code has the following contingency fee prohibition language, which places the responsibility on both principal and lobbyist, and provides an exception for true sales representatives, as long as they limit their sales efforts to procurement staff:

> *Contingency Fees*. No person may retain or employ a lobbyist for compensation on a contingency fee* basis, and no person may accept any such employment or render any service on a contingency fee* basis. However, a sales employee who is paid on a commission basis for the sale of goods or services may contact an official or employee* regarding the purchase of such goods or services, provided that such sales employee is contacting only those officials or employees* who have responsibility for making purchasing decisions regarding such goods or services in

the normal course and that the contact is permitted pursuant to procurement rules.

c. **Gift Ban**. In July 2012, former Georgia state representative Roger Hines wrote an op-ed piece for the Marietta *Journal* with the title "What Does Corruptibility Have to Do with a Dollar Figure?" The op-ed considered the state's $100 limit on gifts from lobbyists. After talking about the value of lobbyists, he talked about the first time (and, apparently, the last time) he accepted sports tickets from a lobbyist:

> I didn't like the feeling I had after accepting the tickets. Not everything that's legal is right or wise to do. Every citizen in Georgia has the right to go to the Capitol and influence legislation, but most don't have the time or money to do so. Joe Voter certainly doesn't have the wherewithal to wine and dine his state representative or senator. … The gift-giving is corrupting, and the writer of this sentence, and every reader of it, is corruptible.
>
> The best route is a complete ban on lobbyist gifts. That way, a well-paid lobbyist and Joe Voter would be on equal footing. Both would be allowed to use their minds, their gift of language, their willingness to study and research an issue, and their powers of persuasion. Neither would be allowed to use their checkbooks, pricey meals, or an incessant flow of goodies to legislative offices.

Many lobbying codes supplement the ethics code's gift ban with a gift ban on lobbyists and, sometimes, their principals. After all, consistent with the most common definition of "lobbying," lobbyists and their principals do not give (and, more important, are not perceived to give) anything to public officials except for the purpose of influencing official action, which is essentially the definition of bribery. Therefore, there is no need to require evidence of influence or motive.

Sometimes a gift ban is absolute, but more commonly there is a maximum allowable gift tied to a period of up to a year. But a partial gift ban opens up a can of worms, which is why some officials feel it is much easier to have an outright ban. They can then say to a lobbyist, "No, it's illegal, I can't do that, that's off the table." When it comes to pay to play, lobbyists are in the same comfortable position when there is an absolute gift ban. Any exception makes saying "No" difficult.

It is important that a gift limit, if there is one, apply not to each individual or entity

(principal or lobbyist), but to the aggregate gifts of an entity, its employees, its owner's immediate family, and its lobbyists (registered or not). Doing this not only makes it harder for a business to influence through effectively bundling its gifts. It also makes it harder for officials to extort numerous gifts from a business's employees and lobbyists (known as "pay to play").

The reason why a lobbyist gift ban is valuable, even if there is a gift ban in the ethics code, is that most gift bans in ethics codes focus on direct gifts. They may include the word "indirectly," but this is rarely defined or emphasized. With respect to lobbyists, gifts are usually indirect, because they actually come from the principal. These indirect gifts should be treated the same as direct gifts, and be credited to the principal.

When indirect gifts are the norm, as they are with lobbyists, the indirectness needs to be emphasized and defined. Here is how San Diego's lobbying code does it (§27.4030; note the useful definition of "arranges for the making of a gift," which complements the use of a similar term in the City Ethics Model Lobbying Code's gift ban):

> (a) It is unlawful for a lobbying firm or any of its lobbyists to make a gift, act as an agent or intermediary in the making of a gift, or arrange for the making of a gift if:
>
> > (1) the gift is given to a City Official, and
> >
> > (2) the aggregate value of all gifts from the lobbying firm and its lobbyists to that City Official exceeds $10 within a calendar month …
>
> (b) For purposes of this section, an entity or individual "arranges for the making of a gift" if the entity or individual, either directly or through an agent, does any of the following:
>
> > (1) delivers a gift to the recipient;
> >
> > (2) acts as the representative of the donor, if the donor is not present at the occasion of a gift, except when accompanying the recipient to an event where the donor will be present;
> >
> > (3) invites or sends an invitation to an intended recipient regarding the occasion of a gift;
> >
> > (4) solicits responses from an intended recipient concerning his or her attendance or nonattendance at the occasion of a gift;
> >
> > (5) is designated as the representative of the donor to receive responses from

> an intended recipient concerning his or her attendance or nonattendance at the occasion of a gift; or,
>
> (6) acts as an intermediary in connection with the reimbursement of a recipient's expenses.

San Diego's lobbyist gift ban applies to any situation where a lobbyist is involved. The only situation where an involved lobbyist is not responsible for a gift is where he knows about an illegal gift someone else is making. He may do nothing. This could be dealt with by a complicity and knowledge provision, but such provisions are sadly rare (see the discussion of this provision in *Local Government Ethics Programs*).

It is questionable whether even the best lobbyist gift ban is necessary when there is an effective gift ban in the ethics code. It is better to have a gift ban that applies to everyone and to all sorts of indirect gifts, and then include that gift ban in the lobbying code, as well. This makes it clear that a gift ban is not really about lobbying, but rather about people seeking special benefits from the government ("restricted sources") making gifts to its officials.

At the local level, only a small percentage of these restricted sources are contract lobbyists. And, in fact, there are numerous other sorts of intermediary involved, such as ward bosses, party officials, fixers, bagmen, go-betweens, and power brokers, few of whom ever register as lobbyists. Limiting gift bans to registered lobbyists is unfair and causes gift-giving to go through other channels. It is better to spread the gift ban to include all indirect gifts, whoever may be involved.

In addition, a lobbyist gift ban, like San Diego's, usually applies only to gifts made directly to an official. This allows gifts to be given to an official's family members, pet charity, legal defense fund, etc. It also allows gifts to be made to PACs, party committees, and independent groups that then pay for officials to travel with lobbyists and their principals or to attend conferences where lobbyists and principals get special access to them. A well-drafted general gift ban will deal with gifts given indirectly in both senses, that is, through intermediaries and to others (as listed above), so that the gift indirectly benefits an official.

It is important to recognize how often gifts are indirectly made. It is easy to get around rules by making gifts to an official's spouse, children, siblings, parents, or pet charity. It is also easy to get around rules by making valuable gifts that have no defined economic value, such as putting in a word for an official's child at a university or private

school she is applying to, or helping a family member, or even an official, get a job or a client. Money and objects with monetary value are not the only way to benefit officials.

There is another issue that is rarely raised in the U.S., but was raised in the European Community in a June 2013 report by the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU): the invasion of privacy involved in contacting an official at home, contacting family and friends of an official, and making gifts to an official's family members in an attempt to further a reciprocal relationship and the influence this provides.

Gift bans also need to take into account the fact that individuals own companies, and that companies have parents, subsidiaries, and affiliates (and that company owners own other companies, sometimes set up solely for the purpose of making campaign contributions and other gifts) that should not be allowed to use their separate legal status to get around gift bans and limitations. All affiliated entities should be treated as one giver, even if only one part has a contract with or grant from a local government. This creates difficulties, but it is the choice of principals to structure their businesses this way.

It is important that officials, lobbyists, and principals have the same obligation to prevent gift-giving. If only one or two of them has the obligation, it is difficult for the other(s) to turn down a request, whether spoken or tacit. As lobbyist-turned-jailbird Kevin A. Ring said in an October 2014 Washington *Post* op-ed piece:

> "Every lobbyist knows that conflicted feeling when a lawmaker whose help you need asks you for something you know he or she probably should not take. You want to say 'yes' for your and your client's benefit. And, let's face it, if a gift prohibition applies only to the officeholder, a lobbyist will find it easy to do the wrong thing."

Some jurisdictions also prohibit lobbyists from offering honoraria (fees paid, usually for speeches) to government officials. Again, it is best that these be prohibited in the ethics code, and the provision reproduced in the list of lobbyist prohibitions.

Some jurisdictions merely require the disclosure by lobbyists of the gifts they make to officials (although rarely to officials' family members, business associates, pet charities, or the like, creating a huge loophole). A Washington state representative told the Bellevue *Reporter* in June 2014, "If you have this friendly, comfortably thing where you know somebody's been buying you a lot of meals, do you feel a direct obligation for a vote? No. But do you feel a personal relationship and a fondness that may be a little out of kilter? You

probably do, but you don't even know it. That's how it works." Add that to the public perception of lobbyists schmoozing with officials over cocktails and dinner, and takng them on trips on their private jets, and you have more than enough reason for a gift ban rather than mere disclosure, which only legitimizes the gift-giving, adding fuel to the public's negative perception of both government officials and those who lobby them.

Sometimes, making gifts to local officials can undermine a lobbyist's goals. This happens, for instance, when a government action or contract can be voided due to the illegal acceptance of a gift. This situation arose in Honolulu in 2014, in conjunction with the approval of a rail transit project. Multiple council members are alleged to have accepted gifts over the limit and then voted to approve the project. In Honolulu, if it turns out that they did accept illegal gifts, the vote may be voided and the principals will have to go through the process all over again. This is another good way to prevent gift-giving.

Below is the City Ethics Model Lobbying Code's gift ban provision, which is intended to complement the City Ethics Model Ethics Code's gift ban, which is reproduced in the model lobbying code:

> *Gifts*. A lobbyist or principal, or any parent, subsidiary, or affiliate of any lobbyist or principal, or any of their officers or employees, may not give, seek to give, or arrange to give anything of value to any official or employee,* or to a an official or employee's immediate family member or business, nor act as an agent or intermediary in the making of such a gift.

For other issues involving gifts, see the relevant section of *Local Government Ethics Programs*.

d. **Making Officials Personally Obligated**. Another popular prohibition is the prohibition against acting in such a way as to make officials personally obligated to them. It is, at least in part, a way of prohibiting lobbyists from making bribes. The government ethics way is to prohibit gifts from restricted sources and those acting on their behalf. By prohibiting gifts, one prohibits bribes and prevents officials from feeling personally obligated. The one concrete thing that the prohibition of making officials feel personally obligated adds is protection against non-financial gifts, such as a call to an admissions director to help get an official's child into a university. Aspirationally, such a prohibition is a

way of stating a societal problem with lobbying.

Here is New York City's language, in its section on lobbyist obligations:

> To abstain from doing any act, with the express purpose and intent of placing a member of the city council, the mayor or any officer or employee charged by law with making a decision on a matter pending or proposed, under personal obligation to him or her or to his or her employer

Although this provision appears to involve bribery, the language is vague and, therefore, does not provide clear guidance to lobbyists or to officials. And yet it is worded as clearly enforceable, rather than aspirational.

A principal goal of lobbying is to make officials feel personally obligated to them. Lobbying, like politics in general, is based on personal relationships, on give and take. Lobbyist prohibitions are supposed to limit the sort of give and take that is allowable. If a jurisdiction wants to prohibit acts, it should name them as clearly as it can, to provide better guidance and to make enforcement of the provision both more likely and more fair. It hurts a lobbying oversight program's reputation to be seen accusing officials or lobbyists of common acts that are not expressly prohibited. In addition, it can be used, and be seen, as the sort of Gotcha! provision that officials and lobbyists believe is used unfairly against them, leading them to oppose effective government ethics enforcement and reform.

Oakland's manual says that its personal obligation provision "primarily relates to arranging or making loans." If that's the case, then why not simply prohibit the making of loans, as some jurisdictions do, including Chicago, Philadelphia, and Baltimore (the City Ethics Model Lobbying Code has a special prohibition on making loans; see the discussion below)?

According to a November 2014 article in the Los Angeles *Times,* a state lobbyist was fined $5,000 under a personal obligation provision because he had done political consulting for two campaigns without demanding full payment for the work he did. The state ethics commission said that the lobbyist failed to comply with the provision because he "did not make adequate efforts to collect debts owed to him and therefore did not receive full and adequate consideration for his services." Effectively, forgiving the money owed was a gift to the state legislators. Gifts such as this can just as easily be prohibited via the definition of prohibited "gift."

As with the prohibition against deception, this catchall prohibition should be included in a lobbying code, if at all, only as a clearly aspirational, nonenforceable provision. For better catchall prohibitions, see the wrongful influence prohibitions below.

e. **Bell Ringing**. If the term "bell ringing" doesn't ring a bell for you, don't feel bad. It didn't ring a bell for me either when I first encountered the term in Baltimore's ethics code. The term refers to a crafty little ploy, whereby a lobbyist gets a friendly legislator to introduce legislation so that the lobbyist can oppose it. It is hard to imagine legislators introducing legislation simply to give a lobbyist business but, after all, lobbying (and politics in general) is all about personal, reciprocal relationships. Mutual back rubbing can take much odder forms than bell ringing. And remember that many lobbyists are former government officials, whose relationships with current officials sometimes go back decades. What's a throwaway bill between friends?

As it happens, bell-ringing provisions are one of the most popular prohibitions, implying that bell-ringing is relatively common. Here's Baltimore's provision:

> A lobbyist may not initiate or encourage the introduction of legislation for the purpose of opposing that legislation.

Los Angeles uses language that makes it more clear that lobbyists use this ploy to get work for themselves, and that getting a legislator to propose a bill, apparently with the lobbyist getting credit, can also be used as an unacceptable way to get work:

> No lobbyist may … Cause or influence the introduction of any municipal legislation for the purpose of thereafter being employed or retained to secure its passage or defeat.

Oakland has an even more expansive version of this provision, taking it beyond legislation.

> No lobbyist shall cause or influence governmental actions for the purpose of creating future business for the lobbyist.

The problem with enforcing the language in the last two forms of this prohibition is that it requires a show that (1) the government official was influenced by the lobbyist and (2) the lobbyist sought the official's action to cause him to be hired. Those are hard things to prove, and very easy for the official and lobbyist to naysay. Baltimore's language has the virtue of dispensing with the first part. There is no need to prove influence or even the creation of future business, only to show that encouraging the legislation was done to oppose the legislation.

One wonders why bell ringing isn't illegal for the legislator, as well. Just because the conduct is for the lobbyist's financial benefit, it clearly reflects the fact that the underlying reciprocal relationship also benefits the legislator. And a legislator has a fiduciary duty to the community not to introduce legislation he does not feel is in the public interest, a duty that a lobbyist lacks. Just because lobbying codes apply primarily to lobbyists and their principals does not mean that its prohibitions should apply *only* to lobbyists. In fact, some lobbying codes do place responsibility on officials to, for example, keep logs of their contacts with lobbyists. Officials should also not accept the gifts that lobbyists offer. Similarly, they should refuse a lobbyist's request to ring a bell for them.

City Ethics Model Lobbying Code's bell ringing prohibition both makes it more clear what bell ringing consists of, applies to all governmental actions (not just legislation), dispenses with the need to prove that the lobbyist influenced the official, and extends the prohibition to government officials:

> *Bell Ringing*. A lobbyist may not initiate or encourage a governmental action for the purpose of creating future business for the lobbyist, such as opposing the governmental action or being employed or retained to secure the passage or defeat of legislation. Nor may an official or employee* be complicit in such a scheme.

f. **False Appearances and Wrongful Influence**. Even more fascinating than bell ringing are the various ways lobbyists can use fraud and fiction, coercion and promises, to try to get the results they want, at least if one believes there is a basis for a number of prohibitions local legislators have placed in lobbying codes.

Here is a basic False Appearances provision from the Dallas lobbying code:

> A person who lobbies or engages another person to lobby, or any other person

> acting on behalf of such person, shall not cause any communication to be sent to a city official in the name of any fictitious person, or in the name of any real person except with the consent of such real person.

This provision implies that there are lobbyists who write letters or make calls in the name of people they do not represent and in the name of fictitious persons. This is where we can let our imaginations go. "Hello, I am calling for Local 123, and I want you to know that our union is 100% behind Bill 321. We can't wait until the next election, when our phone bank will do its magic for you." Whether or not there is a Local 123 doesn't really matter. What matters is that the caller does not represent it, whether it is real or not.

It's hard to believe that a *registered* lobbyist would pull a fraudulent stunt like that. But legislators in multiple jurisdictions must have been hoodwinked like this, and want to stop lobbyists from doing it.

Using an individual's name without his permission can be prosecuted as identity theft. But this isn't the kind of identity theft criminal laws have in mind, so it's very unlikely to be prosecuted.

Oakland adds another wrinkle to this provision to cover what is known as "astroturf" groups, the creation of grassroots groups that have no real base in the community. Its provision starts by saying that no lobbyist may "attempt to create a fictitious appearance of public support or opposition to any governmental action." This could be considered a subset of the provision of deception through false information. But here it is not information that is false, but the level of support or opposition to governmental action. Therefore, it's worth including it in the False Appearances provision.

There is another provision that belongs with this one, because it involves another sort of false appearance, the kind of false statement it is much easier to imagine a lobbyist making: that he can control or obtain a government official's vote or action. Here is the language from the Dallas lobbying code:

> A person who lobbies or engages another person to lobby, or any other person acting on behalf of such person, shall not represent, either directly or indirectly, orally or in writing, that the person can control or obtain the vote or action of any city official.

This provision goes to the essential distinction between professional lobbying and bribery. A lobbyist who takes money from a principal in order to try to influence a government official is doing nothing different from what the principal would have done if it had the necessary expertise and relationships with officials. In fact, at the local level, where local business people do have good relationships with officials, they often don't bother to hire a lobbyist. They try to influence officials themselves.

However, when a lobbyist tells a principal that he can obtain an official's vote or action, he is effectively promising a result and, therefore, taking money from the principal in return for a promise of governmental action, that is, a promise that the principal's money *will* bring about a particular governmental action. This is arguably bribery even according to the limited definition of the U.S. Supreme Court, and it is what the principal intends. It doesn't matter whether the promise is true or false, or whether the action or vote is actually affected by the lobbyist's actions. The promise turns lobbying into bribery, even if the prohibition most likely cannot be enforced, because the promise was most likely made in a private conversation (unless, of course, there is a sting operation).

Ironically, in 2014 this issue arose in Dallas County, the county that includes the city of Dallas, but does not have the city's lobbying code and program. According to an indictment, a lobbyist let it be known to contractors that she had special influence with a county commissioner. The commissioner supported the bids of the lobbyist's clients and provided them with confidential information that gave them a "strategic advantage" over other bidders. The lobbyist and the commissioners allegedly shared kickbacks, but also brought in other people, so that the web of reciprocity would be large enough to protect them. For more on this matter, see this City Ethics blog post.

If the lobbyist did make a false appearance *and* the permit were not given or the council voted against the legislation, this harms the principals, but does not exonerate them, because they knowingly paid money to *get* a specific result rather than to *attempt* to get a specific result. However, the Dallas language would let the principal off, because it was not the principal who made the representation (in fact, it's hard to imagine a principal making this sort of representation). The principal *accepted* the representation as the truth, whether or not it was. Whether true or false, accepting the representation turned the transaction into bribery, where the lobbyist rather than the official (or in addition to, in cases where some of the money is handed over to the official) got the money. The provision should place an

obligation on a principal in this situation:

> If such a representation is made to a lobbyist's principal, including by an employee, the principal must immediately report the representation to [the lobbying oversight office] and stop employing the services of whoever made the representation and of that individual's firm.

Philadelphia has two provisions that deal with other sorts of wrongful influence:

> A lobbyist or principal may not: …
>
> Influence or attempt to influence, by coercion, bribery or threat of economic sanction, a City official or employee in the discharge of the duties of office.
>
> Attempt to influence a City official or employee on legislative or administrative action by the promise of financial support or the financing of opposition to the candidacy of the City official or employee at a future election.

The conduct reflected in these provisions consists of trying to influence officials not with language and ideas, but with bribery, threats, or promises. Although these provisions are unusual, they go to the heart of one of the biggest problems that people have with lobbyists: not just that they get special access, influence and, sometimes, actual power, but that they obtain these not by seeking a redress of grievances by presenting their principals' positions to officials, but rather through underhanded methods. Provisions such as Philadelphia's sum up all the limits and prohibitions on gift-giving, campaign contributions, charitable contributions, etc., provisions that can never cover everything, and take them further to include coercion, threats, and promises. These are catchall provisions of a different nature than that at the end of subsection j below, and they are different, as well, from aspirational provisions like those discussed in section 2 and subsection a above. Although these provisions are difficult to enforce, because their language is specific, they do provide useful guidance. They are not simply Gotcha! provisions.

Philadelphia has a related provision that applies to what might happen when a lobbyist's attempt at influence fails or appears to the lobbyist to be failing. This provision prohibits any retaliation against the official:

> A lobbyist or principal may not: … Extort or otherwise unlawfully retaliate against a City official or employee by reason of the City official's or employee's position with respect to or vote on administrative or legislative action.

This is the only instance I know of a local law that prohibits retaliation *against* rather then *by* a government official. Officials in Philadelphia must have had some bad experiences with lobbyists.

Another sort of wrongful influence is seeking to influence an official through the official's employer. This sort of inappropriate indirect influence is prohibited in Arizona and Utah. It should be extended to include an official's family members, as well.

The mildest form of wrongful influence that some jurisdictions prohibit is lobbying in the legislative chamber. This is more of a conduct rule than a prohibition, and usually follows an embarrassing incident where the press catches a lobbyist coaching a legislator, or simply too many instances of lobbyists not knowing when and where to stop. There is usually no enforcement, or only enforcement by the legislative body or its ethics or conduct committee.

The City Ethics Model Lobbying Code includes all of these wrongful influence prohibitions in two provisions, and adds an official's immediate family to the prohibition on influencing an official through his employer. The first provision requires a principal (1) to report a lobbyist's representation that he can control or obtain an official's vote or action and (2) to stop employing that lobbyist's services. Here are the two model code provisions (§305.2(d) and (e)):

> *False Appearances*. No lobbyist may attempt to create a fictitious appearance of public support for or opposition to any governmental action. No lobbyist may cause any communication to be sent to an official or employee* in the name of any fictitious person, or in the name of any real person except with the consent of such real person. No lobbyist may represent, either directly or indirectly, orally or in writing, that he or she can control or obtain the vote or action of any official or employee.* If such a representation is made to a lobbyist's principal, including by an employee, the principal must immediately report the representation to the lobbying oversight office and stop employing the services of whoever made the representation and of that individual's firm.
>
> *Wrongful Influence*. A lobbyist or principal may not attempt to influence an official or

> employee* by coercion, by threat of economic sanction, through an outside employer or client of an official, through an official's spouse, domestic partner, or child, by the promise of financial support or by the threat of financing opposition to the candidacy of the official or employee.* Nor may a lobbyist or principal retaliate against an official or employee* by reason of his or her action on a matter upon which the lobbyist has lobbied.

g. **Procurement**. At the local level, procurement is one of the areas in which lobbying communications are most problematic, because competitive bidding is supposed to be objective and fair, and the relationships that lobbying depends upon involve being subjective and preferential. Therefore, some jurisdictions, especially those in Florida and California, have provisions in their lobbying codes that apply specifically to procurement.

One such provision involves ex parte communications. In Florida, these provisions are known as Cone of Silence provisions, after the glass cone that Maxwell Smart and his boss, Chief, used to use for "top-secret" conversations in the 1960s TV comedy series *Get Smart*. A cone of silence is defined as "a period of time during which there is a prohibition on communication regarding a particular Competitive Solicitation." According to Robert Meyers in 2008, the then Miami-Dade County ethics commission's executive director, the purpose of the provision is to "insulate county officials and employees from pressure that bidders and their lobbyists try to exert on decision-makers to win lucrative county contracts. … This assures the public that the county's purchasing and procurement decisions are not compromised by backroom dealings and secret negotiations. … [all communication has to be in writing and, therefore, accessible to the news media, to all government officials, to all bidders, and to the public] … it creates a level playing field — all competitors have access to the same information."

In other words, all acceptable communication must be public, equal, and above board. Lobbying, on the other hand, is mostly private, unequal, and under the table.

In Florida municipalities, the Cone of Silence provisions in lobbying codes are the same as those in the jurisdictions' ethics codes and/or procurement rules. But it is good to include them in lobbying codes, as well, so that lobbyists will have all prohibitions involving their conduct in one place.

It is valuable to have a Cone of Silence provision relate not only to communications with procurement officials, but also (1) to communications with high-level officials who may

influence these officials, and (2) to such aspects of procurement as specifications, division of contracts, timing, no-bid contracts, renewals, change orders, etc. Here is San Antonio's provision:

> A lobbyist or a lobbyist's agent is prohibited from lobbying activities with city officials, including elected officials, and employees regarding a proposed contract from the time a Request for Proposal (RFP), a Request for Qualifications (RFQ) or other solicitation has been released until the contract is posted as a City Council agenda item. If contact is required, such contact will be done in accordance with procedures incorporated into the solicitation document. Violation of this provision by respondents or their agents, including lobbyists, may lead to disqualification of the respondent's offer. There is a parallel no-contact provision for contractors and their agents.

If an ethics code's or procurement rules' Cone of Silence provision does not apply to communications with officials other than procurement officials, a provision such as this, which also includes principals, would be useful to include in a lobbying code.

The failure to include elected officials in Phoenix's provision led to some serious appearance problems in 2009, when bidders for a big airport transportation contract hired lobbying firms in which the mayor's sister worked, in which the chairs of campaign committees for the mayor and a council member worked, and in which the former firefighters union president worked (he was also a close friend of and fundraiser for the mayor).

Another problem that arose in this Phoenix situation is that the bidders insisted that, although they hired lobbyists, the lobbyists were not engaged in lobbying activities, but instead were guiding the bidders through the procurement process and introducing them to the officials and business executives they needed to meet. The appearance problems that arise from such excuses for not registering as lobbyists show how important it is for a "lobbying activities" definition to be inclusive and refer to procurement situations in the language, in comments, or in interpretations by the lobbying oversight office.

It is worth considering, as the York region of Canada did in December 2015, prohibiting personal communications with officials by bidders and their lobbyists not only in the ordinary blackout period – during the evaluation and selection process – but also before this period, when a lot of underhanded dealings can go on. Instead, bidders and their

lobbyists would be permitted to speak publicly to the entire council.

An issue once arose in Toronto regarding conflicts between the Cone of Silence provision and other parts of the lobbying code. The lobbying registrar recommended, and the council passed, an amendment to give express precedence to the Cone of Silence provision:

> In the event of a conflict or inconsistency between [the Cone of Silence provision] and any other provision of this chapter, [the Cone of Silence provision] prevails.

Here is the City Ethics Model Lobbying Code cone of silence provision (§305.2(n)):

> *Cone of Silence*. Agent and principal lobbyists, as well as lobbying supporters,* are prohibited from lobbying officials and employees* regarding a proposed contract from the time a Request for Proposal (RFP), a Request for Qualifications (RFQ), or other solicitation has been released until the contract is posted as a legislative agenda item. If contact is required, such contact will be done in accordance with procedures incorporated into the solicitation document. Violation of this provision may lead to disqualification of an offer or avoidance of a contract. In the event of a conflict or inconsistency between this provision and any other provision of this code, this provision prevails.

Another kind of procurement-related provision requires that contractors expressly certify that they and their lobbyists have and will comply with all the requirements of the lobbying code. It is also helpful for the lobbying code to require that the lobbying code be included in every bid solicitation and in contracts and subcontracts. Here is language from Los Angeles (§48.9.H):

> Any bidder for a contract … shall submit with its bid a certification, on a form prescribed by the City Ethics Commission, that the bidder acknowledges and agrees to comply with the disclosure requirements and prohibitions established in the Los Angeles Municipal Lobbying Ordinance if the bidder qualifies as a lobbying entity …. The exemptions contained in Section 48.03 of this article and Los Angeles Administrative Code Section 10.40.4 shall not apply to this subsection.
>
> Each agency shall include the Municipal Lobbying Ordinance in each invitation for bids, request for proposals, request for qualifications, or other solicitation related to

> entering into a contract with the City. The ordinance must be provided in at least 10-point font and may be provided on paper, in an electronic format, or through a link to an online version of the ordinance. The ordinance is not required to be printed in a newspaper notice of the solicitation.

There is no reason to limit this requirement to contracts. The same requirement should apply to grants, permits, and licenses, as the City Ethics Model Lobbying Code does in its Purpose and Intent section, right at the beginning of the code.

See the relevant section in *Local Government Ethics Programs* for further information about procurement communication provisions.

There are aspects of procurement lobbying that cannot be dealt with in a lobbying code, but must be dealt with in the form of procurement procedures, including guidelines, limitations, and prohibitions in procurement regulations. For example, preferred contractor lists reward those who lobby the most and the best. They institutionalize lobbying as an essential element of the procurement process. Therefore, it is better to prohibit the use of preferred contractor lists and to require broad distribution of information about RFPs et al., rather than merely requiring disclosure of lobbying related to such lists.

h. **Identification**. Someone an official believes is a concerned citizen looking to improve her community might actually be a lobbyist seeking to get a special benefit for a principal or for herself. It might seem rude to ask. It is better that a lobbyist be required to identify herself.

Therefore, it is a best practice for lobbyists to have to wear an identification badge, stating that they are a lobbyist and whom they are representing, when they visit government offices or attend affairs that include government officials. This is common practice at the state level, but less common at the local level. However, some local jurisdictions do have provisions that either require identification badges or which can easily be satisfied by wearing an identification badge. Along with the badge, each registered individual and entity should be given a unique identifying number.

Identification should not be limited to in-person encounters. It should be provided in all contacts with officials.

One reason many jurisdictions lack such a provision is that their lobbying codes focus on prohibitions rather than on obligations. Here is how Baltimore phrases the obligation as a

prohibition:

> A lobbyist may not … while engaging in lobbying activities on behalf of a person, knowingly conceal from a public servant the identity of that person.

Philadelphia also goes the prohibition route:

> A lobbyist or principal may not … While engaging in lobbying on behalf of the principal, refuse to disclose to a City official or employee, upon request, the identity of the principal.

Prohibitions such as these are not the best way to require identification. The Baltimore language is not effective because a lobbyist can fail to disclose and, when asked, can easily say he thought that the official he was speaking to knew he was a lobbyist and whom he was representing. The Philadelphia language is better, but still requires people to ask. An identification badge constitutes knowing disclosure, which is far better than the prevention of knowing concealment. Requiring disclosure is simpler and clearly places the burden on the lobbyist rather than on the official.

Toronto is one jurisdiction that makes identification an obligation. There is no explicit mention of an identification badge, although that is the easiest, most certain way to fulfill the obligation. The Toronto language takes the obligation beyond in-person meetings, so that electronic communications must include a disclosure that the speaker is a lobbyist and why the communication is being made:

> Lobbyists communicating with a public office holder shall disclose the identity of the individual, corporation, organization or other person, or the partnership, on whose behalf they are acting, as well as the reasons for the communication.

Denver expressly requires lobbyists to wear an identification badge, but not one that identifies the principal, except upon request, placing the burden on the official:

> No person engaging in lobbying shall … Lobby a covered official in any city building unless the lobbyist is wearing a clearly visible badge identifying his or her name and firm, and unless the lobbyist discloses to the covered official the person whom the

lobbyist is representing if requested by the covered official

It is best to take a positive approach and combine the Toronto and Denver language, as the City Ethics Model Lobbying Code has done. Its identification badge provision (§302.4) appears not in the Prohibitions and Obligation section, but rather in the Registration section, since this is when the badges are provided. Note that identification is required not only in all direct communications with officials, but also in grassroots lobbying efforts and in speaking at a public meeting, as well.

> Each registered agent and principal lobbyist will be given a unique identifying number and a separate identification badge for each principal represented. The number and name of the principal(s) being represented must be conspicuously used in any communication with an official or employee* and in any communication that is part of a grassroots lobbying* effort. The identification badge must be worn in a clearly visible manner whenever visiting a city/county facility, the facility of any independent agency that has any relationship with the city/county, and any event attended by multiple officials or employees.* In addition, each registrant appearing before a city/county body must complete a speaker identification card prior to the appearance and orally identify him/herself and the principal(s) before addressing the body. No official or employee* may permit an individual who would be required to register under this code to communicate with him or her regarding any official matter before being given the lobbyist's unique identifying number or, if in person, being presented with the lobbyist's identification badge.

i. **Conflicts of Interest I**. The most peculiar prohibition lobbying codes place on lobbyists is that on conflicts of interest that arise from representing multiple clients. Whereas the other prohibitions and obligations are intended to ensure transparency and honesty, and to prevent the creation of conflicts of interest on the part of government officials, all with the good of the community in mind, this one is intended to protect the personal interests of those seeking special benefits from the government from abuses by lobbyists, who have put their personal interest in fees above the interests of their clients.

The likely reason why such provisions appear in lobbying codes is that this sort of conflict of interest is central to lawyers' rules of professional conduct. Therefore, the

lawyers who sit on and advise local legislative bodies want to ensure that these conflicts of interest are prohibited for lobbyists as well (many of whom are lawyers themselves).

In fact, lobbyists have themselves recognized that preventing such conflicts and requiring withdrawal or consent when they exist is important to their professional conduct. Article IV of the Association of Government Relations Professionals' (the national lobbyists association) own (unenforced) Code of Ethics states:

> A lobbyist should not continue or undertake representations that may create conflicts of interest without the informed consent of the client or potential client involved.
>
> 4.1. A lobbyist should avoid advocating a position on an issue if the lobbyist is also representing another client on the same issue with a conflicting position.
>
> 4.2 If a lobbyist's work for one client on an issue may have a significant adverse impact on another client's interests, the lobbyist should inform and obtain consent from the other client whose interests may be affected of this fact even if the lobbyist is not representing the other client on the same issue.
>
> 4.3. A lobbyist should disclose all known conflicts to the client or prospective client and discuss and resolve the conflict issues promptly.
>
> 4.4 A lobbyist should inform the client if any other person is receiving a direct or indirect referral or consulting fee from the lobbyist due to or in connection with the client's work and the amount of such fee or payment.

These requirements are greater than those in most local lobbying codes'. Philadelphia's conflicts of interest provision is the most detailed in its requirements. It also contains a valuable exception for budget issues, except where budgetary interests are directly adverse, since there are so many different interests involved in a budget. Here is the Philadelphia conflict provision:

> (5)(a) Except as permitted by subsection (b), a registrant may not lobby on behalf of a principal on any subject matter in which the principal's interests are directly adverse to the interests of another principal currently represented by the lobbyist or previously represented by the lobbyist during the current four-year session of Council, or directly adverse to the lobbyist's own interests.

(b) A lobbyist may represent a principal in circumstances described in subsection (a) if:

(i) the lobbyist reasonably believes that the lobbyist will be able to provide competent and diligent representation to each affected principal;

(ii) the lobbyist provides written notice to each affected principal upon becoming aware of the conflict; and

(iii) each affected principal provides written informed consent waiving the conflict of interest.

(c) If a lobbyist represents a principal in violation of this Section or if multiple representation properly accepted becomes improper under this Section and the conflict is not waived, the lobbyist shall promptly withdraw from one or more representations to the extent necessary for remaining representation to not be in violation of this Section.

(d) If a lobbyist is prohibited by this Section from engaging in particular conduct, an employer of the lobbyist or a partner or other person associated with the lobbyist may not engage in the particular conduct.

(e) A principal or lobbyist required to file an expense report under this Chapter shall include in the report a statement affirming that to the best of the principal's or lobbyist's knowledge the principal or lobbyist has complied with this Section.

(f) A lobbyist and principal shall maintain the records relating to the conflict of interest set forth in subsection (b) for a four-year period beginning on the date the conflict is discovered and provide copies of the records to the Board upon request.

(6) *Multiple Principals.* Nothing in this Section shall be construed to require a lobbyist representing multiple principals who each have an interest in the budget process to comply with subsection (5)(c) unless a conflict of interest exists under subsection (5)(a).

Toronto goes one step further than Philadelphia's (5)(e) by requiring lobbyists to advise officials that they have received informed consent before engaging in lobbying activities with respect to the officials. Here is the language:

Lobbyists shall advise public office holders that they have informed their clients of any actual, potential or apparent conflict of interest and obtained the informed

> consent of each client concerned before proceeding or continuing with the undertaking.

New York City's minimal prohibition provides less guidance: "Not to represent or solicit representation of an interest adverse to such person's employer nor to represent employers whose interests are known to such person to be adverse."

The City Ethics Model Lobbying Code does not include a conflicts of interest rule that relates solely to conflicts among the representation of non-governmental principals. I believe that these conflicts are for the lobbying profession to deal with, just as lawyers and other professionals deal with these conflicts in their professional rules. The more professional lobbyists are, the less likely they are to engage in ethical misconduct that harms the community. It is good to encourage them to have such rules, but it is not the role of a lobbying oversight program to protect principals.

A related and, for a lobbying code, more appropriate issue to deal with involves a lobbyist who represents a government or agency with respect to higher levels of government, and who also represents principals before that government or agency. For example, according to an October 2014 article in the Tampa Bay *Times*, the Pasco County Commission's lobbyist guided a discussion of the county's priorities before the state legislature, and then the commission voted on an ordinance that would benefit one of the same lobbyist's principals, an ambulance company. One commissioner who voted for the ordinance said he didn't see a problem with this, because "I believe in his character and his integrity." Another commissioner, who voted against the ordinance, said, "It just doesn't look right and if that's the way it's going to be, he won't get my vote next time." This is not something each commissioner should decide for himself. This sort of conflict (especially when, as here, it is combined with campaign contributions) should be prohibited, even if other lobbyist conflicts are not.

The best way to protect the community from this conflict situation is by prohibiting lobbyists from getting into it. Here is the language from the Los Angeles County Metropolitan Transit Authority that deals with this conflict situation:

> Any person or entity that receives compensation pursuant to a contract or subcontract to lobby on behalf of, or otherwise represent the MTA, may not lobby the MTA on behalf of any person or entity.

The City Ethics Model Lobbying Code follows this language in §305.2(k):

> *City/County Lobbyists*. Any individual or entity that receives compensation pursuant to a contract or subcontract to lobby on behalf of, or otherwise represent (including as an attorney), the city/county may not lobby the city/county.

Much more rare is a provision that deals with the use of confidential information, not by officials to help others (which is a common ethics code provision), but rather by lobbyists to help those other than their principals. Here is Toronto's provision:

> Lobbyists shall not divulge confidential information unless they have obtained the informed consent of their client, employer or organization, or disclosure is required by law.
>
> Lobbyists shall not use any confidential or other insider information obtained in the course of their lobbying activities to the disadvantage of their client, employer or organization.

This too is wrongly written to protect principals, not the public. It is important that a confidential information provision prevent the misuse of government information by lobbyists working closely with officials, for any purpose, not only for purposes harmful to the principal. Below is the City Ethics Model Lobbying Code provision on confidential information (§305.2(j)), which is similar to the model ethics code's confidential information provision for government officials. Since lobbyists seek and obtain special access to information that is not public, they take on the obligations of a government official:

> *Confidential Information*. A lobbyist may not use confidential information, obtained formally or informally as part of his or her lobbying activities, for his or her own benefit or for the benefit of any other person or entity, or make such information available in a manner where it would be reasonably foreseeable that a person or entity would benefit from it.

j. **Conflicts of Interest II**. Some jurisdictions have in their lobbying codes other sorts of

conflicts of interest provisions that apply specially to lobbyists. It is hard to believe, but in some jurisdictions it is legal for a government official to work for a lobbying firm, and even to lobby on matters before the official's own government or agency. Such basic conflicts should be expressly prohibited in a lobbying code, even if it appears that the ethics code's conflicts of interest provision would apply to such situations. The prohibition should be extended to include an official's immediate family, siblings, and business associates. In 2015, Canada extended its prohibition to include those who "share a close bond of friendship, a feeling of affection, or a special kinship that extends beyond simple association." This includes those who for whom a lobbyist has undertaken political activities, for example, by working on a political campaign.

The prohibition should also be extended to officials who work for or with agencies that, although legally independent or part of the state government, are fully or largely funded by the local government that the official wants to lobby. For example, in Anne Arundel County, Delaware in 2015, it became an issue that an assistant state's attorney for the county could lobby the county because the state's attorney is a state office, even though it is funded by the county.

It is one thing for an elected official to be a businessperson who withdraws from participation in any matter involving his business. Elected officials work outside of government, and some of this work is inevitably going to give rise to a conflict. Such conflicts need only be dealt with responsibly. Any prohibition applies only to the creation of new conflict situations.

It's another thing to be a lobbyist for businesses and others seeking special benefits from one's government, because this is an ongoing conflict that the official chose to create and which continues to give rise to new conflicts. Withdrawal from participation is not a sufficient cure.

Lobbying Down. The most basic conflict of interest is when a government official acts for the interests of her employer or principal, that is, when a government official acts as a lobbyist with respect to matters before her government or a government or other entity over which her government has power, that is, "lobbying down." State and county governments have power over the municipalities within them, as well as over the independent agencies that receive funds from the state or county or have board members appointed by state officials or by the county commission. Katy Sorenson, CEO of the Good

Government Initiative at the University of Miami, has said that "because [state] legislators are in a position to approve or deny money and laws sought by counties and cities, their lobbying carries a much bigger threat than local officials lobbying in Tallahassee, because the local officials don't have power to help or hurt the legislators they lobby. I remember a very uncomfortable situation when a sitting senator came to lobby on behalf of a private client, when I was a county commissioner. And at the time the county had some interests in a committee he was heading … [I]n the back of my mind I was thinking, if I vote against this guy and his private client, is it going to be held against us?"

Broward County, Florida has a provision that prohibits county commissioners from lobbying down to governments within the county. It contains the language, "This form of employment and activity is deemed to be in substantial conflict with the proper discharge of a commissioner's duties in the public interest." One Broward County town, Lauderhill, prohibits any higher-level representative of its community (county commissioner, state representative, congressional representative) from lobbying town officials. Its mayor said in a comment to a blog post that when this had happened in the past, "[I]t put an enormous pressure on us to satisfy someone in a position that can make a decision that impacts us in the future. We didn't want to upset them, for which they could hold a grudge."

The City Ethics Model Lobbying Code has a conflict of interest provision in its Prohibitions and Obligations section (§305.2(l)) that includes both of these prohibitions:

> No county legislator or his or her staff member may lobby any local government entity within the county. Nor may any official or employee* allow a higher-level representative of all or part of the city/county's residents to lobby him or her.

Lobbying Up. But there are problems as well with government officials lobbying up, that is, lobbying at a higher level of government. Two different problem arise when a city official lobbies a county official or a local official lobbies a state official. One, it is not clear to the official being lobbied whether the lobbyist is acting as an official, for her community, or on behalf of a principal or for her own business's private interests. Two, both officials involved in such lobbying sit together on political party and, sometimes, municipal association committees and, therefore, develop personal and professional relationships, even alliances, based solely on the offices these individuals hold. These relationships should not be taken advantage of for the benefit of private clients. Therefore, it is fine for a local official to

lobby up for her government, but not for anyone else.

Matters Involving a Principal. Another sort of conflict arises when a government official who lobbies for (or whose firm lobbies for) a principal at any level of government encounters a matter involving that principal. For example, according to an article in the New York *Times*, in 2011 a village trustee in Rosemont, Illinois voted to award a contract to a client of his lobbying firm. This was perfectly legal in Illinois and Cook County, as long as the representation was disclosed. But disclosure, while appropriate to lobbying, does not cure a conflict of interest. This should be prohibited by an ethics code conflict of interest provision.

One would think that no high-level official could get away with acting as a lobbyist with respect to her own government, but this happens more than one would think, because many people argue that they are not acting as a "lobbyist." For example, it became an issue in Honolulu when the council chair was also head of the local chamber of commerce. These roles may seem to be similar, since a chamber of commerce is such an important civic institution. But the head of a chamber is not a neutral figure, but rather acts as a lobbyist for particular interests in the community. These roles conflict.

Prohibitions. There are two ways of dealing with this conflict: (1) prohibiting government officials from lobbying at any level or (2) requiring that they withdraw from any matter involving anyone represented by the official or the official's firm. The latter may deal with conflicts like the one in Illinois, but does not deal with the problems that arise from officials misusing the power of their position to help their clients when they lobby down, and officials' uncertainty about who is being represented when an official lobbies up.

The easiest thing would be simply to prohibit government officials from lobbying. This is one of the recommendations of a 2009 report published by the Organisation for Economic Co-operation and Development (OECD), entitled "Self-Regulation and Regulation of the Lobbying Profession." But since there is general agreement that lobbying is protected by the First Amendment, it is not possible to have a blanket prohibition. There has to be a good reason for each kind of prohibition.

The City Ethics Model Lobbying Code prohibits local legislators and their staff lobbying down (see above). Other county officials have less power over municipalities.

In its Revolving Door provision (§305.2(m)), the Model Code deals with the situation where a lobbyist takes a job with the city/county government. It sets out exactly

what such a lobbyist must do with respect to a cessation of lobbying activities with respect to that government.

> If a lobbyist is hired by or takes a position with the city/county, the lobbyist must immediately cease engaging in lobbying activities, terminate his or her registration, and within 30 days file any remaining disclosure reports. The lobbyist's firm may no longer represent principals before the former lobbyist's board or agency or, if the lobbyist serves on the local legislative body or is the mayor or other CEO, the government. The lobbying oversight office may waive this rule upon a determination that there is no conflict of interest and that the lobbyist's position cannot be used to influence officials or employees with respect to the areas or topics for which he or she is lobbying.

Lobbying by Development Agencies. Another intra-governmental lobbying situation that can be problematic is that where a local public-private economic development agency effectively represents a business seeking a grant or subsidy. The agency can generally represent its client not only without registering as a lobbyist, but even without disclosing to the public whom it is speaking for. This allows grants and subsidies to be given to businesses that no one knew were seeking these benefits, thereby preventing public input. When this is allowed, as it is, for example, in Florida, it makes a mockery of lobbying oversight programs and undermines their goals of transparency and the public participation this allows.

Lobbying by Family Members. Another basic conflict involves the lobbying of officials by their family members, as well as the lobbying of officials by the immediate family members of high-level officials, especially of a mayor, county executive, or legislator. It's a great way for such officials' family members to get work, because they, more than anyone, are seen as having special access at least to one high-level official, and most likely to that official's friends, allies, appointees, and subordinates, as well. This is why, for example, the younger sibling of a Chicago alderman not only got elected to the state legislature, but also set up a lobbying firm to lobby the city (while his partner lobbied the state). In his excellent book, *Getting the Government America Deserves: How Ethics Reform Can Make a Difference* (Oxford U.P., 2009), University of Minnesota law professor Richard Painter recommends the prohibition of lobbying by high-level officials' family members.

In 2014, Utah state representative Ken Ivory defended his wife's lobbying him on the grounds that she too is a constituent of his. But a spouse is a constituent who has a special

relationship with a government official, she has special access to and can make it uncomfortable for her spouse's colleagues when she lobbies them, and she can use her spouse's office to help her get clients or, as in the Utah situation, create her own lobbying organization, which can raise money based on legislation sponsored by her spouse.

Broward County, Florida is one jurisdiction that has a provision relating to this problem:

> A spouse or registered domestic partner, immediate family members and office staff of a County Commissioner shall not engage in lobbying activities before the Board of County Commissioners or before other local governmental entities within Broward County…

The City Ethics Model Lobbying Code's conflicts of interest provision (§305.2(l)) not only prohibits government officials, employees, and consultants from lobbying their own government, but also prohibits intra-family lobbying, extends this prohibition to intra-business lobbying, and places the responsibility on both the official and the lobbyist:

> No city/county official, employee, or consultant, or any high-level official's spouse, domestic partner, child, or sibling, may lobby the city/county or any affiliated independent agency. No one may lobby a relative (immediate family, parent or grandparent, child or grandchild, including the equivalent step-family members), a relative of a member of his or her lobbying firm, a relative of the principal or an owner, partner, or officer of his or her principal, or a business associate. No city/county official may allow a relative or business associate to lobby him or her.

Lobbying by Political Party Officers. Yet another kind of conflict of interest arises when a political party officer lobbies. Party officers determine the support the party gives to local candidates when they're running locally and when they're looking to run for higher office. It is hard for an elected official, or an official considering a run for elected office, to get on the bad side of party officers. This gives party officers a great deal of clout, solely from their position. It may not be a government position, but it involves conflicts of interest in the public sphere.

West Virginia state representative Justin Marcum said in January 2015, with respect to a bill to create such a prohibition at the state level, "It's vital that the people have that

trust in the legislators to show, yeah we're going to stand up to our party or any other party and speak for integrity. If you want to be ethically sound, step aside as a party chair or as a lobbyist. Pick your fruit, you can't have both." Both major parties' state chairs were lobbyists at the time.

Therefore, it is worth considering a prohibition of at least local party officers lobbying local officials, as City Ethics Model Lobbying Code does in §305.2(l):

> …no local party officer *[county for county officials, and county or city for city officials]* may lobby a local official.

But note that there is a special exception (§302.3(k)) for political party officers communicating with elected officials when it "does not relate to a matter that may specially benefit the party officer or a family member, business associate, or client of the party officer."

Endorsements. Another sort of conflict provision that belongs in a lobbying code is one that prohibits lobbyists from asking government officials for endorsements of their work to others, and officials providing such an endorsement. Many ethics codes have a provision that does not allow officials to endorse any products or services (see City Ethics Model Ethics Code §100.15). But this prohibition involves public endorsements. With lobbyists, the endorsements are usually private and to the last people officials should be advising: restricted sources.

It is inappropriate for a council member to recommend a lobbyist to the officer of a company seeking to influence the government, but it is even more inappropriate for a lobbyist to ask a council member for such a recommendation or for an endorsement that the lobbyist could use more generally (e.g., a letter of recommendation) to get himself business.

The same is true with respect to officials recommending clients. They should not be involved in helping lobbyists in any manner. Hence the City Ethics Model Lobbying Code endorsements prohibition (§305.2(o)):

> *Endorsements*. No lobbyist may ask an official or employee* for an endorsement of his or her work to others, nor may any official or employee* provide such an endorsement. Nor may an official or employee* suggest a possible client to a lobbyist.

Loans. Some jurisdictions, including Chicago, Philadelphia, and Baltimore, expressly prohibit loans between lobbyists and government officials. Loans are a form of gift that some officials will, if not expressly prohibited, disingenuously argue is not a gift. Loans create an ongoing obligation to the lender. If the terms are good, then a loan is a gift by anyone's standards. If the terms are fair market, then there is still the issue of getting a fair market loan (not everyone can, especially when credit is tight), the possibility of the terms being changed if the official acts in the lender's interest, and what happens if the official doesn't make payments.

Loans between officials and restricted sources should be prohibited by a gift provision, but it is useful to emphasize in a lobbying code that loans are especially inappropriate between officials and lobbyists or their principals. The City Ethics Model Lobbying Code has the following loan prohibition provision (§305.2(q)):

> *Loans*. No official or employee,* member of his or her immediate family, or associated business may request or make a loan from or to a lobbyist or principal, or any officer, partner, owner, or employee of a lobbying firm or principal.

Charitable Fundraising. Baltimore has a very useful lobbyist conflict provision that involves the always problematic area of charitable fundraising, especially where pet charities are involved. The following provision from the City Ethics Model Lobbying Code (§305.2(r)) extends the provision to include principals and changes the language a bit:

> *Charitable Fundraising*. No lobbyist or principal may engage in any charitable fundraising activity at the request of an official or employee.* "Fundraising activity" includes the solicitation, transmission, and transmission of a solicitation of a charitable contribution.

Such a provision not only prevents lobbyists from using charitable fundraising as a way to deepen an official's feeling of obligation. It also prevents officials from using their pet charities in pay-to-play schemes.

Another way to deal with charitable fundraising from lobbyists and their principals is to require disclosure of lobbyists' charitable contributions. The problem is that, if this were

limited only to contract lobbyists, it would be reasonable, but it would also be useless, since contributions would then come only from principals. To broaden the disclosure requirement to principals would mean the disclosure of large numbers of contributions from contractors and developers. When a requirement for lobbyists to disclose their charitable contributions was included in a draft lobbying code in Chula Vista, California, lobbyists said this would chill contributions. I don't agree. But when principals are included, it might be considered an invasion of privacy and might actually limit their charitable contributions.

Converted Campaign Contributions. Another way to prevent pay to play, as well as illegal contributions, is, as Philadelphia does, to prohibit lobbyists from receiving economic consideration (including a lobbying fee) based on an agreement, written or oral, that any part of the economic consideration will be converted into a campaign contribution. The City Ethics Model Lobbying Code has a provision to this effect, §305.2(h):

> *Pay to Play*. A lobbyist may not charge a fee or receive economic consideration based on a contract, either written or oral, that any part of the fee or economic consideration will be converted into a contribution to a candidate for any public office or to any political committee.

Complicity, A complicity provision — making complicity with an ethics violation itself an ethics violation — is a necessary part of an ethics code. Such a provision should appear in a lobbying code, as well, either copied from the ethics code or made to apply specially to lobbyists. Here is Toronto's language:

> Lobbyists shall not place public office holders in a conflict of interest or in breach of the public office holders' codes of conduct or standards of behaviour.
>
> Lobbyists shall not propose or undertake any action that would bestow an improper benefit or constitute an improper influence on a public office holder.

This language provides too little guidance. Tampa has better language, which makes it a lobbying violation when someone who "aids, abets, counsels, hires, or otherwise procures [a] violation to be committed." Philadelphia uses prohibition language, prohibiting a lobbyist from "knowingly counsel[ing] a person to violate this Chapter or any other provision of this Code or of any Federal or State statute."

The sixth of lobbyist Nicholas W. Allard's "Seven Deadly Virtues of Lobbying" (from an essay by that name, *Election Law Journal* (2014)) is that lobbyists "makes sure others comply [with the rules]." Not only does he feel that lobbyists should not be complicit in others' ethical misconduct, but also that they have a positive obligation to make sure others comply or, if they do not, report them to the lobbying oversight office.

The Code of Ethics of the Association of Government Relations Professionals, the national lobbying group, does not go this far. It only requires that lobbyists do not "cause" others to violate rules. However, it would certainly go a long way to show the public that lobbyists, due to their role as a conduit for communication between a government and its citizens, especially considering how many are former government officials and current attorneys, have positive obligations to protect the public from ethical misconduct about which they have knowledge.

The City Ethics Model Lobbying Code reproduces the Model Ethics Code provision on complicity:

> Complicity with Others' Violations. No one may, directly or indirectly, induce, encourage, or aid anyone to violate any provision of this code. One who has knowledge of another's possible violation is encouraged to report it to the appropriate authority.

Campaign Officers and Consultants. Philadelphia has a provision that prohibits lobbyists from serving as officers of campaign committees for city office candidates or for PACs controlled by such candidates. Such service is another way that lobbyists both deepen an official's feeling of obligation to them and create a close personal and professional relationship that will not only help their clients, but also make it easier for them to get clients, because they are seen to have this special relationship with high-level officials. In other words, this service creates a conflict of interest.

The same sort of relationship, and conflict, can be created between a candidate and a campaign consultant. Not only are these consultants vital to a campaign, but they can also make undisclosed contributions on behalf of their clients by accepting a lower hourly rate, and letting it be known that clients are making up the difference. They can get special access and favoritism for their clients if the candidate wins. It looks bad when, as occurred in Portland, Oregon in 2015, a political consultant for the mayor and a city commissioner

represented a client in a matter, and both the mayor and the city commissioner changed their minds on this matter. It is irrelevant, as the mayor said, that the consultant "has not been compensated by me or my campaign committee since I have been mayor." The timing of compensation, or even the existence of compensation, is irrelevant to the other side of the matter, and to the public. What they see is preferential treatment being given to a former political consultant.

This important relationship can also lead to the sharing of confidential information that is valuable to the campaign consultant's clients. In short, it is not good to allow anyone to wear both these hats. Here is language from San Francisco's lobbying code, which prevents campaign consultants from lobbying those officials they have consulted to:

> No campaign consultant, individual who has an ownership interest in the campaign consultant, or an employee of the campaign consultant shall communicate with any officer of the City and County who is a current or former client of the campaign consultant on behalf of another person or entity (other than the City and County) in exchange for economic consideration for the purpose of influencing local legislative or administrative action.

A situation involving a campaign consultant led to an ethics complaint in San Francisco in October 2014. The complaint alleged that, while a firm was organizing AirBnB customers to contact city supervisors (council members) in favor of legislation that would benefit AirBnB, a member of the firm was a consultant on one supervisor's campaign. While insisting it was not lobbying for AirBnB, the firm says that it created a firewall between the consultant and the ten-person firm's employees working on the AirBnB matter. But there is no way for anyone to know whether this firewall was actually in place, that is, whether the consultant discussed AirBnB with the supervisor. In any event, it is hard for the public to believe that the supervisor was not influenced on the issue by knowing that his consultant's firm was working with AirBnB.

An alternative is to require that an official must withdraw from any matter that involves a former campaign committee officer or consultant.

If there is no prohibition, officials still have a choice. They can say to a lobbyist-consultant, "I'd like you to be my campaign consultant, but if you accept the job, you can't lobby me for at least a couple of years." Or they can choose not to hire any local lobbyist to

consult to them.

Lobbyists have an obligation here, as well. Although they have no fiduciary duty to the public, as officials do, they do have a special duty to their principals. And their principals do not want their names associated with scandals that arise from conflict situations. Principals want special access based on a special relationship, but not a front page article about that special access based on wearing two hats with respect to one high-level official such as, for example, the speaker of the New York City council in 2013-2014 (see my blog post on it). Wearing two hats, although lucrative for the lobbyist in the short run, may be harmful to the lobbyist in the long run, because it will cause her other clients to question her judgment, it will cause other officials to steer clear of her, and it will cause regulators to pay more attention to everything she does, as if she were driving a bright red Corvette down the government ethics highway.

Below is City Ethics Model Lobbying Code provision, §305.2(g), which prohibits lobbyists and officers or employees of principals from serving as campaign committee officers, and also prohibits campaign consultants from lobbying those they have consulted to.

> *Political Activity*. Neither a lobbyist nor an officer or employee of a principal may serve as a treasurer or other officer for the political committee or political action committee of any candidate seeking a city/county elected office or of any candidate for another elected office who is a city/county official or employee.* City/county officials may not speak at political fundraising events sponsored in whole or in part by lobbyists or other restricted sources. No campaign consultant or employee of a campaign consultant may lobby any official or employee who is a current or former client of the campaign consultant or whose superior is a current or former client of the campaign consultant. "Former" in this provision means within the past two election cycles.

Lobbyists on Government Boards. The Los Angeles Unified School District has an excellent provision that should be in every lobbying code. It prevents lobbyists from sitting on government boards:

> A Lobbying Organization, Lobbying Representative(s) or any other agent(s) acting on their behalf are prohibited from … Serving on an LAUSD board or commission while acting as a Lobbying Representative …

Keeping lobbyists off of boards and commissions is sometimes controversial. Restricted sources want a seat at the table when issues relating to their interests are being discussed, whether or not the board has authority or is primarily advisory in nature. In fact, sitting on an advisory committee is an important lobbying activity. As Anthony Nownes wrote in his book *Total Lobbying: What Lobbyists Want (and How They Try to Get It)* (Cambridge University Press, 2006), "Because advisory committees have the ear of agency personnel, lobbyists value advisory committee assignments."

Even where a board is only advisory, its recommendations are usually accepted and, even when they are not accepted wholesale, they have a great deal of authority. Having lobbyists — contract, in-house, or principal — sit on zoning boards or on boards involved in the contract or grant approval processes, needs to be recognized as a form of preferential treatment given to favored lobbyists, not as a way of getting a variety of views.

After all, lobbyists will make their recommendations whether or not they sit on an advisory board and whether or not there even is an advisory board. These views will be communicated to agency personnel and local legislators. An advisory board consisting primarily of lobbyists is not about obtaining views, but rather about making certain lobbyists' recommendations appear official, so that it is easier for government officials to accept them, even when they are controversial. Lobbyists should not even communicate with these boards, except in the form of public testimony. If lobbyists want to make joint recommendations to an agency or body, they can either form a coalition or set up a board on their own, without any need for government involvement.

Officials usually argue that expertise is needed to help them make the right decisions for the community. But those who have both expertise and a current financial interest in decisions do not have to actually sit on boards and commissions. Boards and commissions need to have access to those with expertise, of course, but this can be supplied via written and oral testimony from experts and interested parties, and then members of the community and government employees and attorneys can discuss the views and evidence that are provided. Lobbyists can also disagree publicly with advisory board recommendations and continue to lobby privately.

Sitting on a board is never necessary. There are other individuals with expertise who are not involved in current projects, who are retired or work elsewhere. But the most

valuable expertise for a board member to have is the ability to listen, learn and, independently of special interests, responsibly make recommendations and decisions. Someone who knows what he wants and who will be benefited or harmed, directly or indirectly, by recommendations and decisions, is much less likely to listen.

The best argument in favor of allowing lobbyists to sit on boards is that, when they are prohibited from doing so, they are more likely not to register. This is what happened when the Obama administration prohibited lobbyists from sitting on boards. But this can be prevented by using a broader definition of lobbying, one that does not contain the loopholes federal lobbyists use to say that they are merely consulting, practicing law, or engaging in public relations efforts. Definitions such as those in the City Ethics Model Lobbying Code will do this.

In fact, lobbyists should not be prohibited from sitting on boards because they are lobbyists, but rather because they are restricted sources. That is, any such prohibition should include principals as well as lobbyists. As co-author of the American Bar Association's *Lobbying Manual* Thomas M. Susman wrote to the District of Columbia's ethics board on this topic, "What is undesirable is anyone who serves on a commission or board that has a financial interest in any industry or entity subject to regulation by that board." In other words, this is a conflict of interest issue.

At the local level, principal and lobbyist are more likely to be the same person, or to work in the same company, so there is even less reason to differentiate between the two in this context. As Susman suggested, the prohibition should only apply to boards or areas where the lobbyist lobbies or the principal has a financial interest. A developer should be permitted to sit on an arts commission, and a procurement lobbyist should be permitted to sit on a planning commission. However, even where there is not a financial interest, for example, when an environmental organization director wants to sit on a conservation board, there is still, as Susman says, "an appearance problem that would cause hesitation on the appointing authority as a practical matter."

An August 2014 decision of the federal Office of Management and Budget (OMB) is erroneous and should not be followed at the local level. The decision was to allow lobbyists to sit on advisory boards in their representative capacity (as employees for companies), but not in their individual capacity (as individuals who happen to be lobbyists). If anything, it should be the other way around. Someone who happens to be a registered lobbyist, but is

not representing anyone in matters relevant to an advisory board, is not conflicted and, therefore, should be allowed to sit on the advisory board. It is only when a lobbyist is representing someone who could benefit from the board's recommendations that she should withdraw (or be asked to withdraw) from participation or, if the matters about which she is conflicted form a significant part of the advisory board's work, not sit on the board at all.

The OMB decision was a response to a federal appellate court decision in *Autor v. Pritzker*, 740 F. 3d 176 (D.C. Circ. 2014), which treated the issue not as a conflict of interest issue, but rather as a constitutional government benefit issue (the benefit is the opportunity of sitting on an advisory board). If this decision stands and gets support from other circuits, the best solution is for governments to end the practice of having official advisory boards. Instead, officials can hold open meetings, at which various interests present their cases publicly. Or unofficial advisory boards could be formed independently by those debating an issue or project, without government involvement. Since possible members would be able to insist on balance or, at least, on separate recommendations (or dueling boards), and the boards' recommendations would be less likely to be rubber-stamped by officials who had selected the board members in the first place, there would be fewer real or apparent government ethics problems with such boards.

If no such boards were created and those without a financial interest in a matter were not as well organized and able to pay for lobbyists, officials could take initiative by inviting their input. If this were the only result of the decision in this case, it would actually be helpful. But this decision could lead to problems, even for those jurisdictions that do not prohibit lobbyists and their principals from sitting on advisory boards. Will officials feel they have to invite lobbyists to meetings even if they prefer to speak to their principals? Will officials feel that they can't turn down requests from lobbyists to meet with them?

Below is the City Ethics Model Lobbying Code prohibition (§305.2(p)) relating to lobbyists and principals serving on boards in any area related to their interests:

> *Service on Boards*. No lobbyist or principal (including owners, partners, officers, board members, and employees) may serve on a city/county board or commission, including advisory boards, in any area related to a principal's financial interests, business, or assets.

Use of City Equipment. The conflict provisions in a lobbying code that I have found the

most surprising involve lobbyists' misuse of city supplies and copying equipment, and entering or using an official's office, phone, or parking space without explicit permission. These Denver provisions imply that there is a problem with lobbyists not only wandering city hall trying to buttonhole officials, but also walking into and using their offices and office equipment, and even their parking spaces. It would be inappropriate for officials to give permission to certain lobbyists to do this, unless they give permission to all lobbyists and, for that matter, to all city/county residents. The best way to prohibit this is through a well-written ethics provision like that in the City Ethics Model Code (§100.11; emphasis added):

> An official or employee may not use, *or permit others to use*, any city funds, property, or personnel for profit or for personal convenience or benefit, except (a) when available to the public generally, or to a class of residents, on the same terms and conditions, (b) when permitted by policies approved by the local legislative body, or (c) when, in the conduct of official business, used in a minor way for personal convenience.

Basic Conflict of Interest Provision. It is worth repeating the basic ethics code conflict of interest provision in a lobbying code, making it expressly applicable to lobbyists and principals. Here is the City Ethics Model Lobbying Code language (§305.2(l)):

> No lobbyist or principal may propose or undertake any action that would bestow a financial benefit on an official or employee* or an official or employee's spouse, domestic partner, family member, or business associate.

k. **The Revolving Door**. At the federal level, lobbying firms often make job offers to officials and their aides in order, as the infamous lobbyist Jack Abramoff himself has put it, "to own them. … Every request we make, they're going to do it." At the local level, there are few lobbying firms and these are less likely to have open positions, unless they're divisions of large law firms. But principals have lots of jobs to offer.

When an official leaves public service to work for a principal, it puts into question everything the official did with respect to that principal. If the official accepts a position at a lobbying or law firm, it puts into question everything the official did with respect to that lobbying or law firm's clients. It is because the hope or promise of such a job can seriously influence, and be seen to influence, the acts of a government official that post-employment

provisions are so important to include in a lobbying code. If there is already a good one in an ethics code, it should be reproduced in the lobbying code. Where necessary, the provision should be supplemented with provisions that apply specifically to lobbyists.

In his essay "Regulating Lobbyists: Ethics, Law and Public Policy," 16 Cornell Journal of Law and Public Policy 1-61 (2007), Vincent R. Johnson provided another important reason for post-employment provisions: "a public-servant-turned-lobbyist will have, or will appear to have, an unfair advantage in petitioning the government." This is equally true whether the former public servant works as a contract lobbyist, as an in-house lobbyist, or as the head of an association, organization, or institution that seeks special benefits from the local government, such as a local chamber of commerce, social service agency, university, or hospital. This advantage may derive from special personal knowledge of and a special personal relationship with a former colleague. As Archibald Cox wrote (quoted in Richard Briffault's 2014 essay "The Anxiety of Influence: The Evolving Regulation of Lobbying"),

> "[T]he ex-official will often be able to trade upon habits of deferring to his advice and wishes engendered during the days when he was senior to, or at least a more influential official than those with whom he now deals in a different capacity."

There are also issues relating to confidential information the former public servant learned while in office, which can give his new employer or clients an advantage.

The most basic revolving door provision is that used, for example, by the Los Angeles County Metropolitan Transit Authority:

> No former authority official shall become a lobbyist for a period of one year after leaving the authority.

Of course, by "lobbyist" the MTA means someone who lobbies the MTA.

The Los Angeles Unified School District extends this basic provision, so that officials, employees, and consultants (it is important to include consultants, too) are prohibited from lobbying the school district both during and for a year after their employment.

A rule was once proposed in Miami that would have prohibited campaign consultants to city commissioners from lobbying the city commission for two years after working on a campaign. This was a response to a particular situation. But it is valuable to consider

lobbying-oriented revolving door rules for other than elected officials, because those with especially close relationships — such as aides and campaign managers and treasurers — should not be able to immediately use these relationships to benefit restricted sources.

What less commonly appears in ethics codes and, therefore, is more important to include in a lobbying code is a pre-employment (or "reverse revolving door") provision, such as Chicago's:

> No city employee or official shall personally participate in a decision-making capacity, for a period of two years from the date of employment or becoming a city official, in a matter that benefits his or her immediate former employer or immediate former client who the employee or official represented or on whose behalf he or she acted as a consultant or lobbyist prior to commencing his or her city employment or prior to becoming a city official.

Pre-employment provisions are necessary to prevent special interests from putting a lobbyist in office, where access and influence are even stronger. Even more than post-employment rules, pre-employment laws involve conflicts of interest and, therefore, appear in ethics codes, as Chicago's does. It is best that such a provision appear in both the ethics code and the lobbying code or lobbying section of an ethics code, so that lobbyists can find in one place all the prohibitions and obligations that apply to them (this useful inclusion of relevant provisions applies to county, state, and federal prohibitions and obligations, as well).

As for the cooling-off period — the period during which a former official should not lobby or a former lobbyist must withdraw from participation or not work for the government — the common lengths are one year or two years. However, in 2015 there was a move in the Florida legislature to extend the period to six years. Reasons for cooling-off periods include (1) after they have passed, the confidential information a former official knows is less likely to give her client or employer an advantage, and (2) many of the former official's contacts will be gone from government and not in a position to give the client or employer preferential treatment.

For post-employment laws, the argument for a shorter period is that, the longer the period, the harder it will be to get people to enter into public service, since their post-government prospects would be limited for a long time. It is understood that officials will

use the expertise they gain in public service when they go into the private job market. It is, therefore, necessary to balance this reasonable use of skills against the misuse of confidential information and one's former position to benefit prospective employers.

This argument about cooling-off periods does not apply equally with respect to pre-employment provisions, because jobs are not what is prohibited, only lobbyists' involvement in particular matters they were involved in as lobbyists or that their clients are involved with. Therefore, although one year may be acceptable (although not optimum) for a post-employment rule, two years is more reasonable for a pre-employment rule. In fact, the best practice is for lobbyists not to be involved in any matter in which their former employer or clients are involved, either for the entire time they are in public service or, since that could conceivably last decades, for at least five years.

There is a federal district court decision, *Brinkman* v. *Budish*, 692 F. Supp. 2d 855, 864 (S.D. Ohio 2010), which found unconstitutional a one-year ban on lobbying state government by former state legislators, at least to the extent the lobbyist is not being paid directly for his services. But many consider this a questionable extension of the U.S. Supreme Court's decision in *Citizens United*. For example, Richard Briffault argues in his paper "The Anxiety of Influence: The Evolving Regulation of Lobbying," Columbia Public Law Research Paper No. 14-367 (January 2014), that revolving door laws "are much more tightly limited than the spending ban at issue in *Citizens United*. [These laws apply] for a limited time [and] with respect to a limited set of matters." He also argues that the burden on political expression is "quite modest." And "the essence of the nineteenth and early twentieth century anti-lobbying decisions – the reliance on personal importunities, private solicitation, and the use of inside knowledge – is at the heart of the rationale for the revolving door ban, and would apply even to uncompensated lobbying."

In addition, the money issue is secondary with respect to a revolving door provision. It isn't the fact that a legislator is paid for his lobbying that makes the lobbying inappropriate. What is important is that there might have been a deal with the client to act in its favor while the legislator was still in office. In addition, a legislator may lobby for free while receiving his compensation indirectly, say, through legal work for the same client. It is the lobbying itself, in matters related to government work or to people who were colleagues and subordinates, that makes the revolving door a sign to citizens that their government officials are pawns of special interests — selling them their special relationships with colleagues and

subordinates — rather than representatives of those who elected them. Payment for lobbying services is a very minor part of the problem.

Revolving door rules may be waived with respect to individuals who have been or will be lobbying for nonprofits, as in-house or contract lobbyists, strictly about policies, not about contracts, grants, or other financial benefits. See the discussion above about the differences between for-profits and nonprofits from a government ethics point of view. But a general exception is problematic, even an exception for uncompensated lobbying done for nonprofit organizations. The reason is that there is the possibility that a nonprofit is merely a front for one or more special interests, either as part of an "astroturf" lobbying effort or as part of a relationship with major contributors. It is better to handle such issues via a public waiver process than by a blanket exception.

It's worth noting that a June 2013 report by the Alliance for Lobbying Transparency and Ethics Regulation (ALTER-EU) recommends that lobbying firms be responsible for not hiring former officials during the cooling-off period. In the U.S., there is an assumption that officials should carry the entire burden of complying with ethics laws. It is best if everyone is brought into the program and given responsibility for following ethics laws.

The City Ethics Model Lobbying Code's revolving door provision, §305.2(m), has both pre- and post-employment rules. These rules are strict, because the appearance of impropriety in the mixture of lobbying and public service is so strong.

> *Revolving Door*. For a period of two years from the date of employment or becoming a city/county official, an official or employee may not participate in a matter that may benefit his or her immediate former employer or immediate former client. If an agent lobbyist is hired by or takes a position with the city/county, the lobbyist must immediately cease engaging in lobbying activities, terminate his or her registration, and within 30 days file any remaining disclosure reports. The agent lobbyist's firm may no longer represent principals before the former lobbyist's board or agency or, if the lobbyist serves on the local legislative body or is the mayor or other CEO, the government. The lobbying oversight office may waive this rule upon a determination that there is no conflict of interest and that the lobbyist's position cannot be used to influence officials or employees with respect to the areas or topics for which he or she is lobbying. No individual may lobby an official or employee* for two years after that individual has left city/county service or after a member of his or her firm or an owner, partner, or office of his or her principal has left city/county service.

This provision is intended to complement City Ethics Model Ethics Code Post-Employment provision §100.10(d), which has a two-year cooling off period for government officials and employees, and applies to employment with and representation of restricted sources.

l. **Secondary Obligations**. There are several obligations that are secondary to a lobbying code's basic prohibitions and obligations, but are important to mention.

Indirect Means. San Diego and San Francisco require that lobbyists "not attempt to evade the obligations in this section through indirect efforts or through the use of agents, associates, or employees." It is useful to sprinkle the words "directly or indirectly" throughout an ethics or lobbying code, but it is valuable to also have a provision such as this to remind people that, even where indirectness is not expressly included in a provision, or where rules could be evaded through indirect efforts that were not contemplated, doing something indirectly is just as wrong as doing it directly. The only difference is that such indirect efforts are harder to contemplate and prohibit in code provisions. A lawyer's creative mind should not be used to take advantage of the limitations of those drafting ethics and lobbying provisions.

This is the sort of catch-all provision that provides clear guidance and, therefore, is not problematic. Here is the City Ethics Model Lobbying Code language of §305.2(w), which extends that of San Diego and San Francisco to include lobbyists' and officials' family members:

> *Indirect Means*. Agent and principal lobbyists may not attempt to evade the prohibitions or obligations in this code through indirect efforts or through the use of their or their principals' agents, associates, employees, or family members, or through the agents, associates, employees, or family members of officials or employees.*

For more on the subject of indirectness, see the section devoted to the subject, below.

Responsibility for Grassroots Lobbying. Philadelphia has a valuable provision that relates to indirect or grassroots lobbying communications, requiring the lobbyist or principal to

publicly take responsibility for such communications:

> Whenever any person makes an expenditure for indirect communication for the purpose of disseminating or initiating a communication, such as a mailing, telephone bank, print or electronic media advertisement, billboard, publication or education campaign, the communication shall clearly and conspicuously state the name of the person who made or financed the expenditure for the communication.

Retention of Records. Another secondary obligation is the retention of documents. New York City requires that lobbyists "retain all books, papers and documents necessary to substantiate the financial reports required to be made under this subchapter for a period of five years." This does not go without saying. The City Ethics Model Lobbying Code contains the following provision, §305.2(t):

> *Retention of Records*. All lobbyists and principals must retain, for a period of five years, all books, papers, and documents necessary to substantiate the disclosures required to be made under this code.

Limits on Hiring Lobbyists. A fourth important secondary obligation is for lobbyists to tell their principals about any law that might limit or prohibit their hiring or payment to them with particular funds. This is especially important when the principal is a government or agency. For example, the failure of multiple lobbyists to tell the Buffalo government that federal Department of Housing and Urban Development (HUD) funds cannot be used for lobbying got Buffalo into a lot of hot water in 2014. It's a good idea for principals to place this obligation in every contract they enter into with a lobbyist.

Requirement to Report Lobbying Violations. Another secondary obligation is on officials who deal with lobbyists: to report lobbying violations. Chicago requires the reporting of a lobbyist's failure to register. This is a good start, but this obligation should cover all violations and should apply to all government officials and consultants, as in City Ethics Model Lobbying Code provision §305.2(v):

> *Reporting Violations*. Officials, employees*, and consultants, as well as lobbyists and principals (and their officers and employees), are required to report to the lobbying oversight office possible violations of this code of which they have knowledge,

including the failure of a lobbyist to register or fully disclose.

m. **Other Prohibitions and Obligations**. Toronto has three uncategorizable prohibitions and obligations that are worth sharing:

> Lobbyists shall inform their client, employer or organization of the obligations under this chapter.
>
> Lobbyists shall not conduct lobbying activities at a charitable event, community or civic event, or similar public gathering.
>
> Lobbyists communicating with a public office holder on a duly registered and disclosed subject matter shall not use that opportunity to communicate on another subject matter, unless first having registered as required and disclosing the identity and purpose.

The first of these does not go without saying, at least in those lobbying programs that do not directly involve principals through training and disclosure. In such programs, it is important to make lobbyists responsible for enabling their principals to realize what they, and their lobbyists, must and must not do. If the lobbying oversight office is not given authority to involve principals, lobbyists should be required to effectively share their training with their principals. Here is the City Ethics Model Lobbying Code's language (§305.2(u)):

> *Informing Principals*. All agent lobbyists must inform their principals about any law that might limit or prohibit their hiring, expenditures, or other acts or be jointly liable for their violations of such laws.

The second involves timing. There is a time and place for everything, and it is worth considering whether lobbying should take place at public, non-governmental events, where it is inappropriate. One judge has recommended further that "Business meetings between lobbyists and elected officials should be conducted in a business environment, during business hours whenever possible. If lobbyists expect access to government decision-makers to persuade them directly, they should also expect that opportunities to persuade will be granted only in places of business, during appropriate work hours." It is unusual to set limitations on the time and place of lobbying, but it is certainly an aspiration worth

discussing. Here is the City Ethics Model Lobbying Code's language (§305.2(i)):

> *Lobbying Venues*. Lobbyists may not engage in lobbying activities at a charitable event, a community or civic event, or a similar public gathering. So far as possible, business meetings between lobbyists and officials should be conducted in a business environment, during business hours and at city/county offices whenever possible.

Prohibiting and Limiting Campaign Contributions. The prohibition of campaign contributions from lobbyists and their principals sounds like a serious obstacle to lobbying and one that is of questionable constitutionality. However, many lobbyists support such a prohibition, because otherwise they have little choice but to pay to play, that is, to make contributions to elected officials who let it be known that not only the officials' support, but access to them, is dependent on the making of sizeable campaign contributions. Even without pay to play, escalation in the campaign activity of lobbyists does nothing to help professional lobbyists, because anyone can spend money. Federal lobbyist Nicholas W. Allard, in his essay "Lobbying Is an Honorable Profession: The Right to Petition and the Competition to Be Right," 19 *Stanford Law and Policy Review* 23 (2008), wrote that he "would be first in line to support a prohibition of paid lobbyists from making campaign contributions, especially if it resulted in multilateral disarmament."

As Allard points out, one growing group of lobbyists already cannot make certain campaign contributions, because they're already illegal in many jurisdictions. I am referring to in-house public sector lobbyists, the lobbyists who represent local and state governments and agencies with respect to other, usually higher levels of government. Somehow they are able to do their jobs well without making campaign contributions.

In fact, prohibitions and limitations only in areas other than political campaigns can serve to skew lobbying activities toward this area, making political campaigns more important to lobbyists than they would like them to be.

Los Angeles is the only large local government I could find that prohibits campaign contributions from lobbyists (in its charter rather than in its lobbying code). The prohibition applies only to lobbyists, not to their principals. Since the lobbyist is just the principal's agent, this doesn't make sense. What is valuable about the language in the provision is (1) the prohibition applies to both lobbyists and candidates, (2) it covers both solicitation and

the making or accepting of contributions, and (3) it applies to contributions to candidates for an office that the lobbyist is registered to lobby as well as contributions to officials the lobbyist is registered to lobby, even when they are running for a different office. Here is the language:

> No elective City officer or candidate for elective City office, nor any of his or her City controlled committees, shall solicit or accept any contribution to the officer or candidate, or to any of his or her City controlled committees, from any lobbyist or lobbying firm registered to lobby the City office for which the candidate is seeking election, or the current City office, commission, department, bureau or agency of the candidate or officer. No person required by ordinance to be registered as a lobbyist or lobbying firm shall make any contribution to an elective City officer or candidate for elective City office, or to any of his or her City controlled committees, if the lobbyist or lobbying firm is required by ordinance to be registered to lobby the City office for which the candidate is seeking election, or the current City office, commission, department, bureau or agency of the candidate or officer.

Miami Beach, Florida has a better approach, because it prohibits campaign contributions not only from lobbyists, but also from vendors and developers, that is, their principals (or themselves if they do their own lobbying). It also ensures that all documents relevant to vendors and developers gives notice of this rule, so that no one is caught unawares. But it only applies in the areas of procurement and land use, and only to certain elective offices, not to any city/county official running for any office. The language below pulls together several Miami Beach provisions (§2-487ff):

> (A) No vendor or lobbyist on a present or pending solicitation or award, and no real estate developer or lobbyist, may give a campaign contribution directly or indirectly to a candidate, or to the campaign committee of a candidate, for the offices of mayor or commissioner. Commencing on the effective date of this ordinance, all proposed city contracts, purchase orders, standing orders, direct payments, as well as requests for proposals (RFP), requests for qualifications (RFQ), requests for letters of interest (RFLI), or bids issued by the city, as well as all applications for development agreements and for changes in zoning map designation as well as future land use map changes, must incorporate this section so as to notify vendors, real estate developers, and lobbyists of the proscription embodied herein.

> (B) No candidate or campaign committee of a candidate for the offices of mayor or commissioner must deposit into such candidate's campaign account any campaign contribution directly or indirectly from a vendor, real estate developer, or procurement or land use lobbyist. Candidates (or those acting on their behalf) must ensure compliance with this code section by confirming with the procurement office, city planning department, or lobbyist oversight office's records to verify the vendor, real estate developer, or lobbyist status of any potential donor.

Such prohibitions are controversial, but they are a reasonable attempt to prevent what appears to the public to be bribery or pay to play, especially if the rule allow small contributions. Applying these prohibitions only to procurement or other matters, as in Miami Beach, is not reasonable because, in many jurisdictions, elected officials do not have any say in contracts, while they have a lot of say in grants and development projects. And for the sake of fairness, all restricted sources, and their agents, should be treated the same.

A federal appellate court prohibited lobbyist campaign contribution bans in *Green Party* v. *Garfield*, 616 F.3d 213 (2d Cir. 2010), concluding that only limits on such contributions could be constitutional. The principal reason was that lobbyists were not implicated in recent scandals, the way contractors were (the campaign contribution ban on state contractors was permitted). The court also disallowed the prohibition of lobbyists soliciting contributions, but did say that specific prohibitions, such as of bundling, would be constitutional. It suggested that an acceptable approach would be "simply to ban lobbyists from soliciting contributions from their clients, and contractors from soliciting contributions from their employees and subcontractors."

This points to a provision that is too rarely included in local lobbying codes, that is, a provision that prohibits lobbyists and their principals from bundling campaign contributions or otherwise getting involved in campaigns, other than by making legal campaign, PAC, party, and independent organization contributions or independent expenditures, or by speaking out in favor of candidates.

The same federal circuit court upheld a New York City law that lowered contribution limits for both lobbyists and restricted sources, what is often called a "pay-to-play" law (*Ognibene* v. *Parkes*, 671 F.3d 174 (2d Cir. 2011)). The court stated, "When those who do business with the government or lobby for various interests give disproportionately large contributions to incumbents, regardless of their ideological positions, it is no wonder

that the perception arises that the contributions are made with the hope or expectation that the donors will receive contracts and other favors in exchange for these contributions. … Contributions to candidates for City office from persons with a particularly direct financial interest in these officials' policy decisions pose a heightened risk of actual and apparent corruption, and merit heightened government regulation."

Below is the City Ethics Model Lobbying Code's campaign contribution prohibition, §305.2(f). It applies not just to lobbyists, but to all restricted sources; it applies to contributions to entities that make independent expenditures, to prevent an easy evasion of the prohibition; it requires that notice of this prohibition be included in the documents these individuals and entities are likely to encounter in their dealings with a government; it shares responsibility between lobbyists and principals, on the one hand, and candidates and officials on the other; and it requires government offices to provide up-to-date lists of registered lobbyists and restricted sources, to make it easier for candidate committees to know which contributions to return. The provision applies a total ban, but it can be changed to allow small contributions. If this is done, it is best to use aggregate amounts that apply to a principal and its agents (including lobbyists) and the employees and board members of all these entities as a whole.

Campaign Contributions and Independent Expenditures

(1) No lobbyist, principal, or other restricted source may, directly or indirectly, give a campaign contribution to or solicit or collect a campaign contribution from a city/county candidate or a candidate who is an official or employee,* the campaign committee or related political committee of such a candidate, or an entity that makes independent expenditures in support of such a candidate or in opposition to such a candidate's opponent. All proposed city/county contracts, purchase orders, standing orders, direct payments, as well as requests for proposals (RFP), requests for qualifications (RFQ), requests for letters of interest (RFLI), and bids issued by the city/county, as well as all applications for grants, permits, licenses, development agreements, and changes in zoning map designation as well as future land use map changes, must incorporate this paragraph so as to notify vendors, grantees, real estate developers, licensees, and lobbyists of the proscription embodied herein.

(2) No city/county candidate or campaign or related political committee of a city/county candidate or of a candidate who is an official or employee* may deposit

> into such a candidate's campaign or political committee account any campaign contribution directly or indirectly from a lobbyist, principal, or other restricted source. Candidates, and those acting on their behalf, must ensure compliance with this code section by confirming with the lists to be placed online by the procurement office, city planning department, grantmaking and licensing agencies, and the lobbyist oversight office to verify the status of each potential donor.

The unfortunate reality of local politics is that restricted sources are the principal large campaign contributors. Therefore, any local legislative body that bans or limits their contributions is hurting themselves. This is why such rules are rarely passed, even if these rules are a very effective way to deal with pay to play and to prevent the principal appearance of impropriety in the funding of campaigns.

There are alternatives besides a ban or dollar limit on such contributions. One alternative is what I call the Westminster Approach, which allows campaign contributions from restricted sources, but requires that officials who receive such contributions withdraw from matters involving contributors. See the section of *Local Government Ethics Programs* on this approach.

Another alternative is to limit the prohibition to those officials running for an office which the lobbyist is registered to lobby. The problem with this approach include (1) officials may give to candidates they intend to lobby, but have not yet lobbied and, therefore, need not have included on their registration form; (2) officials may remove an official from their registration list before making a contribution to their campaign; and (3) contributions to officials one is lobbying are allowed as long as they are running for a higher office.

Another alternative, employed by several states, is to prohibit campaign contributions only while the legislature is in session, when the appearance of impropriety is the greatest. But local legislatures are almost always in session, so this alternative wouldn't work at the local level. In any event, such laws have had a mixed reception from courts, which have either said they are overinclusive (i.e., small contributions, which do not appear improper, should be allowed) or underinclusive (why not all restricted sources?).

An alternative employed in Alaska prohibits contributions from lobbyists in districts other than the one in which the lobbyist is allowed to vote. This could be useful in municipalities that have legislative districts. Otherwise, just the lobbyist or one officer or

owner of the principal would have to live in the municipality. External contributions are an important issue in state and federal elections, where contributions come from all over. They are less important in local elections, but still a factor in many. One unintended consequence of a requirement for someone living in the jurisdiction is that it would lead out-of-town restricted sources to hire a local lobbyist simply to allow it to make campaign contributions, at least if the prohibition applied to principals (as it should) in addition to lobbyists.

Another alternative is public campaign financing which places a limit on contributions from every individual, including lobbyists and principals. It is no accident that the leading opponent of a referendum to bring public campaign financing to Seattle was a professional lobbyist. Many lobbyists, or their principals, do not see it as in their interest to limit the gifts they can make to the elected officials they seek to influence (although many lobbyists feel otherwise).

The last alternative, which can be combined with another, is to require the disclosure of contributions on an ongoing basis in the lobbying database, as is suggested above.

Here is recommended language for two of the other alternatives:

> (1) (*the Westminster Approach*) "An official must withdraw from participation in any matter that may benefit a campaign or political committee contributor, or his or her business or client, whose contribution(s), in aggregate, are greater than $300. The requirement to withdraw remains in effect until the expiration of the term of office which the official was seeking when the contribution(s) were made."
>
> (2) (*where legislators are selected by district*) "Lobbyists, principals, and other restricted sources may contribute only to a legislative candidate for the district in which the individual is eligible to vote or will be eligible to vote on the date of the election. This exception applies only to individuals, not to their employers or clients."

Another reason to limit or prohibit contributions from contract lobbyists is that local governments have been increasingly hiring these lobbyists to represent them at the state and federal levels. This makes any contract lobbyist a potential contractor, who might be making contributions not only to help their principals, but also to help themselves get a lobbying contract with the government. This makes such contributions doubly problematic.

Political Fundraising. The 2011 ABA Task Force on Federal Lobbying Laws report acknowledged that lobbyist participation in political fundraising activities is worse than their

making campaign contributions. It recommends that "so far as practicable, those who advocate to elected officials do not raise funds for them, and those who raise funds for them do not advocate to them." Here is its reasoning (the focus is on Congress, but equally applicable to mayors and local legislators):

> [T]he multiplier effect of a lobbyist's participation in *fundraising* for a Member's campaign (or the Member's leadership PAC) can be quite substantial, and the Task Force believes that this activity should be substantially curtailed. A lobbyist who solicits and then "bundles" large numbers of individual donations for the benefit of a particular Member of Congress, or who leads a fundraising effort on behalf of that Member's campaign, becomes an extremely valuable asset to that politician. In many instances, this role enables the lobbyist to wield particularly strong influence when he or she makes a "lobbying contact" with the Member. Even if the lobbying occurs first, the expectation that the lobbyist may later serve as an important figure in raising money for the Member's campaign can result in undue influence in the legislative arena. Thus, a self-reinforcing cycle of mutual financial dependency has become a deeply troubling source of corruption in our government. In addition, public awareness of this interplay has contributed to an appearance of corruption and, thus, to widespread mistrust of the legislature.

The ABA Task Force recommends a solution akin to revolving door provisions: no one should not be permitted to lobby an official for whom they have raised funds in the past two years. But what about lobbying first and raising funds later? This solution does not deal with that problem. In fact, with respect to earmarks, which are the federal equivalent of the subject of most local lobbying, the ABA Task Force recognized this limitation.

Only the prohibition of fundraising by lobbyists is adequate to deal with the problem as a whole. And the rule should apply to both principal and lobbyist, as well as to all members of a lobbyist's firm, the firm itself, and any PAC associated with the principal or with the lobbyist or lobbyist firm. In addition, the prohibition should apply to any campaign, at any level of government, and to any PAC controlled by an official who has been or is soon to be lobbied.

Even here, there is a problem ensuring that lobbyists register, because such a prohibition could only be applied to registered lobbyists, since non-registered lobbyists are not bound by a lobbying code. However, if someone were found to have raised funds and

failed to register, their fundraising should also be considered a violation of such a rule. This double violation might make people think twice about failing to register in order that they may raise campaign funds.

As Richard Painter said in his book *Getting the Government America Deserves: How Ethics Reform Can Make a Difference* (Oxford Univ. Press, 2009), the best way for lobbyists to improve their reputation is for them to voluntarily end their involvement in campaign finance, and focus on their subject matter expertise. This is the best way to extinguish their reputation as "well-dressed bagmen." Doing this would also greatly lessen pay to play.

Other Political Activities. Another valuable prohibition is of officials speaking at fundraising events for organizations that lobby the government or have a contract with or grant from the government. But this is part of a larger issue: lobbyists' volunteer campaign activities, beyond fundraising. Although there are laws that consider discounted professional services in-kind contributions, laws look kindly on volunteers, because they are the heart of the traditional political campaign. This allows lobbyists to not only make and bundle contributions, but also to provide a range of free services that will cement their relationship with officials and greatly benefit their principals. In 2014, York University professor Robert MacDermid called these volunteer services "a loss leader. … That's why so many people who work at the core of campaigns are people who work in the lobbyist industry."

A lobbyist's services to a campaign or political committee should be prohibited above the contribution limit, with volunteer services valued at the fair market value and considered an in-kind contribution. In 2015, such a prohibition was being pushed by a prominent Pennsylvania lobbyist, Stanley I. Rapp. A state senator who agreed said, "There needs to be a separation between a lobbyist working as a consultant for House or Senate members' campaigns and having a large book of clients" whose interests may conflict with the lawmaker's agenda.

Below is the City Ethics Model Lobbying Code's ban on participation in political campaigns, §305.2(g). Its ban on fundraising activities appears in the campaign contribution ban above. If a jurisdiction chooses not to ban contributions from lobbyists and principals, it should at least preserve the ban on solicitation of such contributions:

> *Political Activity*. Neither a lobbyist nor an officer or employee of a principal may serve as an officer for or consultant to the committee or political action committee of any candidate seeking a city/county elected office or of any candidate for another

> elected office who is a city/county official or employee.* City/county officials may not speak at political fundraising events sponsored in whole or in part by lobbyists or other restricted sources. …

Billing for Lobbying. Pentagon procurement rules prohibit using contract funds for lobbying or billing for lobbying costs. All procurement and grant rules, or a lobbying code, should do this as well. Of course, money is fungible and a company can find ways to effectively bill for their lobbying costs, but it should be clear that this is prohibited.

Cellphone and Computer Use. Lobbyists often have special access to certain government officials. One form of special access is officials' cellphone numbers (both private and public). Lobbyists can use this special access to send text messages and e-mails to officials during legislative, board, and agency meetings. Making all text messages public would cause privacy problems. And later disclosure will often be too late. Therefore, the best way to prevent this sort of special access is for governments to require that the cellphones, tablets, and computers of all government officials in attendance (on boards, on staff, or possibly speaking) at public as well as closed meetings be turned off (or at least put on airplane mode), so that the officials cannot be influenced during meetings. In the alternative, to allow officials to get important personal messages, some jurisdictions (such as Jacksonville) require that any text message or e-mail dealing with official business be disclosed online within 24 hours. There is a trend for local legislatures to do this, but it should not be left up to each government body and agency. A government-wide policy is preferable.

6. **Indirectness**

Indirectness involves a series of related situations and issues that have kept coming up in this book. This section is intended to bring these issues together in one place, with links back to each specific situation or issue, so that there will be a minimum of repetition.

Indirectness is central to the idea of lobbying. Those who are seeking special benefits

from government often contract with or hire individuals or firms to represent their interests by seeking to influence government officials. In the alternative, they have regular employees do this, or the owner or CEO does it herself. Only in the last case, which is more common at the local level than at the state and federal levels, is lobbying not an indirect activity. But even with this most direct kind of lobbying, others are often brought in between the government and those seeking to benefit from government actions, so that what occurs does not appear to be direct influence. The goal is not only to get around laws, but also often to make transactions appear more legitimate and speakers more independent.

Because of the indirectness at the heart of lobbying, those who draft, advise regarding, and enforce lobbying codes need to take into account various kinds of indirectness even more than do those who do the same things with respect to conflicts of interest codes. The simplest way to ensure this is done is to frequently include in a lobbying code the phrase "directly or indirectly," so that rules are not limited to direct conflicts, direct gifts, direct employment, direct campaign contributions, or direct lobbying.

Here is a list of the various indirect lobbying activities and aspects of lobbying discussed in this chapter:

1. Indirect or "grassroots" lobbying. This involves seeking to influence local officials indirectly by seeking to influence others to communicate with local officials. It includes public relations campaigns, coalition building, and related strategic advising. This has become an increasing part of lobbying activities in recent decades. For more information, see here and here.
2. Making indirect gifts and contributions to officials and/or indirectly benefiting an official by making gifts to an official's family member, business, business associate, creditor, or pet charity. Most gifts from lobbyists are actually gifts from a principal, but if the lobbyist is not registered, this may not be considered a gift from a restricted source. This is one reason it is so important to broadly define "lobbyist" and "lobbying activities." Also, gifts and contributions can be directed to an elected official via a company or nonprofit, which does not clearly have a relationship to the actual contributor. For more information, see here.
3. Employing a former official to lobby with respect to his government or agency indirectly. For example, if a revolving door provision only relates to lobbying one's own

agency, a former council member might be hired to lobby the county or council members from neighboring towns regarding a development or transportation project, even when he was involved with the project as a council member and, through the project or the local government association, had established working relationships with the county officials and employees and the council members from neighboring towns.

4. Indirectly compensating a lobbyist, either because the lobbyist is a subcontractor or because the principal is a member of an association. For more information, see here.
5. Lobbying officials who lack authority with respect to a matter, but who can influence those who do have authority. For example, a mayor or council member may not have a vote on planning decisions, but they may have influence on planning board members as appointing (and re-appointing) authority and as fellow party member (influence over planning board members' political future). Similarly, administrators, government attorneys, and agency and department heads have influence in legislative matters due to their ongoing advisory and working relationship with council members; in fact, they often draft bills, contracts, and board decisions. Therefore, the authority of someone who is being lobbied should not be relevant to whether the activity constitutes "lobbying." What also should not be relevant is the professional status of anyone who is lobbied. That is, a lobbyist's communications with a government attorney should not be considered confidential, or confidentiality should be automatically waived. Otherwise, a city or county attorney, who is often the most important official next to a mayor or county executive, becomes the perfect loophole to get around a good lobbying oversight code. Of course, procedural matters, discovery, and settlement talks, where the attorney is acting in a role only attorneys may fill, would still be privileged. In addition, government attorneys should not play a role in campaigns, such as raising funds or bundling contributions, in order to get more influence over elected officials and, thereby, attract the attention of lobbyists seeking an indirect path to high-level officials.
6. The lobbying of local officials not about local matters, but about state or federal matters, especially grants, loans, and subsidies. Local officials have influence on certain state and federal matters, even though they may not make the final decisions. Local governments apply for grants and loans on behalf of local companies or for projects

that local companies will build. This leads to much lobbying that may not commonly be considered "lobbying." Therefore, the definition needs to be broadened. For more information, see here.

7. Lobbying for and by principals who benefit indirectly from government action. One example is the situation where an individual paying the lobbyist (or doing the lobbying) would not directly benefit, but a company in which the individual has an interest, or a property partially owned by the individual, might benefit. In such a situation, the principal in name is not a restricted source, but the actual principal is. It may seem on its face to be citizen lobbying, when it is actually lobbying for the purpose of obtaining special personal benefits that accrue indirectly.
8. Indirectly being involved in an ethics or lobbying violation. Through temptation or otherwise, a lobbyist or principal may be involved in an official's ethics violation, or a principal in a lobbyist's lobbying violation, without himself being in violation of a law. This is why it is important to have a complicity provision in lobbying and ethics codes. See here and also see the Complicity section of *Local Government Ethics Programs*.
9. Negative lobbying, intimidation. An example of this can be found here.
10. Influencing through a consulting company's report. An example of this can be found here.
11. Indirect payment of an apparently pro bono lobbyist or volunteer. An example of this can be found here.

Here are two kinds of intermediaries who play a role in lobbying:

1. Fixers: those who bring people together in an attempt to influence officials, sometimes in ways that do not require direct communication. Also referred to as "power brokers" and "go-betweens." For more information, see here.
2. Placement agents. For more information, see here.

Another sort of indirectness involves evading obligations pursuant to a lobbying code. For example, San Diego and San Francisco require that lobbyists "not attempt to evade the obligations in this section through indirect efforts or through the use of agents, associates, or employees." The City Ethics Model Lobbying Code borrowed this language from them for

its own §305.2(w).

It is useful to sprinkle the words "directly or indirectly" throughout an ethics or lobbying code, but it is valuable to also have a provision such as this to remind people that, even where indirectness is not expressly included in a provision, or where rules could be evaded through indirect efforts that were not contemplated, doing something indirectly is just as wrong as doing it directly. A lawyer's creative mind should not be used to take advantage of the limitations of those drafting ethics and lobbying provisions. This is the sort of catch-all provision that provides clear guidance and, therefore, is not problematic.

Philadelphia has a valuable provision that relates to indirect lobbying communications, requiring the lobbyist or principal to publicly take responsibility for such communications:

> Whenever any person makes an expenditure for indirect communication for the purpose of disseminating or initiating a communication, such as a mailing, telephone bank, print or electronic media advertisement, billboard, publication or education campaign, the communication shall clearly and conspicuously state the name of the person who made or financed the expenditure for the communication.

7. **Oversight**

A lobbying code by itself is not likely to lead to much disclosure. For example, three years after Green Bay, Wisconsin passed a lobbying code, only seven lobbyists had registered, representing only two clients. There needs to be not only leaders who care about lobbying disclosure (which Green Bay appears to have lacked), but also an office or body to provide the oversight necessary to ensure disclosure and make sure that obligations and prohibitions are not ignored.

The best practice is to place oversight in the hands of an office or body whose officer or members have not been selected by the officials under its jurisdiction (or who have special relationships with those under its jurisdiction) and which, if a body, have access to staff that works only for the commission. This best practice is increasingly becoming the norm in larger jurisdictions.

Lobbying oversight is sometimes handled by ethics commissions. This is true in most of the cities and counties with the best government ethics programs, such as Los Angeles, Seattle, Chicago, Philadelphia, Oakland, D.C., and Honolulu.

Toronto has a special lobbying registrar to oversee its lobbying program. An office such as this is a good alternative, especially where there is not a well-funded or independent ethics program. It need not be a full-time position, but it should not be held by someone who is already a government official or contractor (such as a contracted town attorney), unless the official is independent, such as an auditor or comptroller.

Oversight by Clerk's Office. Lobbying oversight is often handled by the clerk or city secretary, usually with the aid of the city or county attorney. This is the approach in such cities as New York City, Denver, Dallas, Austin, San José, and Providence. The reason often is that the clerk oversees elections, and due to lobbyists' involvement in political activities, lobbying oversight is often seen as related to elections oversight.

In some jurisdictions, oversight is shared. In Jacksonville oversight is shared by the ethics office and the secretary of the legislative body. In Miami-Dade County, oversight is provided by the clerk of the legislative body, but the ethics commission handles enforcement other than late filings.

Although issue-wise, lobbying oversight is closest to government ethics, in its

processes it is more like campaign finance oversight. Also, in both areas oversight primarily involves individuals outside of government who are closely involved with government officials. It is harder to gain these individuals' attention without clear rules and strong enforcement, and they have less personal incentive to go along with the program and read publications, attend training classes (or view online training programs), seek advice, or file forms fully and on time. Also, like campaign finance, there are numerous transactions that need to be reported on a frequent basis, through a similar database. When there is not a good online database, an ethics program can be overwhelmed with minutiae and the need to review and sometimes audit large quantities of data.

This is why lobbying oversight is often coupled with elections (a clerk's office) rather than ethics. But elections oversight requires a very different kind of focus than campaign finance. There is certainly a lot of minutiae and the review of a lot of data and documents, especially petitions and the like. But there is less emphasis on training, advice, and disclosure. In these areas, ethics is also the better fit.

Another problem with having clerks provide lobbying oversight is that they are elected or appointed officials, often highly political, without an ethics program's independence and often with their own lobbying issues and issues of relationships with high-level officials and political parties. Independence is important in ensuring that the public trusts the information presented and the decisions made with respect to those who may have violated lobbying rules. No one who is lobbied should be involved in a lobbying oversight program, except, of course, allowing local legislators to pass, or not pass, a lobbying code.

In New York City, the clerk is appointed by the council and, in fact, is the clerk of the council, as well. The clerk's office has a special lobbying bureau, with its own investigators and electronic filing system. But if a clerk were to go easy in a situation involving a council member or someone who was seen to have a special relationship with a council member, especially in a leadership position, it certainly would look like the clerk was not acting independently.

It appears that the current clerk is doing an excellent job, and supported the 2014 lobbying reforms. But what about the next clerk, and the next council that appoints someone to the position? A decision should not depend on the individual in a government office, but on the office itself, its selection process, and the conflicts that arise from the office's relationship with officials whose activities and relationships are under its jurisdiction.

For more, see the section of *Local Government Ethics Programs* on ethics program independence.

There is no perfect fit, but an independent government ethics or campaign finance program is a more appropriate fit than a clerk's office.

It is best to have a government ethics program handle lobbying oversight, due to its many conflicts of interest matters and an ethics program's independence. However, it can be a mixed blessing. If the ethics program is not sufficiently funded (and most are not), it can take a great deal of time and personnel getting an online system to work, training and advising lobbyists, their principals, and the officials they lobby, keeping after them to keep logs and file on time, and dealing with complaints. It is imperative that lobbying oversight, by an existing ethics commission or by a clerk's or auditor's office, be accompanied by a sufficient budget increase or sufficient fees on lobbyists and principals to pay for the additional staff and computer requirements.

Self-Regulation. There is another alternative: self-regulation. Federal and state lobbying associations have developed their own ethics codes, but their rules do not apply to principals, in-house lobbyists, or part-time lobbyists; their rules do not involve disclosure, but only conduct, mostly regarding their principals; their rules are rarely enforced; and their programs rarely provide training or advice. Therefore, they are not a true alternative at all. In fact, they try to re-frame the issue of regulation from disclosure to ethical conduct in a narrow, professional sense.

A 2009 report published by the Organisation for Economic Co-operation and Development (OECD), entitled "Self-Regulation and Regulation of the Lobbying Profession" said that self-regulation "cannot be as widely applied and evenly balanced among different professions as government regulation." Self-regulation, which involves little or no enforcement, can go no further than loss of membership. And unlike with lawyers, where bar membership is a requirement for practice, lobbying association membership is not necessary to practice as a lobbyist. Self-regulation also cannot offset the negative view of lobbyists that Americans have.

Enforcement by the Association of Government Relations Professionals (AGRP), the national association of federal lobbyists, is not of the association's Code of Ethics, but is based on external findings of violations of criminal, lobbying, and campaign finance laws. And loss of membership is automatic, so that the AGRP itself does no investigation and takes

no action.

On the AGRP's former "How Is Lobbying Regulated?" page, the only mention was of federal law. And the description of the association's Professional Standards & Conduct Committee says nothing about enforcement. It says that the committee is intended "to both foster ethical conduct and to be a source of advice for AGRP members on government relations practices, law and regulations. The committee is also responsible for monitoring legislation and regulation that affects the profession and offering guidance to the Board on how AGRP should respond." In other words, it is more concerned with setting policy on laws that provide lobbying oversight than itself providing lobbying oversight.

Therefore, the AGRP Code of Ethics is aspirational rather than enforceable, and focused more on obligations to principals than on obligations to officials and the public, although there are provisions relating to these, as well.

There is not an equivalent sentence about forfeiture of membership or other sort of enforcement in the codes of ethics and codes of conduct of most state-level lobbyist associations. These codes have, for the most part, been passed in recent years. See, for example, the codes of the Florida Association of Professional Lobbyists, the California Institute of Governmental Advocates, and the Oregon Capitol Club. Georgia and North Carolina are exceptions. The North Carolina Professional Lobbyists Association's Standards and Conduct Committee can hear complaints regarding violations of its code of conduct and recommend a reprimand or dismissal of membership to the Board of Directors. The Board of Directors of the Georgia Professional Lobbyists Association may expel a member who has violated its code of ethics. I could not find any information about actual enforcement on any of the state association websites. Also see the Statement of Principles of the National Association of State Lobbyists.

It is worth noting that although lobbyist associations' ethics codes have sections on conflicts of interest, the only conflicts of interest they include are those involving their principals. Those involving government officials, which are the core of government ethics laws, are ignored. Therefore, the professional associations clearly have no intention of serving the public the way government ethics programs do. They are focused on serving their clients and their sense of professional respectability.

Therefore, self-regulation is not a reasonable alternative to regulation by lobbying oversight offices

There is the possible alternative of government regulation of self-regulatory organizations, as is done with broker-dealers, CPAs, and other professionals. But since lobbyists' work relates only to government, it is more appropriate for government regulation to be direct.

In jurisdictions where attempts at passing a lobbying code have been blocked for years, an alternative is to institute an opt-in program for lobbyists who want to distinguish themselves by agreeing to abide by certain ethics rules and by ethics commission jurisdiction over them. This may not even require legislation. A resourceful ethics commission with initiative could set up this sort of program without obtaining any additional authority.

a. **Training**

It is important to require lobbyists and representatives of principals to take a training program at least when they first register. It is valuable to require a refresher course every two years, at least for those who lobby (or for whom others lobby) above a certain threshold. Fines that grow daily may not be necessary to get lobbyists to take the training program, but tripling the annual registration fee might do the trick.

Chicago has one of the few online lobbying training programs. Lobbyists must take the program once a year. If they do not, they may be fined from $200 to $750 *a day* for each day until they complete the training. The training program sticks close to the law, clarifying the important definitional questions, making it clear what must be done and what cannot be done at all. There are good questions, with an explanation that follows both correct and incorrect answers. It's not optimal to have only online training, without more understanding of the context and without any opportunity to discuss issues and ask questions. But in Chicago, lobbyists are encouraged to call with any questions they may have.

New York City has a video that shows lobbyists how to file with its online database system (to check out the database, it's best to use Internet Explorer). In addition, the city employs in-person training, which is required of lobbyists every other year (Powerpoint presentations are also available on the website). It also has an informative introductory page on lobbying, with links to the appropriate webpages where more extensive information is available.

San Francisco has a training video, but only requires training when a lobbyist first registers. Toronto has numerous focused training videos, as well as optional in-person

training sessions.

Two lobbying manuals worth looking at are those of Oakland and San Antonio. Also see the congressional Lobbying Disclosure Act Guidance.

What is missing from almost all of these training materials is the reasons why a lobbying program is important. The focus is on laws and procedures, without much context. It is important for people to see the process as something more than just a burdensome filling out of forms. It is helpful to know why this area of constitutionally-approved behavior comes with difficult disclosure requirements as well as prohibitions and obligations.

One of the best forms of training is setting an example, which is out of the hands of a lobbying oversight office. This involves leadership. High-level officials should report their contacts with lobbyists more frequently and more inclusively (that is, contacts with those who feel they don't need to register as lobbyists) than required by law. They should also report not only gifts *given* by lobbyists or principals to anyone with whom the official has a special relationship, but also gifts *offered*. This isn't "telling," this is making public information public. Nothing offered to a public servant by someone seeking public benefits is private.

Another way leaders can set an example is to make local government lobbyists — that is, lobbyists who represent municipalities at the regional, state, and federal levels — as transparent as possible. Both in-house and contract lobbyists for a local government should place their calendars and expenditures online. They should not be permitted to make any gifts or campaign contributions, and they should be required to seek advice from the ethics commission relating to any conflicts they may have. They should be required to tell the truth, even to the point of admitting facts about their community that may make the local government less likely to get a grant or a larger apportionment of funds. They should never be allowed to lose sight of the fact that they are acting as public officials. This should also be true of those who lobby for associations of public officials, who are representing the association board not as a group of individuals, but as a group of public officials acting solely in their role as public officials.

Below is the City Ethics Model Lobbying Code provision on lobbying training, §306.6:

> Training. The lobbying oversight office will (1) within six months after its passage make this lobbying code, and explanations of its provisions (including information

on how to fill out all forms and statements), available (including, but not limited to, on the office's website) to all those under its jurisdiction, and (2) develop educational materials and a required educational program regarding the provisions and purposes of this code for all those under its jurisdiction. The educational program will commence no more than one year after this code goes into effect and, after current registrants and appropriate officials and employees have been trained, the program will be provided at least every two months for new registrants, new employees of registrants, and new officials and employees. Every individual who is required to register as a lobbyist, or who lobbies the city/county for a lobbying firm or principal that registers, must attend a lobbying training session conducted by the lobbying oversight office no less than once every two calendar years. In addition, the lobbying oversight office will hold an annual workshop to discuss this code, its values and goals, its enforcement, and the ways in which the code has affected its work and the working of the city/county government.

b. **Advice**

It can be both harder and easier to provide lobbying advice than ethics advice. It is easier, because government officials generally want to be told they can do what they want to do. They are used to calling the shots and having "their" attorneys give them the answers they want. Many officials do not like to consult anyone over whom they have no control. Lobbyists, on the other hand, do not have government attorneys to turn to for approval. The only way they can prevent enforcement is by seeking advice from the lobbying oversight office.

Lobbying advice is harder to provide because lobbyists and principals do not work for the city or county and, therefore, are not likely to think to call a government office for advice and, if they do, may not feel that a government employee should tell them what they can and cannot do. And there is less likely to be an ongoing relationship between lobbying adviser and advisee, the way there can be, in a healthy ethics environment, between ethics adviser and council member or mayoral aide. Most serious, however, is the fact that many individuals who lobby do not consider themselves "lobbyists" and, therefore, never think of the lobbying program at all.

Advisory opinions can be especially useful in making lobbying definitions more concrete. For example, here is part of an advisory opinion from Chicago explaining when a land use expeditor is engaging in lobbying activities:

Expeditors, while engaged in the following activities, are not attempting to influence nonministerial administrative action, and thereby are not acting as lobbyists:

1. Preparing and submitting permit applications.

2. Monitoring the progress of these applications through Plan Examiners' reviews of the plans submitted as part of an application.

3. Meeting with Plan Examiners and other Department of Buildings personnel to clarify what needs to be corrected in the plans in order to conform with building code requirements.

4. Acting as a contact person in the event of emergency, if listed on the permit as the "contact person."

5. Inquiring as to the status of permit applications.

Expeditors, while engaged in the following activities, are attempting to influence nonministerial administrative action and thereby are acting as lobbyists, and therefore must register with the Board of Ethics:

1. Attempting, in any way, to persuade Department of Buildings personnel to expedite permit processing, or advocating, in any way, that a request for expedited permit processing be approved by Department of Buildings personnel.

2. Attempting, in any way, to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code or attempting to influence their decision to approve a particular set of plans submitted as part of an application.

3. Attempting, in any way, to persuade Aldermen, employees of the Mayor's office, or any other City employee or official to intercede in, promote or influence the permit application process in any of the following ways: a) requesting expedited permit processing; b) attempting to persuade Plan Examiners or other Department of Buildings personnel to adopt a particular interpretation of the building code; c) attempting to influence the decision of Plan Examiners or other Department of Buildings personnel to approve a particular set of plans submitted as part of an application.

This kind of information is valuable only if it is made easily available to expeditors and others involved in land use matters, including government officials such as local legislators, planning and zoning commission members, and planning and building department staff.

Advice Online. Advice is too often an afterthought in a lobbying oversight program's website. When any office other than an ethics program manages a lobbying program, it tends to ignore the importance of advice. A major exception is the New York City clerk's office, which has a Contact the Lobbying Bureau page. Even a small-print exhortation to contact the registrar with questions toward the bottom of the Toronto's lobbying registrar's homepage led to 2,410 telephone inquiries in 2013, in addition to inquiries via e-mail and in person.

Dallas is typical in providing under the rubric "Lobbyist Help" only directions to filing online. Making advice more central to the mission of the program will lead to more inquiries and, therefore, better compliance with the lobbying rules.

Even many ethics programs do not emphasize the availability of lobbying advice on their lobbying webpage. Like Philadelphia, they should at the very least have an Ask for Advice button that allows one to easily e-mail or call in a question. But when one pushes the button, one is told that "the Ethics Board is responsible for giving advice to City employees and officials about the *ethics* laws." (emphasis added) There is no mention of lobbyists or principals or the lobbying code. It may be that the ethics board lacks the authority to give these individuals ethics advice (sometimes boards think they lack this authority, but actually may provide such advice). This authority is essential to a lobbying program. Every lobbying oversight office should do what it can to obtain this authority.

With this authority, these offices should do more than merely provide a button. They should take the initiative to let everyone who contacts officials, directly or indirectly, know how important it is for them to discuss with a lobbying or ethics adviser any questions they may have, including whether or not they should be registering as a lobbyist, who would be responsible for disclosing what information when, and what prohibitions and obligations apply to them. Lobbying codes — especially their all-important definitions — are not self-explanatory, and lobbying registration is not something one can expect one's lawyer to have experience with (outside of Washington, it isn't easy finding a lawyer who does).

It is also valuable to make lobbying advisory opinions easily available online. New

York City's Lobbying Bureau has the only lobbying webpage I could find with direct access to lobbying advisory opinions (in the left margin). Los Angeles has a clickable "Advice" category on the left margin of its principal lobbying page, but this takes one to all ethics advisory opinions, which need to be searched by keyword (search here for the keyword "lobby"; the great majority of opinions relate to post-employment questions). Ditto for Philadelphia's unsearchable advisory opinions (but worse, the link is at the bottom of the page). Chicago's lobbying-oriented advisory opinions cannot be accessed from the lobbying page, but at least the ethics board has separated them out from other advisory opinions. San Diego's advice letters relating to lobbying can be found by a keyword search of its advice letters list.

Lobbyists, their principals, and their attorneys are not government officials, but (1) they should be able to obtain advice from the lobbying oversight office; and (2) they should not have to filter through all ethics advice to find the advice relevant to them and their situations. There is no reason why every jurisdiction cannot offer ethics advice about lobbying, place lobbying-related advisory opinions online in a separate listing, and have the opinions directly accessible from the principal lobbying webpage. On this, New York City should be the model to follow.

Waivers. As with government ethics programs, it is a good idea to also provide for a waiver process. A request for a waiver is essentially a request for advice when the requesting party recognizes that its conduct would be in violation of the law, but believes that there are special reasons why it should be excepted from the rule. Unlike with advice, since the conduct would be in violation, a waiver should be given only after a public hearing. The decision, which should also be public, should be accompanied by a clear explanation of the reasoning behind the provision of the waiver. For more about waivers, see the relevant section of this book.

Confidentiality. One thing it is important to consider about lobbying advice vs. ethics advice is the difference in the level of confidentiality regarding advice to private citizens, as opposed to that regarding advice to public officials, which should be as transparent as possible. Private citizens seeking ethics advice for themselves should be allowed to have the advice kept confidential. However, since their conduct involves public officials, and because it is valuable that other lobbyists and principals know that they are seeking advice and what that advice is, private citizens should be encouraged to waive confidentiality at the time they

are given advice and, if they do not waive it and their conduct is questioned, they should once again be asked to waive confidentiality. When important advice is given confidentially, lobbying oversight offices should consider publishing a general advisory opinion on the topic, which makes no mention of the lobbyist and leaves out unnecessary facts.

It is valuable to expressly set out the requirements for and limitations on access to advisory opinions. Below is City Ethics Model Lobbying Code provision §306.5(d), which provides for redacted (or unredacted) advisory opinions to be placed online in a searchable manner if the subjects of the opinion permit it.

> To the extent each subject permits, advisory opinions (with unnecessary financial and personal details redacted on request) will be indexed and maintained on file by the lobbying oversight office and will also be made available, in a searchable manner, on the office's website. Officials and employees, and registered lobbyists and principals, should be notified about advisory opinions that directly affect their conduct.

A lobbying code should list those who may request a formal, written advisory opinion, and those who may request informal, verbal advice (which may also be given in the form of an e-mail). City Ethics Model Lobbying Code §306.5(a) allows "any official or employee,* any former official or employee, any candidate or consultant, any lobbyist or principal, any individual or entity that believes that it or one of its officers, employees, or agents might be engaging in lobbying activities, or any restricted source" to request a formal advisory opinion. Anyone may request informal advice.

It should be expressly stated in a lobbying code that formal advice can be given only with respect to future actions. And there should be a time limit on the provision of advice so that it is made in a timely manner. The model code suggests fifteen days for an office and fifteen days after the next regular meeting when a board is involved. The informal option, which should be quicker, is always available.

In the advice provision, it is worth repeating what it says in the powers and duties provision: that the lobbying oversight office has a monopoly on lobbying advice. Unless this is very clear, the city/county attorney's office is likely to provide advice, as well, which prevents a consistent interpretation of the lobbying code and allows officials and lobbyists to shop for the answers they want. Here is the City Ethics Model Lobbying Code language

(§306.5(a)):

> No one but the lobbying oversight office, or an individual it designates, may provide ethics advice; any other advice is not binding on the lobbying oversight office and does not protect the advisee.

It is also important to state how binding lobbying advice is, and on whom. City Ethics Model Lobbying Code §306.5(c) says that informal advice is not binding and that formal advice is binding on the lobbying oversight office and on the subjects of the opinion, to the extent there was no omission or misstatement of a material fact in the request for advice:

> A written advisory opinion rendered by the lobbying oversight office, until and unless amended or revoked, is binding upon the office in any subsequent proceeding concerning the individual or entity that requested the opinion, or to which the advisory opinion referred, and acted in good faith, unless the requester omitted or misstated a material fact in requesting the advisory opinion. The advisory opinion may also be used as a defense in any civil action brought by the lobbying oversight office or by the city/county. A written advisory opinion is also binding on any individual or entity under the lobbying oversight office's jurisdiction to whom it directly applies. If the lobbying oversight office has reason to believe that a written advisory opinion has not been complied with, it will take appropriate action to ensure compliance.

Advisory opinions should not be appealable, but the requester or subject of an advisory opinion should be permitted to ask for reconsideration of an opinion if he believes that the opinion contains a material error of fact or law, or that there has been a material change in the facts or law since the request for advice was made. Here is the City Ethics Model Lobbying Code language on reconsideration (§306.5(e)):

> A requester or subject of lobbying advice may seek reconsideration of a written advisory opinion. A request for reconsideration must allege that (1) a material error of law has been made; (2) a material error of fact has been made; or (3) a change in materially relevant facts or law has occurred since the request for advice was made. A decision by the lobbying oversight office upon reconsideration is final and may not be appealed. The office may reconsider its advice on its own initiative, providing

> notice to whoever originally requested the advice and to any individual or entity under its jurisdiction that will be directly impacted by the advice. Advice stands until it has been amended; it is not suspended pending reconsideration or an attempt to appeal.

c. **Jurisdiction, Powers, and Duties**

It is important to expressly give a lobbying oversight program jurisdiction over all those affected by the program, and to make sure that this jurisdiction does not end when an official or employee resigns or when a lobbyist deregisters. The City Ethics Model Lobbying Code has the following provision, §306.1:

> The lobbying oversight office has jurisdiction over all former and current officials and employees*, consultants, and candidates, and over all lobbyists, principals, lobbying supporters, and other restricted sources.* The termination of an official or employee's term of office or employment with the city/county, or the termination of a lobbyist or principal's registration, does not affect the jurisdiction of the lobbying oversight office with respect to the requirements imposed by this lobbying code.

Independent Agencies. Another important area of jurisdiction involves not individuals, but independent agencies. School districts are the most important independent governmental agencies that are often omitted from lobbying oversight. Only some larger school districts, such as Los Angeles's, have their own lobbying oversight programs. The chair of the Orange County, Florida school board has been quoted as saying, "Seventy, eighty percent of the people who come talk to me don't think they're lobbying, but they are." Most of these lobbyists are vendors and their representatives. Since vendors are not trying to change policy, they often do not think of themselves as lobbyists. But at the local level, most lobbyists are not trying to change policy. They're trying to get a contract, permit, or grant. This kind of lobbying is as common in school districts as it is in municipal governments. It should be disclosed, and school district lobbyists should be under the jurisdiction of the city or county's lobbying oversight program or, if they are large enough, they should have their own.

Also important to lobbyists are independent districts and authorities, which do everything from water management, mosquito control, and community development to

running public hospitals, ports, transit systems, housing developments, and airports. Larger districts enter into contracts and other transactions for many millions of dollars a year, and deal with lobbyists frequently. Even smaller districts often have one large contract or project that attracts many lobbyists. For example, the $12 million Lake Worth (FL) Drainage District has for several years been exploring the establishment of a regional water utility to address southeast Florida's future drinking water supplies. The project would involve a $1 billion investment in infrastructure, land acquisition, etc. And yet, with the exception of some transit and airport authorities, these special districts rarely have their own lobbying oversight programs or allow local or state governments to provide the oversight for them.

It's not that special districts don't know about lobbying. Many of them hire their own lobbyists, after all. The problem is that few citizens know about the districts and what they do, and the districts are not well covered by the news media. There is, therefore, no one to hold the districts accountable, except the state government that these districts lobby, sometimes to get funds, sometimes to prevent oversight. Special districts often provide as little transparency as they can get away with. And district officials often get too much from lobbyists that they do not want to give up.

Regional districts should be brought under the oversight of a state lobbying program. When districts are large enough, the state may, in the alternative, require them to establish their own programs, as long as they are given independence and sufficient funding. For example, in 2014, Florida required that the state's five water management districts establish lobbying oversight programs. However, when there are no such requirements, independent agencies should arrange for a city or county to handle its lobbying oversight, and cities and counties should ask the state or, if they can, require independent agencies to accept their lobbying oversight program's jurisdiction.

It is important to remember that lobbying oversight isn't just for the public. It is also helpful to officials. The president of the Florida Association of Special Districts, himself the executive director of a large independent special district, has acknowledged the value of a lobbying oversight program to the special districts themselves. He said that lobbyist registration would help those who work at special districts better understand those who may approach them. "Are they trying to persuade me of a position based on their remuneration or employment? It's a matter of understanding who you are talking to."

Recognizing the importance of lobbying oversight with respect to independent

authorities and districts, in 2014 San Francisco's Board of Supervisors extended the lobbying oversight program's jurisdiction to include a number of boards, authorities, and agencies. Like San Francisco, the City Ethics Model Lobbying Code does this in its definition of "official or employee" (in §301), but where San Francisco lists each independent agency, district, and authority, the model code simply uses the language, " as well as of an affiliated independent office or agency or quasi-public or public-private body." The reason for this is that the names of these agencies and bodies vary so greatly, it is impossible to make a list that would apply to a range of cities and counties. Each city and county should add in its own list, but make sure it is exhaustive and that the legislative history clearly states why any agency or body has been left out, so that it is clear that any others that are left out were overlooked rather than omitted.

To help select the agencies to include on this list, the term "affiliated independent agency" is defined in the City Ethics Model Lobbying Code as "an agency, district, or authority, including a school district, that (1) has jurisdiction over the same community, (2) receives more than 25% of its budget from the city/county, (3) has more than one board member and/or the CEO selected by city/county officials, or (4) reports to or is overseen by a city/county agency, body, or official."

There are two other places in the lobbying code that refer expressly to affiliated independent agencies (other than provisions that deal with an agency's lobbyists). The lobbying conflicts of interest provision (§305.2(l)) reads, "No city/county official, employee, or consultant, or his or her spouse, domestic partner, child, or sibling, may lobby the city/county *or any affiliated independent agency*." And the identification badge provision (§302.4) reads, "The identification badge must be worn in a clearly visible manner whenever visiting a city/county facility, the facility of *any affiliated independent agency*…"

Powers and Duties. It is also important to set forth the lobbying oversight office's powers and duties, and to give the office a monopoly on the most important parts of the lobbying program. No one but the lobbying oversight office should provide advice, interpretations of the lobbying code, waivers, training, or enforcement, or create, maintain, review, or audit registration and disclosure forms. The lobbying oversight office should also be expressly required to prepare annual reports, promulgate rules and regulations, put disclosure online, and provide for public inspection of its records. Below is the City Ethics Model Lobbying Code powers and duties provision, §306.2:

Administration. The lobbying oversight office has the following powers and duties, and will engage in the following activities or designate another office, agency, or individual to engage in these activities on its behalf:

a. To solely render, index, and maintain on file informal advice and advisory opinions rendered pursuant to this lobbying code, as well as interpretations of this code;

b. To solely dispose of waiver requests made pursuant to this lobbying code;

c. To solely provide lobbying training and education to officials, employees, consultants, lobbyists*, and principals*;

d. To solely prepare and provide online forms for lobbying registration and disclosure, and for filing lobbying-related complaints and reporting suspected undisclosed lobbying activity and lobbying activity by unregistered individuals or entities;

e. To solely review, index, maintain on file, and place on its website, registration and disclosure forms filed with the lobbying oversight office pursuant to this lobbying code, and to audit the records of registrants, for cause or on a random basis;

f. To solely review, index, maintain on file, and dispose of lobbying-related complaints, investigate possible violations of this lobbying code (whether pursuant to a complaint or on its own initiative), subpoena witnesses and records, enter into settlements with alleged violators of this lobbying code, advocate for the city/county at and/or conduct public hearings, apply and recommend sanctions, assess penalties, make referrals, and initiate appropriate actions and proceedings;

g. To prepare and place on its website an annual report of its operations, proceedings, revenues, and expenditures, which also must include recommendations to the local legislative body for changes to this lobbying code;

h. To provide for public inspection of certain of its records, as required by law.

i. To promulgate such rules and regulations as deemed necessary for administration of this lobbying code.

j. To perform other duties as may be assigned by the local legislative body.

d. **Registration and Disclosure**

It is difficult for lobbying oversight offices to know whether all those who engage in lobbying activities are registering. It is useful when officials provide information about those who lobby them, but when this is either not required, or not done willingly (oversight offices *are* allowed to ask), oversight offices must do their best to accumulate information that will help them identify and contact those who might be required to register as lobbyists.

In 2014, the New York City council gave the clerk's office, which oversees the city's lobbying oversight program, the express responsibility "to develop a protocol to review sources of information" that may provide evidence of lobbying misconduct. The new provision (§3-212(e)(1)) even provides some examples of such "sources of information":

> 1. state lobbying registration documents;
>
> 2. notices of appearances before city agencies that identify the representative of an applicant; and
>
> 3. the city's "doing business" database.

Every lobbying oversight office should develop such a protocol, looking at the examples on this list, as well as newspaper articles and blog posts about public meetings and lobbyists.

The 2014 New York City reforms also required the clerk's office to work with the council and city agencies "to develop notices and advertisements to be placed in print and electronic media intended to reach persons and organizations doing business with the city that will inform them of the requirements set forth in this subchapter." The goal is to identify lobbyists and get them into the lobbying program, or to have them and their principals identify themselves by seeking advice or registering as lobbyists.

Disclosure is an important element of a government ethics program, but the central element of a lobbying program. Therefore, it is especially important that the lobbying oversight office not be passive regarding disclosure, as most ethics programs are.

There are three aspects of lobbying disclosure that require close attention and action: late filing, deficient filing, and false information. Late filing is easiest to know about (assuming the disclosure is eventually made), and it is most easily dealt with as well, via administrative per diem fines on late filers.

Some deficient filing can be discovered by glancing through a disclosure to see that every section contains something resembling the type of information requested. But more complex deficiencies are difficult to discover. Clear guidelines that provide concrete examples of the extent of disclosure required can be helpful (for a good example, see the congressional Lobbying Disclosure Act Guidance). The more clear the guidance, the easier it is to find a disclosure inadequate and, through advice and enforcement, get lobbyists to provide information that is useful to the public. Deficiencies are best dealt with by alerting the filer and requiring that inadequate responses be remedied within a short period of time, for example, ten days.

But clear guidance is insufficient. Many congressional lobbyists ignore the excellent Congressional guidance publication. The reason is that these offices lack the auditing and investigative power to police the sufficiency of disclosures. Their big problem is getting lobbyists to disclose anything in a timely manner. How much detail they provide comes too far down the priority list of enforcement actions. This is why it is so important for a lobbying oversight office to be both sufficiently funded and independent, that is, run by someone who is neither lobbied nor associated, professionally or politically, with officials who are lobbied.

The hardest part of administering disclosure is when filers provide partial or false information. Most programs depend on complaints to enforce against these violations. But the best way to prevent these violations is to require information from multiple sources: lobbyists, principals, and officials. Then the lobbying oversight office can review the various disclosure forms to find inconsistencies. If the disclosure is done through a database, or even via fillable, searchable PDFs, the office's job is much easier, because they can do joint or, at least, complementary searches. If they are not corroborated, the office can ask questions. The news media and local good government groups are more likely to provide oversight if searches are easily done.

Most important, the knowledge that there are checks on the information one provides will lead lobbyists, principals, and officials to be more transparent, that is, more careful and complete in their disclosures. The only other choice they have is to conspire to hide information. If individuals are willing to do this and it comes out via a tip or complaint, it could not only end the lobbyists' careers, but bring down an entire administration. In other words, it is extremely risky and, therefore, unlikely to happen except in very

unhealthy ethics environments.

Another alternative, when sufficient resources are available, is the random audit. To allow this, it is helpful to have a provision that allows the lobbying oversight office to get access to necessary records. Here is Baltimore's language:

> On request and reasonable notice, the records required by § 9-1 must be made available to the Ethics Board or the City Solicitor for inspection.

Below are the City Ethics Model Lobbying Code's provisions in §306 on the administration of registration and disclosure:

> 3. Access to Registration and Disclosure Information. The lobbying oversight office must make all registration and disclosure information available online in an easily accessible manner, as follows:
>
> > a. Information must be made available via a Lobbying Database on the lobbying oversight office's website, in an open format that is machine readable or structured, easy to search, sort, analyze, download, and reuse with a variety of common software, and capable of being bulk downloaded.
> >
> > b. All data will be tied to the filer's unique identifying number, as well as to the numbers of their agents and principals, to facilitate sorting and analysis.
>
> 4. Review of Registration and Disclosure Information. The lobbying oversight office must review all registration and disclosure forms filed with it to determine whether any person required to file such a form has failed to file it on time, has filed deficient or inaccurate information, or has filed a form that reveals a possible or potential violation of this lobbying code. The lobbying oversight office must also develop a protocol to review sources of information that may provide evidence of lobbying misconduct, including state lobbying registration documents, notices of appearances before city/county agencies that identify the representative of an applicant, the city/county's "doing business" database, and newspaper articles and blog posts about public meetings and lobbyists*. If the lobbying oversight office determines that a registration or disclosure form is late, deficient, inaccurate, or reveals another possible violation of this lobbying code, the lobbying oversight office must notify the registrant in writing of the possible violation and of the possible

penalties for failure to comply with this lobbying code.

e. **Annual Reports**

The only lobbying oversight office I could find, other than a government ethics commission, that publishes annual reports is New York City's clerk. It publishes excellent reports, with detailed information about complaints, fines, audits, training, outreach, requests for assistance, and lobbyists and their lobbying activities. There is statistical analysis, charts, top ten lists, the works. Sixty-two pages of useful information that should be the model for all lobbying oversight offices. Even if they cannot afford to do as complete a report, an office should be able to provide the essential information annually, and inessential but valuable information, say, every other year. Annual reports are a perfect project for interns and local college or public administration students looking for special projects.

Here are a few links to the annual reports of ethics commissions that provide lobbying oversight: Chicago, Oakland, and Honolulu.

Below is the City Ethics Model Lobbying Code provision on annual reports, §306.7:

> Annual Reports. The lobbying oversight office must prepare and submit an annual report to the local legislative body, summarizing the activities, decisions, and advisory opinions of the office. The report may also recommend changes to the text or administration of this code. The lobbying oversight office should, in its publications and on its website, ask for recommendations to improve the lobbying program. The report must be submitted no later than October 31 of each year, covering to the year ended August 31, and must be filed with the clerk and made available on the city/county website.

Yale law professor David Schleicher suggested a valuable idea to me: a report on who influences the local government. Such a report would give the public as well as officials and lobbyist a bigger picture against which to view lobbying disclosure. Such a report recognizes that, no matter how a lobbying code defines "lobbying," it will not bring under the jurisdiction of a lobbying oversight office all those who influence government. Such people include large landowners, former officials, state and federal officials who represent the city or county, candidates, consultants and hired professionals (including outside auditors), advisers, party officers, power brokers and fixers, those who own and manage contractors

that do government work, such as charter schools, and those who work for independent, semi-independent, and public-private offices, agencies, and authorities. The classic report on this subject is Robert Dahl's *Who Governs? Democracy and Power in an American City* (Yale University Press, 1961), which studies New Haven, Connecticut (see my blog post on this book).

f. Reform

Lobbying reform often occurs as part of a more general government ethics or campaign finance reform process, which is described at length in *Local Government Ethics Programs*.

But sometimes it is a separate process that occurs either when a jurisdiction realizes that it needs to establish a lobbying oversight program, or when it wants to improve the program it already has, usually based on the program's own recommendations.

There are three principal reasons for the lack of effective lobbying reform. One is that it will put an end to a pay-to-play culture that is beneficial to the very local legislators and elected executives who decide whether or not to have an effective lobbying code. The second is that elected officials want to keep their relationships with lobbyists and principals hidden from the public. To them, this is too much information. After all, few mayors and county executives are elected without a lot of money from lobbyists and other restricted sources with whom they communicate often. This is not something they want to emphasize. The third reason is ignorance of what an effective local lobbying oversight program looks like. This book deals with the third of these reasons. Now, the only reasons left are selfish ones, which are usually hidden behind such arguments as "We don't need a lobbying program. There's not much lobbying here, and lobbying is constitutionally protected." and "It will cost too much, and there's no clear value for the money."

One recent and successful reform effort occurred in New York City. In 2006, the council decided to provide for the formation of a commission to review the city's lobbying program and make recommendations to the council and the mayor. The commission was not set up until 2011. It held hearings and, in 2013, drafted an excellent report. Most of its recommendations were accepted. Here is how its report begins:

> In early 2006, [the mayor and council] introduced legislation to strengthen New York City's laws regulating lobbyists. In hearings on the three pieces of legislation that eventually overhauled the Lobbying Laws, it became clear that the City's

> system was barely functioning. The New York City Clerk, the agency in charge of lobbyist registration, was essentially a repository for the filings of the approximately 250 lobbyists who voluntarily chose to comply with the law. The filings were done on paper and not readily accessible to the public, and the Clerk had never assessed penalties against any lobbyist for non-compliance. The only lobbying data regularly available to the public was an annual list of the City's lobbyists ranked by earnings.

Too many municipalities rest on their laurels, even when these laurels are made of paper, that is, when a lobbying program exists, but provides little disclosure, no training, no advice, and no enforcement. When this is the case, it is important to look at ways to improve the program, to consider what the program's goals are, and to examine best practices that will enable the government to reach these goals.

An independent body, with a good staff (the five NYC commission members had six staff members to support their work), can do the job of lobbying reform. Or it can be done by an ethics commission, either with the help of current staff or with the help of staff hired by the commission for this particular purpose.

One unusual, but exemplary part of the 2014 NYC reforms was an amnesty program. Register now and the past will be ignored. That's a good deal for a lobbying program that, like most, is limited in resources. It shows good will, sends the message that the new, improved lobbying oversight program is not primarily about enforcement, and creates a clear line between the old program and the new one.

Another good part of the 2014 reforms was the decision to appoint a lobbying commission in three to four years. This recognizes the fact that reform is ongoing process.

An unusual instance of lobbying reform occurred in 2015 in Austin. An attorney who represented the president of the Austin Neighborhoods Council in a complaint against someone who was allegedly lobbying regarding land use and sitting on a development board learned how limited Austin's lobbying law was, and put together a coalition, including the city's Ethics Review Commission, to get it reformed.

8. **Enforcement**

As in a government ethics program, enforcement should be the last resort of a lobbying oversight program. The area where enforcement should be most frequent is late filings, which also happens to be the most minor violation, but important because lobbying information should be timely. The longer the filing period, the more important it is to quickly and effectively enforce filing deadlines. If filings are allowed to be late, filers are likely to be lax.

Enforcement should be more consistent than onerous. For example, first-time lobbyists who say they didn't realize they were lobbying or didn't know about the lobbying oversight program (especially if they're from out of town) should not be fined or otherwise sanctioned; they should be sent a warning letter. The goal should instead be to establish ways of finding out who is lobbying (especially from officials who are lobbied), alerting lobbyists to the program, and giving them some training so that they can properly and easily comply with the rules.

Since lobbyists and their principals have numerous obligations and prohibitions beyond disclosure, there would appear to be many opportunities for enforcement. But the better alternative is to provide quality training and to emphasize the value of advice, providing it on a timely basis by an independent professional. This will mean not only less need to enforce the rules, but also fewer arguments that the lobbyists and principals didn't know what to do.

And yet enforcement is necessary, because people tend not to follow rules that are not enforced. For example, according to a January 2016 article in the Tampa Bay *Times*, lobbyists in Hillsborough County, Florida "did not properly register more than one-third of their meetings with the county staff and elected officials last year" because the county lobbying oversight program allows lobbyists to police themselves. Not only were lobbying contacts not disclosed, but those that were were often incompletely disclosed. This is why "the fourth most lobbied person in the county in 2015 was 'Incomplete.'" The county attorney's office is permitted to enforce the rules, but it almost never does. After all, those a county attorney considers to be his or her clients are involved. Enforcement by honor system or by the city or county attorney's office rarely works.

The principal difference between government ethics and lobbying has to be taken into consideration in deciding how to enforce a lobbying code. That difference is the fact that government officials — the principal subjects of a government ethics code — have a fiduciary duty to their community, while lobbyists and their principals — the principal subjects of a lobbying code — do not. Officials' fiduciary duty allows the use of administrative procedures that provide less due process than must be given to ordinary citizens. Administrative enforcement by an independent ethics commission is the best practice for government ethics. But it is not necessarily the best practice for lobbying, at least when respondents are not government officials. In this case, it is best to have the lobbying oversight program act solely as investigator and advocate, not to act as the one who determines whether or not a violation occurred and what the sanction should be. But it is important that whoever does make such determinations does so consistent with the major goals of a lobbying oversight program, that is, ensuring full and timely disclosure of lobbying activities and preventing practices that undermine the community's trust in its government.

If administrative enforcement by an ethics commission is the chosen approach, each rule of procedure needs to be carefully considered to take into account the difference between enforcement against government officials with a fiduciary duty and against others who have no such special duty, but still have a duty to follow the rules set forth in a lobbying code. Therefore, there should be a separate rules of procedure when lobbyists rather than officials are the respondents (see the section below on procedures).

a. **Criminal, Civil, and Administrative Enforcement**

The best practice regarding sanctions for violations of lobbying code provisions (which I will henceforth call "lobbying violations") is to give the lobbying oversight office a range of alternatives and full authority to seek one of several administrative sanctions, seek judicial authority, or refer matters to a criminal prosecutor. Unfortunately, this is not the norm. The norm is either civil fines or criminal prosecution for a misdemeanor, or both.

The biggest difference between the two kinds of sanction is not the sanction itself, but rather the standard of proof. To find someone guilty of a misdemeanor, one must prove beyond a reasonable doubt that the violation was done knowingly and with intent. Administrative fines generally do not require this; civil fines sometimes require knowledge and intent, but not evidence beyond a reasonable doubt. It is much more difficult and

expensive to discipline a lobbyist via criminal enforcement, and much easier to discipline — and reach a settlement with — a lobbyist via administrative enforcement. Criminal enforcement also requires the cooperation of prosecutors, who generally do not consider lobbyists criminals (which they usually are not) and, therefore, are reluctant to prosecute.

Forgetting to file a form or include one or more pieces of information on a timely-filed form is not a crime. Omitting information about family members or business associates, which one may not know unless one asks, is negligent, but not criminal. Violating a lobbying prohibition or failing to fulfill a lobbying obligation, like any ethics prohibition, is not a crime, even if it is problematic. In fact, since lobbying violations are mostly committed by citizens without a government official's fiduciary duty to the community, lobbying violations are *less* serious than most ethics violations and, therefore, have even less reason to be seen and treated as criminal.

In addition, it is difficult and expensive to try a criminal case, so that any case for which there is not evidence about such things as the individual's knowledge, intent, and motive will most likely not be enforced.

So then why impose criminal rather than administrative sanctions? The usual reasons are that prosecutors or former prosecutors are involved in drafting the laws, or politicians want to look like they're being "tough." But they're not being tough. Criminal enforcement means *less* enforcement, because it is much harder and more expensive to find someone guilty of a crime than it is to find someone deserving of a civil or administrative fine. Also problematic with respect to criminal enforcement, prosecutors are political appointees or elected officials who often have a partisan or even personal motive to either prosecute or not. And prosecuting lobbyists is hardly a high priority for them, unless the case has received a lot of press, that is, when it involves a former high-level official or a controversial principal.

And yet New York City, Los Angeles, San Diego, Jacksonville, Oakland, Dallas, and Tallahassee, among others, have criminal sanctions for lobbying violations, although some have civil and administrative sanctions, as well.

Another reason there is criminal enforcement of lobbying laws is that lobbying oversight is generally a minor part of the designated office's work, and the office does not want to get involved in enforcement, or simply doesn't have any investigative or enforcement expertise or capability. The result is that investigations and enforcement are

handled instead by the city or county attorney or by the district attorney. In such offices, the ethics approach of administrative enforcement is not an alternative; enforcement by prosecutors and courts is the default approach. This is true, for example, of Dallas, whose lobbying program is overseen by the city secretary. There are only criminal penalties, so that the lobbying program is not involved in enforcement.

The best argument for turning lobbying over to a government ethics program is that this best allows for an integral program, where training, advice, disclosure, and enforcement work together toward the same goals. In an integrated ethics program, enforcement is more about prevention and education than about punishment. When this message is clouded by a failure to successfully prosecute, as is common, or by politicized prosecution, which is equally damaging, it can undermine trust in the lobbying program, making it look intentionally weak and without authority, or overly politicized and, therefore, unfair.

Another problem with criminal enforcement is that it is focused on punishing individuals. A lobbying oversight office's goal is less to punish individuals than to prevent people from violating laws. The goal is to encourage officials, lobbyists, and principals to seek independent advice, to provide guidance and security to advisees, so that they do the right thing and are protected from sanctions if they follow the advice they are given.

Finally, since it is hard for citizens to know about lobbying violations, it is necessary to have an oversight office be able to initiate its own investigations and, thereby, begin proceedings without a complaint. If the criminal justice system is to be involved, it will want to do its own, duplicative investigation, which is wasteful of resources. And the investigator will likely lack the ethics program investigator's expertise, not to mention give the matter the same priority as an ethics program will.

Whatever the situation, criminal sanctions in a lobbying code are unnecessary. If a crime has been committed, then the lobbying oversight office is free to turn the case over to a prosecutor. But if there is a lobbying violation, it should be dealt with by the body that is charged with oversight, in the form of either an administrative proceeding or a civil suit filed by the office.

The best way to provide for criminal sanctions is, as Palm Beach County, Florida, has done, by allowing a referral by the lobbying oversight office:

> Willful and knowing violations of this article shall be referred by the commission on ethics to the state attorney for prosecution in the same manner as a first degree

misdemeanor

This allows an ethics commission to enforce lobbying provisions without having to prove knowledge or intent. In serious cases where the commission feels that one or more allegations are deserving of criminal enforcement, it can choose to refer these allegations to a prosecutor. This way, enforcement decisions, up until this point, remain in the hands of the lobbying oversight office.

Some jurisdictions, such as Los Angeles, require the filing of a civil suit in order to enforce the lobbying code. This increases the cost of enforcement and its timeliness. And, since the civil action is handled by the city attorney's office, it separates enforcement from training and advice just as much as in a criminal action.

b. **Fines**

There are two kinds of fine: regular one-time fines and those that increase day by day when forms are not filed or omissions or mistakes are not corrected ("per diem" fines). Late filing fines are almost always per diem fines.

It is important that lobbying fines on government officials may not be paid out of campaign funds. Allowing this means that high-level officials do not personally suffer from their misconduct, and it is unfair (1) to officials who either were not elected or who no longer have campaign funds, and (2) to campaign contributors, who had no expectation that their contributions would be used to pay for lobbying-related misconduct. A prohibition on the use of campaign funds to pay lobbying fines (or, more generally, any civil penalties) can be done in a lobbying, ethics code, or campaign finance code. But wherever the rule appears, it should also appear in the enforcement section of a lobbying code or, if lobbying rules are part of an ethics code, in that code's enforcement section. The City Ethics Model Lobbying Code has simple language in its Enforcement section, §307.18(h): "Lobbying-related fines may not be paid from campaign funds."

1. *Late Filing Fines*

It is valuable to send a reminder letter, e-mail, or text message a couple of weeks before each report is due, so that it is more likely that reports will be filed on time (saving everyone a lot of trouble) and there is no defense of having forgotten to file, especially when a lobbyist has not been active during the period and is, therefore, most likely to forget. An attached,

fillable PDF or a link to a database makes it very easy to report no activity. A return receipt is helpful to make sure that an e-mail didn't find its way into a spam filter.

Of course, the best thing is to use an app that automatically sends reminders and allows extra-easy filing of reports, including no activity. This would ensure a very high rate of on-time filing.

Per diem fines may begin either on the day a filing is due, especially if there has been a prior reminder, or the day a late notice is sent (assuming electronic notice). Either is acceptable, but tying fines to late notices makes it appear more fair. With an app and multiple reminders, there is no reason not to start the period on the due date.

Chicago has the most severe per diem fine, for both disclosure reports and registration: $1,000. Dallas has a $500 per diem for all violations. Philadelphia's per diem is a large $250, but its maximum is a moderate $2,000 (that is, the fining stops after eight days). Providence's per diem is also $250, but there is no maximum. New York City has a per diem fine of $10 for first offenders, and $25 for multiple offenders. Los Angeles charges everyone the same: $25 per day up to $500. After twenty days, there is no monetary reason to file a report in Los Angeles. Denver also has a $25 per diem fine, but there is no maximum. Ditto for Miami-Dade County's and Tampa's $50 per diem.

According to the New York City clerk's March 2014 report on its lobbying oversight program, a decision in *OCC* v. *Constantinople* & *Vallone Consulting, LLC*, Index Nos. 325/12 & 348/12 (July 9, 2012) capped per diem late filing penalties at $1,000 in New York state. The result of this change is notable: "In comparison to 2012, in 2013 there was an increase in both the number of late filings (44%) and the number of entities that filed reports late (38%). However, despite the almost doubling of the number of late filings, the total late filing penalties incurred for 2013 decreased by 30%." In other words, instituting a low penalty maximum is likely to increase late reports, most likely due to a cost-benefit analysis that determines that the cost isn't close to the benefit of not disclosing information that could be harmful. In fact, New York City's experience shows that lobbyists perceive a value in keeping their lobbying activities secret.

City Ethics Model Lobbying Code §307.18(a) requires the lobbying oversight office to e-mail a reminder two weeks before each quarterly or annual report is due, and then send a late notice. This way, at a low cost and with little time spent, everyone can be given a timely heads up, thereby lessening the number of fines and increasing fairness and

accountability. Like New York City, the Model Code sets different per diem fines for first offenders and multiple offenders. The suggested fines are $10 and $25 per day, with a maximum of $5,000 (200 days for a multiple offender, enough to make a difference).

In addition, a failure to pay a fine for thirty days means a suspension of engaging in lobbying activities (including having others engage in lobbying activities on one's behalf) for one year. The reason that this sanction is not itself sufficient is that, especially at the local level, many of those who lobby do not do so on an ongoing basis. They lobby only when there is a particular contract or land use proceeding, and may not lobby again for another year or more.

For the sake of fairness, it is important that the same fines apply to both lobbyists and officials when both are required to disclose their lobbying contacts.

In 2014, New York City added a provision allowing waivers of late filing penalties, so long as the waiver decision is put in writing (when a body considers a waiver, it should do this at a public meeting). The provision lists five factors that the clerk's office must take into account in making its decision:

> (i) whether and how often the lobbyist or client has filed late in the past;
>
> (ii) the annual operating budget of the lobbyist or client;
>
> (iii) whether the lobbyist lobbies solely on its own behalf;
>
> (iv) for periodic reports, the number of lobbying matters, number of hours spent working on those matters, and amount of compensation and expenditures that were not reported during the relevant period; and
>
> (v) the significance of the impediments to timely filing faced by the lobbyist or client.

City Ethics Model Lobbying Code §307.18(a) has a similar waiver process, but with some different factors to consider and in a different order of priority.

> Upon request, late filing fines may be reduced or waived by the lobbying oversight office. A decision regarding such a reduction or waiver must be placed on the lobbying oversight office website in a clearly designated section and must take the following factors into account:

(i) the significance of the impediments to timely filing faced by the filer;

(ii) whether the filer received a reminder or notice of an overdue report;

(iii) whether and how often the filer has filed late in the past;

(iv) the annual operating budget of or fees paid to the filer;

(v) whether the lobbyist lobbies solely on its own behalf; and

(vi) for ongoing and quarterly disclosure, the number of lobbying matters, number of hours spent working on those matters, and amount of compensation and expenditures that were not reported during the relevant period.

2. *Deficient Filing Fines*

It is much more difficult to determine that a filing is deficient — that is, that information has been omitted from a registration or disclosure form — than to determine that a filing is late. It is also, often, not as serious a problem, because the omission may have been the result of a misunderstanding, a lack of knowledge, or a negligent oversight. Very few people properly fill out forms, and most of the people who do fill them out properly are accountants, to whom few turn to fill out their lobbying registration and disclosure forms.

On the other hand, it can be very damaging if important information is left out of a form, even if, after alerted, the registrant supplies the omitted information. The reason is that this information may, at this point, be of little value, and learning what was omitted may undermine rather than increase trust. Unless there are checks on disclosure — that is, disclosure not only by lobbyists, but also by principals and officials — a lobbying oversight office can usually discover omissions only when someone alerts them or, suspicious, they ask the right questions of the registrant.

It is also difficult to prove that information was intentionally omitted. Therefore, it is not advisable to require this. If intent is required, the violator will almost always say (or his attorney will say on his behalf) that it was an oversight or that he did not know the information had been omitted. This makes it very difficult to sanction anyone, and it is likely that lobbyists and officials will take advantage of this weakness on the part of the lobbying oversight office.

Below is the City Ethics Model Lobbying Code provision on fines for deficient filings,

§307.18(b). Note that, if a deficient filing is not corrected within fourteen days of notice that it is deficient, it will be treated as an inaccurate filing.

> When, upon reviewing a registration form or disclosure report, or based on information read or received, the lobbying oversight office finds that such a form or report is incomplete, it must notify the registrant or filer in writing of the possible violation and of the penalties for such a violation. The registrant or filer must supply the missing information, or explain why the information provided was complete, within fourteen days of receipt of this notice, or the deficiency will be treated as an inaccuracy, pursuant to subsection (c) below.

3. *Penalties for Failure to Register*

A lobbyist or principal who does not register will not disclose any information or be held to a lobbying code's prohibitions or obligations. This may be due to a lack of understanding of what constitute "lobbying activities," or it may be due to a desire to keep one's lobbying activities secret or to keep it secret that certain individuals are lobbying. To prevent this from occurring, a lobbying oversight program (1) needs to publicize the program, reaching out especially to the city or county's officials and to the contractor, land use, grantee, and licensee communities; and (2) requires the authority to apply serious sanctions for failure to register.

City Ethics Model Lobbying Code §307.18(d) provides for the possibility of a $100 per diem fine from the day lobbying activities began (up to a much higher limit of $25,000), as well as, for an egregious violation, suspension from lobbying and debarment. The fines are subject to reduction or waiver. Here is the language:

> Any individual or entity who seeks to influence city/county officials or employees, directly or indirectly, should either register or seek the advice of the lobbyist oversight office to determine whether the registration requirement is applicable to them. If the lobbying oversight office finds that an individual or entity has engaged in lobbying activities without registering, the violator will be charged an administrative fine of $100 for each day since it first engaged in lobbying activities. If the lobbying oversight office finds the violation egregious, the violator may be suspended from engaging in lobbying activities or from having anyone lobby on its behalf for up to a period of two years. The maximum fine for this violation is $25,000. Debarment may also be applied to someone who has engaged in lobbying activities without

registering. The lobbying oversight office will take into account mitigating and aggravating circumstances.

To put this $25,000 maximum fine in perspective, in 2015 South Australia set a maximum fine equivalent to US$105,000 for lobbying without having registered.

4. *Inaccurate Filing Penalties*

Even more difficult to discover than deficient filings and failures to register are inaccurate filings. Materially inaccurate information can also be much more serious a problem. Therefore, for inaccurate filings, one-time administrative fines are usually applied.

Laws setting ordinary civil fines usually have maximums and, sometimes, minimums, as well. Toronto has two maximums, one for first offenders ($25,000) and another for multiple offenders ($100,000). Seattle's, San Francisco's, and San Jose's sole maximum is $5,000, Los Angeles's is $3,000, Philadelphia's and Chicago's are $2,000 (Chicago has a $500 minimum), and San Diego's is only $1,000.

In "Towards A Madisonian 'Interest-Group' Approach To Lobbying Regulation" (St. John's University School of Law Legal Studies Research Paper Series #07-0064, January 2007), Anita S. Krishnakumar suggests that fines for inaccurate reporting be a percentage of the lobbyist's fees or the principal's lobbying expenditures, that is, something that makes the pain of fines more equitable by making it dependent on the amount of lobbying that has been done. Small fines are simply costs of doing business to large principals.

Smaller jurisdictions may consider it reasonable to have smaller maximums, but that does only two things: it makes it look like the local legislature doesn't think lobbying violations are serious (or that its members are protecting their friends), and it hampers the lobbying oversight office from differentiating between minor and serious offenses. A low maximum also means that an expensive investigation and hearing process may use up a great deal of a lobbying oversight office's budget even if it finds a serious offense.

Consider a scenario. The county's $3 million health insurance contract is up for renewal, and a bidder, wanting to ensure it gets the contract, has its lobbyist makes large contributions to the county executive's pet charity, pays for county commissioners to travel to resorts, and makes illegal communications to those on the contract approval committee, and reports that it made no such contributions or gifts, and that its communications with the

committee occurred only before the time when they became illegal. Should the lobbying oversight office's hands be tied by a low maximum, simply because only 40,000 people live in the county?

City Ethics Model Lobbying Code §307.18(c) provides for a range of sanctions for inaccurate filings:

> When, upon reviewing a registration form or disclosure report, or based on information read or received, the lobbying oversight office finds that such a form or report is materially inaccurate, it will notify the registrant or filer in writing of the possible violation and of the penalties for such a violation. … If the lobbying oversight office finds that there was one or more material inaccuracies, it may impose an administrative fine of up to $5,000 per inaccuracy, suspend the violator from engaging in lobbying activities, void a contract, grant, loan, license, permit, or other benefit with respect to which the violator engaged or had others engage in lobbying activities, and/or debar the violator from obtaining a city/county contract, grant, or other special benefit for up to five years and/or from lobbying for the city/county or any affiliated agency. In setting the amount of an administrative fine for this violation, the lobbying oversight office will take into account mitigating and aggravating circumstances as well as the amount of the lobbyist's fees, the principal's lobbying expenditures, and the size of the benefits sought in the particular matter.

5. *Administrative Fines*

City Ethics Model Lobbying Code §307.18(e)(4) provides for a general administrative fine. It allows the lobbying oversight office to fine a violator up to $5,000 per violation (unless otherwise stated, as for failure to register), or three times any amount not properly reported, or three times any amount given or received in excess of the gift limit, whichever is greater. This is a way to allow an additional or alternative fine for especially serious omissions and for gifts accepted beyond a gift limit, for jurisdictions that limit rather than ban gifts from lobbyists and their principals (the model code recommends a ban, but limits are more common).

c. **Other Sanctions**

As with ethics violations, for lobbying violations there are administrative and civil sanctions other than fines, and it is best that a lobbying oversight office be able to choose from a

number of sanctions in order to ensure the one(s) most appropriate to each situation. The choice of sanctions should include:

Warning or public education letter

Settlement

Reprimand or censure

Injunctive relief

Order to show cause re need to register

Suspension of lobbying activities

Avoidance of contracts, permits, grants, loans, and licenses

Debarment

Damages

Costs of Investigation

These sanctions may appear in state law, in the local ethics code, in the charter, or in regulations. Wherever they appear, if they apply to one or more types of lobbying violation, they should be reproduced in the lobbying code, so that lobbyists, their principals, their legal counsel, government officials and employees, the lobbying oversight office, the city or county attorney's office, prosecutors, and the courts are fully aware of the nature and extent of available sanctions.

Admission and Settlement. It is valuable to acknowledge in the lobbying code itself that those who violate lobbying provisions should act in ways that will increase trust in lobbying and in the local government. In fact, the most valuable sanctions are those violators impose on themselves. They can quickly admit to their violations, and apologize, rather than compound their misconduct by once again putting their personal interest ahead of the public interest by denying, obfuscating, explaining away, or covering up their misconduct, and costing the government many thousands of dollars in investigation, hearing, and litigation costs. They should also educate the public and their colleagues by publicly saying why what they did was wrong, and they should show that they appreciate the harm in what they have done by promising that they will not engage in such misconduct again. Where appropriate,

they should offer compensatory action, turn the particular lobbying matter over to someone else (or, if the principal, not lobby on the matter other than by providing public testimony) or, if involved in an ongoing pattern of misconduct, promise to stop lobbying altogether. Here is language from the City Ethics Model Lobbying Code (§307.15):

> Violation of any provision of this code should raise conscientious questions for the violator as to whether an admission, sincere apology, compensatory action, and a settlement are appropriate to promote the best interests of the community and to prevent the cost – in time, money, and emotion – of an investigation and hearings.

When one thinks of enforcement as primarily a learning experience for the offender, for other lobbyists and principals, for officials, and for the public, and one recognizes that a lobbying oversight office's resources are usually limited, one sees that most instances of misconduct can and should be dealt with via a quick settlement (with an admission of a lobbying violation and the payment of a fine or compensation).

1. *Warning and Public Education Letters*

A warning letter is appropriate when a *de minimis* violation has occurred or been alleged, even when there is a stated minimum that has not been reached (that is, there is no actual violation). A warning letter is an educational experience only for the respondent, unless the respondent waives confidentiality, which should be encouraged in situations where the warning letter would be helpful to others (in the alternative, especially where the violation is relatively common, a lobbying oversight office may draft a general advisory opinion on the relevant topic, including the advice given in warning letters without mentioning any particular violator's name). A warning letter lets the respondent know that, if the allegation were true, he violated the ethics code and, therefore, should be careful not to engage in such conduct in the future, even at a *de minimis* level. It also may be pointed out that the respondent should ask for advice if such a situation arises again. A warning letter is effectively unrequested ethics advice.

Warning letters may also be used where there is insufficient evidence of a violation, but where, as in the language used in California, "the subject of a complaint should be made aware of potential future responsibilities." Warning letters can also be used when a lobbying oversight office investigates a matter, finds evidence, but does not believe a fine or other

sanction is called for.

When someone who has received a warning letter does what he was advised not to do, this should be considered an aggravating circumstance in a future proceeding.

Another sort of warning letter, called a "public education letter," is employed in Massachusetts. What makes this different is that it requires the consent of the respondent, making it a form of settlement of a minor case, where the emphasis is placed on prevention and education rather than on getting the respondent to admit to a violation. While ordinary warning letters are usually not made public, a public education letter is intended to be public, thereby educating everyone, just like a settlement agreement.

2. *Settlements*

Lobbying enforcement proceedings are usually simpler, on average, than ethics proceedings. The most complex questions tend to be definitional: whether an individual was required to register or whether an individual engaged in lobbying activities. These definitional issues can be worked out via regulations, advisory opinions, public education letters, waivers, and decisions.

The relative simplicity of lobbying enforcement issues makes it easier to reach settlements. Reaching a quick, fair settlement is the most effective way a lobbying oversight office can show the community how important it is to have a responsible, independent office with teeth. Only such an office can reach a fair settlement that will be respected and that will bring a community relief rather than the sort of strife that scares citizens away from participating in government.

For more on settlements, see the relevant section of *Local Government Ethics Programs*.

3. *Reprimand or Censure*

Reprimand and censure are sanctions that constitute little more than a finding of a violation, and they communicate nothing more to lobbyists, principals, officials, or the public (although they may be accompanied by a warning letter or public education letter). Therefore, they are of limited value, although the finding of a violation can be an embarrassment, especially if the respondent has been vociferously insisting on her innocence.

The limitations of these usually undefined sanctions are greatest when they are the only sanctions, other than small fines, at the disposal of a lobbying oversight office, which is

sometimes the case. It makes it look like the office cannot really sanction anyone.

There are times when it is important for an office to ensure that a violation is publicly recognized as such, and a fine is inappropriate due to mitigating circumstances. This should be made clear when a reprimand or censure is the sanction of choice or is agreed upon in a settlement agreement.

4. *Injunctive Relief*

Many jurisdictions allow the lobbying oversight office, or the city or county attorney (it is preferable that the office's own counsel does this), to go to court to enjoin violations of or to compel compliance with lobbying provisions. Best is when the office is allowed to make cease and desist orders (to stop the violation of a lobbying provision) which, if not followed, can be supported by a court injunction. This approach saves time and money.

Even if an office is not given express authority to issue cease and desist orders, the office can effectively issue them by telling the respondent that he will have to pay the costs of seeking injunctive relief through the courts. If the respondent agrees to cease the violation in order to prevent having to pay for a court proceeding, the result is effectively the same as a cease and desist order.

Injunctive relief can also be sought if a respondent ignores a decision or order made by the lobbying oversight office.

Otherwise, injunctive relief is appropriate primarily when misconduct is ongoing. Ongoing misconduct can be harmful and, therefore, the lobbying oversight office should not be required to wait until the enforcement process has run its course. This is especially true when the respondent has good reason to delay the process as much as possible, because he is benefiting from it or has not yet received the benefits.

When a lobbyist or principal fails to file or complete a disclosure form when requested, the office cannot file an order to cease and desist, but can order it to do what is required. The office should be expressly permitted to order the filing or amending of a deficient disclosure statement, so that it can seek injunctive relief after a specified number of days have passed.

Tallahassee has some good language providing authority to seek injunctive relief:

> Violations of this Code that are continuous with respect to time are a public nuisance and may be abated by injunctive or other equitable relief. The imposition

of a penalty does not prevent injunctive relief.

Here is the City Ethics Model Lobbying Code language relating to injunctive relief, §307.18(e)(3):

> The lobbying oversight office, on behalf of the city/county, may order a violator to cease and desist a violation if the violation is still ongoing, or it may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a violation of this code or to compel compliance with this code, including the payment of fines and other sanctions. The lobbying oversight office may also order a violator of a disclosure requirement to file an unfiled disclosure report or to add information to a filed disclosure report.

5. *Order to Show Cause*

What does a lobbying oversight office do when it discovers that someone who has been engaging in lobbying activities has not registered as a lobbyist and has ignored a request to register? One cannot enjoin behavior that is not occurring. If the office orders an individual or entity to register, the respondent can easily say that its activities do not fit the definition of "lobbyist" or "lobbying," at least not yet. It doesn't necessarily have to show evidence.

Therefore, the best solution is to enter an order to show cause why the individual or entity does not need to register. This places the burden on the respondent. It requires the respondent to present evidence about itself, its agents or principals, and its and their activities. In order to enter an order to show cause, this authority must be expressly given to the lobbying oversight office, or the respondent's lawyer will refuse to provide any evidence. Here is edited language from Oakland's lobbying code:

> Any official, employee, or citizen may request that the lobbying oversight office issue an order to any unregistered person to appear and provide evidence that he or she has complied with the registration requirement or is exempt from registration.

Some jurisdictions even have online forms to make it easy for individuals to report the names of individuals they believe to have been lobbying without having registered. For example, the Los Angeles Unified School District has a Form for Reporting Suspected Undisclosed Lobbying Activity.

It is a good policy to require a lobbying oversight office to proactively seek out unregistered lobbyists, rather than waiting for people to make requests. The best approach is (1) to ask officials to let them know of anyone who contacts them with respect to financial interests and does not provide a registration number, and (2) to require officials to keep logs of their meetings and turn them over to the office on a frequent basis (or put them online). The office can then contact people who appear to be lobbying without having registered, asking them to explain why they have not registered as a lobbyist. This is one place where a minimum hourly requirement would be problematic, because anyone could simply say she has not yet lobbied sufficient hours during the relevant period.

The office can also read meeting agendas and minutes, newspapers, and local political blogs in order to anticipate who will be or has started lobbying, and invite them for training, offer them advice, and explain the disclosure and oversight program. Getting people to register as lobbyists should only be confrontational when individuals refuse to respond to friendly communications.

Below is the City Ethics Model Lobbying Code order to show cause provision, §307.17. Note that, unlike Oakland's provision, this provision allows the lobbying oversight office to issue an order to show cause on its own initiative.

> The lobbying oversight office may, on its own initiative or upon the request of any official, employee, or citizen, issue an order to any unregistered individual or entity to appear and provide evidence that he, she, or it is exempt from registration requirements.

6. *Suspension of Lobbying Activities*

The authority to suspend someone from engaging in lobbying activities can be the most powerful sanction a lobbying oversight office has, especially for contract lobbyists. But although many jurisdictions allow this sanction to be used, it is often very circumscribed, due to the concern that this involves the taking away of a constitutional right. This is why it is important to clarify the basis for this sanction before discussing the sanction itself.

There is no constitutional right to be paid to communicate someone's views to government officials, directly or indirectly. There is no more right to do this than there is to be legal counsel to someone who is trying to employ her constitutional rights. Professional representation entails professional responsibility. If you violate the rules, your license is

suspended. The client has to find another attorney.

More difficult is suspending the lobbying activities of a citizen representing himself or a company he owns. But even a *pro se* citizen-attorney is required to follow the rules. A *pro se* attorney cannot make gifts to a judge, make false representations, or communicate with the jury, directly or indirectly, outside of formal proceedings. Why should a *pro se* lobbyist not be required to follow similar rules?

A respondent may argue that nothing should limit the right to lobby. But the right to lobby is not absolute. First, rules must be followed. Second, unlike speech, access to officials is limited. They and their aides have only so much time to talk or read correspondence. Even time to speak at public hearings is limited by the body holding the hearing or by general government rules.

Even if a principal were suspended from lobbying, this would not prevent the individual or company from giving public testimony and, thereby, presenting its grievances to officials. This is enough access for someone who has failed to follow the rules regarding secret lobbying, to the extent that a lobbying oversight office believed this sanction was appropriate.

For most lobbying violations, a fine or other sanction is adequate. But numerous or ongoing, clearly intentional violations may deserve suspension of lobbying activities, both as punishment and to send a clear message that there are responsibilities that accompany the right to lobby, and that if a lobbyist acts very irresponsibly, he will lose this right for a period of time. This is fair as long as this information is openly communicated up front, so that individuals know what may happen to their right to lobby if they continue to violate the rules that accompany this right. If they seriously violate these rules, they have chosen to jeopardize this right, in full knowledge of the possible consequences. It is childish to argue that one's rights are always more important than the rule of law or than one's responsibilities to one's community or to another community where one has financial interests.

The length of suspension that may be imposed varies widely. Chicago and the Los Angeles United School District allow for indefinite suspension (Chicago's language is "Any lobbyist who violates any provision of Article IV of this chapter shall be subject to the suspension of his lobbyist registration."). Philadelphia allows for up to a five-year suspension, but only when the violation is found to have been intentional. Los Angeles

provides for a four-year suspension when a lobbyist has made an illegal campaign contribution, but the period can be decreased to as little as one year due to mitigating circumstances. Several cities and counties in Florida allow suspensions up to two years, and Honolulu and Gainesville allow suspensions up to one year. New York City allows only 60 days. The City Ethics Model Lobbying Code allows for a suspension of up to three years.

When reports are late, Chicago provides for suspension until a fine has been paid. Miami-Dade County makes this kind of suspension automatic:

> Any lobbyist who fails to file the required expenditure report by September 1 shall be automatically suspended from lobbying until all fines are paid unless the fine has been appealed to the Ethics Commission.

Another approach is the one taken by Miami Gardens, Florida: a schedule that increases suspension as the number of violations increases:

> [E]very lobbyist who is found to be in violation of this article shall be prohibited from registering as a lobbyist or lobbying in accordance with the following schedule: (1) First violation: for a period of one year from the date of determination of violation; (2) Second violation: for a period of two years from the date of determination of violation; (3) Third violation: for a period of three years from the date of determination of violation.

Tampa and Miami-Dade County have the same kind of schedule, but the periods are 90 days, one year, and five years, respectively.

There are two problems with this particular language. One is that it does not make it clear whether multiple violations would include those found in a single proceeding, or whether they need to be found over a period of time. That is, does a single finding of three violations allow a three-year suspension, or only one year? Does it matter if the violations are related and occurred at the same time, or whether they occurred over time (I think it should make a difference)? A related question is, When a continuing violation is considered multiple violations, as it is in many jurisdictions, does this also apply to suspension (I would argue that it does not)? Similarly, does the failure to file three quarterly reports constitute one violation or three (I would say three, at least if the lobbyist is notified of the first and

second at the appropriate time)?

The second problem is that this provision does not provide the lobbying oversight office with the discretion to take into account mitigating circumstances, including the severity of the violations, when determining the appropriate sanction. Any first violation requires a year suspension. That will usually be too stringent.

City Ethics Model Lobbying Code §307.18(e)(5) simply gives the lobbying oversight office an additional sanction, without a schedule:

> A registrant may be suspended from engaging in lobbying activities or from having anyone lobby on its behalf for up to three years.

7. *Avoidance*

Avoidance or revocation of contracts, permits, grants, loans, and licenses is an important arrow for a lobbying oversight office to have in its quiver. It is important because it relates most directly to the principal goal of local lobbying, that is, to obtain direct benefits. It is hard to throw out legislation that was partly the result of illegal lobbying activities. It is much easier to void a contract, permit, or grant. Therefore, this sanction is the one most likely to ensure that principals and their agents follow the rules.

Unfortunately, some avoidance provisions are limited to procurement. For example, the Los Angeles Metropolitan Transit Authority lists among its sanctions "rejection of a party's bid or proposal to enter into a contract with the MTA." Even more specific is the language in Orange County, Florida:

> The board of county commissioners may void a contract entered into in connection with a procurement matter where the county mayor or his or her respective staff, one or more county commissioners or their respective staff, or a member of the pertinent procurement committee has been lobbied in violation of the black-out-period restrictions

Not only is this language limited to black-out-period restrictions, that is, the ban on communications relating to a procurement matter (the "Cone of Silence"), but it also provides the avoidance authority to the local legislative body. Since the members of that body may have a special relationship with the lobbyist or the principal, its refusal to void a

contract would be seen as preferential treatment. The argument in favor of the legislative body's involvement is that voiding a contract can be harmful to the community, because there may be a damaging delay to a project or a temporary suspension of important services. These problems can usually be dealt with through the timing of the avoidance, for example, by scheduling a re-bidding of the contract for a time when it would be best for the community. Done right, with input from the procurement office, from the department or agency involved, and from the legislative body, there is no reason that a lobbying oversight office cannot make a responsible decision that takes into account not just sanctioning, but also the needs of the community. This may mean choosing not to void a contract, but rather to debar the contractor for a period of time (see the following subsection).

It is worth noting another kind of contract avoidance provision, from Broward County, Florida:

> In addition to all other penalties in this section, an employer who has retained a lobbyist(s) to lobby in connection with a competitive solicitation shall be deemed non-responsive unless the employer, in responding to the competitive solicitation, certifies that each lobbyist retained has timely filed the registration or amended registration required under Section 1-262. If, after awarding a contract in connection with the solicitation, the County learns that the certification was erroneous, and upon investigation determines that the error was willful or intentional on the part of the employer, the County may, on that basis, exercise any contractual right to terminate the contract for convenience.

What is a valuable sanction with respect to contracts would appear to be even more valuable with respect to permits, grants, subsidies, tax abatements, loans, and licenses, because voiding them is less likely to be damaging to the community. A developer who has illegally lobbied in order to get a permit, a social service agency that has illegally lobbied in order to get a grant, or a restaurant that has seriously violated lobbying provisions in order to get a liquor license, can best be sanctioned, and future illegal lobbying activities be prevented, by taking away their permit, grant, or license.

Tampa has an avoidance provision that applies only to permits and licenses, while for contracts it provides the sanction of debarment. Avoidance should be allowed across the board.

Below is the City Ethics Model Lobbying Code avoidance provision, §307.18(e)(6):

> The lobbying oversight office may void a violator's contract, grant, permit, subsidy, tax abatement, license, or other benefit with respect to which the violator directly or indirectly lobbied. In order to best consider the consequences to the community of an act of avoidance, the office should discuss the matter with any agency, department, or body involved with the benefit, as well as with the local legislative body.

8. *Debarment*

Debarment consists of prohibiting an individual or entity from seeking a contract, grant, loan, license, permit or other benefit for a certain period of time. It is a good alternative when it is damaging to the community to void a contract, grant, or permit. Not only does debarment affect the lobbying code violator's business in the immediate community, but it can affect their business elsewhere, since communities often check other communities' debarment lists. Therefore, although this is a severe sanction, its availability to a lobbying oversight office will prevent a great deal of misconduct in the areas where local lobbying is most important. It is valuable to have it as an alternative, even if it is never used. The seriousness of the sanction led Miami-Dade County to allow it only when there have been three violations, ethics or lobbying.

San Antonio and the City Ethics Model Lobbying Code allow debarment for up to three years. Like Miami-Dade County, the Los Angeles Unified School District allows debarment without a time limit, but also without the need to prove three violations.

Debarment should never be taken lightly, and should never be used for anything but major infractions. It should also be imposed only upon a finding of knowledge or intent. Here is the City Ethics Model Lobbying Code language (§307.18(e)(8):

> If the lobbying oversight office finds that an individual or entity has knowingly violated any provision of this code in a more than *de minimis* way, that individual or entity may be prohibited from entering into any contract (including a lobbying contract) with, or obtaining any grant, loan, permit, license, or other benefit from, the city/county for a period not to exceed three years.

It is worth expressly including in a debarment provision debarment from lobbying *for* the government or its agencies, as the Model Code does. This is the form of debarment that

is most harmful to contract lobbyists, because government lobbying has become an important business for them. They may not be able to lobby an agency they work for, but there are lots of other agencies to lobby for. Knowing that they might lose this business will help prevent lobbying misconduct. San Antonio is one city that has recognized the virtues of this kind of debarment.

9. *Civil Forfeiture*

Civil forfeiture, also known as "restitution" or "disgorgement of gains," requires someone who violates a lobbying provision to forfeit to the local government any financial benefit the violator, or someone aided by the violator, has received. Even when it is determined that no more than a small fine is required because, for example, the misconduct was merely negligent, it is important to require that any benefits of misconduct be returned. The public certainly doesn't want to see anyone keep ill-gotten gains.

In lobbying there are only two areas where restitution might be appropriate: illegal gifts and contingency fees. However, in both areas, normal restitution would be to the person who was complicit in the lobbying violation: the giver of the gift or the client who agreed to pay an illegal contingency fee. Therefore, restitution would not be appropriate, except in an instance where there was evidence that the principal did not realize that contingency fees were illegal. What would be more appropriate is having the forfeiture go to the public through its government. With respect to gifts, it would involve a fine to both parties; with respect to contingency fees, it would involve damages (see the following subsection).

Too often illegal gifts and campaign contributions are simply returned. If this is done upon receipt or at least upon recognizing that a campaign contribution was illegal, then returning the gift is acceptable because it quickly resolves the problem, even if it does not penalize the gift giver. But if this is not immediately done, and the matter comes to the attention of the lobbying oversight office due to a tip, complaint, or investigatory journalism, restitution is no longer appropriate. At this point, all parties involved should be fined, and the fine on the gift recipient should take into account the amount received. The lobbying oversight office's decision should make it clear that a failure to immediately resolve such a matter by restitution will be costly to all parties involved.

This is done best by the Los Angeles Metropolitan Transit Authority, which allows

treble civil penalties for unlawful gifts and expenditures. But to do this, either a citizen or the civil prosecutor must file a suit. Therefore, it is a remedy available only for large gifts, where the civil penalties will be sufficient to pay for the litigation.

10. *Damages*

Since most lobbying misconduct is not damaging to the public in a direct monetary way, damages are rarely the appropriate sanction. That is why I did not find one jurisdiction that includes damages as one of its sanctions.

But damages are appropriate to the second area where restitution is inappropriate: contingency fees (assuming the lobbyist has been paid). The question here is whether the entire fee should be paid to the government as damages, since it was illegal, or whether the lobbying oversight office should try to determine a market price for the services actually rendered and sanction the parties for any fees over that amount. The problem with the latter approach is that what is illegal about a contingency fee is not the fact that it is excessive, but rather that it is against public policy to tie fees to the results of lobbying. Therefore, since the entire fee is illegal, not the excess amount, it is more appropriate to sanction the parties to a contingency fee arrangement for the entire fee.

Below is the City Ethics Model Lobbying Code provision on damages, §307.18(e)(7):

> The lobbying oversight office, on behalf of the city/county, may initiate an action in a court of appropriate jurisdiction to obtain damages.

11. *Joint and Several Liability*

With respect to lobbying enforcement, it is important to expressly state that all parties to a violation are jointly and severally liable, that is, each of them owes the full amount of any fine or other monetary sanction. The reason for this is that when a lobbyist violates a lobbying provision, she is acting as the agent of someone else and, therefore, that principal is equally responsible, even if he didn't know about the illegal conduct. In addition, others may be involved, including government officials and employees, subcontractors, and intermediaries. All should be held responsible.

It might seem better if each individual's role in a violation were considered a separate violation, and he was held solely liable for any fines, costs, or restitution that arose. That is what the situation would be, I think, if nothing were said in a lobbying code. However, joint

and several liability makes it more likely that a respondent would seek to bring into a proceeding other people involved in the matter, so that he could share his costs and fines. Since inclusion of all parties involved is an important goal of government ethics enforcement, a lobbying code should expressly make all parties liable. Here is language from San Francisco:

> Should two or more persons be responsible for any violation under this Chapter, they may be jointly and severally liable. If a business, firm or organization registers or files lobbyist disclosures on behalf of its employees …, the business, firm or organization may be held jointly and severally liable for any failure to disclose its employees' lobbying activities.

San Francisco's mention of the situation where the lobbyist is the principal's employee is useful. There is no reason to fine the employee. The principal can deal with situations where its employee acted without authority. Here is the City Ethics Model Lobbying Code provision, §307.16:

> If two or more individuals or entities are responsible for any violation, they may be jointly and severally liable.

Chicago has a rule that makes principals responsible for a lobbyist's failure to register: "No person shall retain or employ a lobbyist who has failed to register as required in this Article. Any person who violates this section shall be subject to the penalty or penalties, as applicable." Making the employer of a lobbyist responsible for registration ensures that it is in everyone's interest to register and disclose. When there is doubt about the need to register, the principal's responsibility for it will make it more likely that advice will be sought from the lobbying oversight office.

Another approach to the issue of joint liability has been taken by Tampa, in a criminal context:

> Whoever commits a violation of the City Code, or aids, abets, counsels, hires, or otherwise procures such violation to be committed, and such violation is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or

constructively present at the commission of such violation

12. *Professional Discipline*

The most effective and easiest sanction to impose on a lobbyist who is a lawyer or other professional is the notification of the professional disciplinary board (including a lobbyist association disciplinary board, if there is one) that the lobbyist has violated the lobbying code. This is not something that individuals will like to have on their records. Below is the City Ethics Model Lobbying Code provision, §307.18(g):

> The lobbying oversight office will notify the professional disciplinary board of any lobbyist or principal who is found to have violated this lobbying code.

13. *Legislative Action*

Although it is important to give the lobbying oversight office a monopoly on the enforcement of a lobbying code, this does not mean that the local government cannot take into account lobbying violations, especially if the government feels that the hearing officer was overly lenient and that it is important to send a message to other lobbyists and principals that such misconduct will not be taken lightly. This is the reason for the following City Ethics Model Lobbying Code provision (§307.18(h)), which allows the local government to take lobbying violations into account with respect to the awarding of what lobbyists and their principals are generally seeking: contracts, grants, permits, licenses, and the like. Of course, this can be done without providing express permission, but it is best to openly consider whether this is appropriate, especially in light of the fact that this power may be abused for partisan reasons rather than to prevent further misconduct.

> *Effect on Government Action***.** The local legislative body, a board or commission, or a department or agency may take into account a violation of this lobbying code in making its determinations, including the award, rejection, or termination of a contract, grant, loan, permit, zoning change, license, subsidy, tax abatement, extension, renewal, change orders, and other special benefits.

14. *Costs of Investigation*

Some local governments charge a lobbying code violator for the costs of investigation. The

idea is that if the respondent had immediately admitted to the violation, the community would have been saved this cost. Sometimes, this is explicitly allowed; sometimes, it is done as part of a settlement.

15. *State Limitations*

Some states place a limit on the size of fines that can be imposed by municipalities. For example, Florida municipalities are limited by state law to criminal enforcement or fines of up to $500. This would seem to severely limit local lobbying enforcement. However, many Florida municipalities have chosen to go beyond findings by adding such sanctions as suspension, avoidance, and debarment. And although a $500 top fine seems much too low, this can be remedied by making each day's continuance of a violation a separate violation.

d. **Mitigating and Aggravating Circumstances**

When determining the appropriate sanction, the following mitigating and aggravating circumstances should be considered. It is best if they are expressly included in the ordinance or in regulations to provide clear guidelines for the ethics commission (as they are in City Ethics Model Lobbying Code §307.18(f)):

> The nature and severity of the respondent's misconduct
>
> The duration of the misconduct
>
> Whether the incident appears to have been singular or part of a pattern
>
> Whether the violation appears to have been inadvertent, negligent, or deliberate
>
> The position and responsibilities of the respondent
>
> The amount of any financial or other loss to the municipal government as a result of the misconduct
>
> The value of anything received or sought
>
> The efforts taken by the respondent to either disclose and correct the misconduct, or to conceal it from, or otherwise deceive or mislead, officials, the lobbying oversight office, or the public
>
> Whether the respondent in any way coerced or intimidated subordinates, colleagues, or others into participating in or failing to report the misconduct

The costs incurred in investigation and enforcement

Whether or not the respondent sought advice from the lobbying oversight office [*or a government attorney if the office does not offer advice*], and what that advice was (failure to follow advice is a serious aggravating circumstance)

Whether a violation is a first violation, or the respondent has been found to have violated the provision, or other government ethics-related provisions, before

Whether the conduct appears to have been induced, encouraged, or aided by a superior, colleague, or someone in the municipal government

Whether the respondent cooperated with the lobbying oversight office both with respect to his or her own conduct and with respect to related conduct of others

Whether the respondent had prior notice or reason to believe, due to the handling of similar situations, that the conduct was prohibited

e. **Statute of Limitations**

It is important for a lobbying code to have a clear statute of limitations — that is, a period after which no enforcement can be taken — even if there is a general statute of limitations in the ethics code, in another ordinance, in the charter, or in state law. One reason is to provide clear notice to everyone involved. But another is to ensure that the period and its starting date are relevant to enforcement of lobbying violations and the core values of lobbying oversight.

When the private influence of officials is involved, including gifts, misuse of confidential information, and the like, there is a tendency to try to hide and, if it comes out, cover up misconduct. Secrecy is a paramount goal of lobbying offenders, while timely transparency is the paramount goal of lobbying oversight. Secrecy also exacerbates a violation, further undermining the public's trust. Secrecy also often involves intimidation of others, which is the worst form of ethical misconduct.

Therefore, a statute of limitations relevant to a lobbying program needs to be based not on the date on which someone engaged in misconduct (thereby rewarding secrecy), but rather on the date the secrecy surrounding the misconduct ended and it was discovered by the complainant or by the lobbying oversight office.

This is why it is important to have a statute of limitations that does not start to run until the misconduct has been discovered. After discovery, enough time is needed to enable

a complainant (or the lobbying oversight office) to look further into the facts, consider and take alternative steps, talk to people about jointly filing the complaint, get up the nerve to file, and then actually prepare the complaint or have someone else do it.

In addition, discovering the violation does not necessarily mean that the complainant recognizes it as a violation. This may not happen for some time after. Therefore, the best practice is to allow a complaint to be filed up to at least one year after the date the complainant or the lobbying oversight office discovered the alleged violation.

Some statutes of limitations based on discovery rather than misconduct refer to "reasonable discovery" or conduct that "could have been discovered through publicly available information." The latter formulation is preferable. Reasonableness should be based on something solid, such as publicly available information. But even here, how publicly available the information was is an important consideration. Information that is searchable online is one thing. Information that could be obtained through a carefully worded public records request is another thing. The fact that information is sitting in a file somewhere (or spread through several different files) does not make it "publicly available." Since it is so difficult to know what could have been discovered when, it is better to rely on actual discovery.

A statute of limitations rule should also make it clear when a lobbying enforcement proceeding begins. Is it the date the complaint is filed or the date a self-initiated investigation is begun? Or is it the date sufficient probable cause is found and, therefore, the actual proceeding begins (this is the rule, for example, in Los Angeles)? The date the complaint is filed seems to be the best choice.

Here is the City Ethics Model Code language from §307.2: "A complaint must be filed within one year after the complainant discovered the alleged violation."

f. **Procedures**

Unlike government ethics codes, most lobbying codes say little about procedures, including jurisdiction, the filing and handling of complaints, investigations, settlements, sufficient or probable cause determinations, confidentiality and transparency, hearings, the division of roles (investigator, advocate, hearing officer, and determiner of sufficient cause and violation), and appeals. When the ethics commission is the lobbying oversight office, its procedures apply. But when the clerk or another office that is not accustomed to

investigations and hearings is in charge (and there is no administrative hearing officer, as there is, for example, in Albuquerque), it is important to include the procedures in the lobbying code, accompany it with regulations or rules of procedure, or include a reference to all the local and/or state rules that would apply in a lobbying enforcement proceeding.

Enforcement procedures is a huge area that is covered in the Enforcement chapter of *Local Government Ethics Programs*, so I will not go over it again here, other than to emphasize that the values of independence, transparency, and the ability of the office to self-initiate investigations are just as applicable in the lobbying context. It is, therefore, best to let an independent ethics program oversee lobbying and enforce lobbying rules, if such a program is available. Whatever the situation, the city or county attorney should not be involved; independent counsel is greatly preferable.

Differences Between Ethics and Lobbying Enforcement. The principal difference between government ethics and lobbying needs to be taken into consideration in drafting procedures. That difference is the fact that government officials have a fiduciary duty to their community, while lobbyists and their principals do not. This fiduciary duty allows the use of administrative procedures that provide less due process than must be given to ordinary citizens. This difference is most important with respect to the standard of proof and the division between those who on the one hand investigate and advocate and, on the other hand, hear and make a determination.

Ethics commissions that enforce both ethics and lobbying codes generally do not distinguish between enforcing laws against government officials and enforcing laws against private citizens and entities. I believe that three important changes need to be made to ethics commission enforcement procedures when the respondent is a lobbyist or other citizen.

One is that the standard of proof should rise from the ethics best practice of "preponderance of the evidence" to "clear and convincing evidence."

Two is that more must be done to create a clear division between (1) the individual(s) who investigate a matter, act as advocate for the municipality in a proceeding that relates to an alleged lobbying violation, and have the authority to enter into a settlement, and (2) the individual(s) who hear the proceeding and make a final determination. The investigator may make a sufficient or probable cause determination, because that is actually no more than a decision that there is enough evidence to move on to a full investigation and then to a hearing, if no settlement is reached.

A sufficient cause determination is often confused with a final determination. However, they differ in two important ways. First, there is often not a clear evidentiary standard for sufficient cause, and second, a sufficient cause determination cannot be appealed. It is only a decision not to dismiss a matter for lack of evidence.

The third important change in procedure is the level of transparency. Ethics proceedings should be transparent as possible, because what is at stake is the conduct of public officials. But lobbying proceedings, to the extent that they involve private citizens (except for those who have recently been public servants, in revolving door matters), require more confidentiality. However, whenever a proceeding involves public officials, as many do, lobbyists and their principals should be encouraged to waive confidentiality.

Late and Deficient Filing Enforcement. Most lobbying enforcement involves late or deficient filings. Enforcing these violations does not require a hearing. It only requires notice, an opportunity to make additions or corrections where the problem is deficiency, and an opportunity to plead mitigating circumstances to lessen fines. Mostly, this involves paperwork. It is important to have a separate procedure for late and inadequate filings.

Below is the City Ethics Model Lobbying Code provision, §307.1, on handling late and deficient filing matters:

> For late and deficient filing violations of this lobbying code, a truncated procedure requires notice, an opportunity to make additions or corrections where the problem is deficiency, and an opportunity to plead mitigating circumstances to lessen fines. No hearing is required, and the lobbying oversight office may make determinations and apply sanctions as set forth below. There is no appeal from a finding of a late or deficient filing.

Failure to Register Enforcement. An important and difficult area of enforcement involves failures to register. The best way to enforce against this failure is to require officials and employees to insist that anyone who may be a lobbyist either register or seek advice before they will talk to the individual. Otherwise, the lobbying oversight office is usually faced with a situation where someone has been lobbying for some time without registering, and will fight hard for a ruling that she is not a "lobbyist." This can be very expensive and time-consuming, especially when the individual is an attorney.

The best way to prevent this from happening is to require officials to disclose the

name and business or client of everyone they have contact with regarding government matters, as well as lists of those doing and seeking special benefits from their agencies or departments. Then the lobbying oversight office can compare the officials' lists to the list of registered lobbyists and contact those who are not registered, asking them to discuss with the office the possibility of their need to register. Because all this is a lot of work, it is best to get officials to agree not to meet with anyone who is either not clearly a citizen with an opinion (or does not fit another exception) or a registered lobbyist, at least until the lobbying oversight office has said that the individual is not lobbying.

Click here to read the City Ethics Model Lobbying Code procedures for lobbying enforcement proceedings, which are very similar to the model ethics code's procedures, except for the three issues discussed immediately above.

g. **Enforcement Actions**

There is almost no information available online about lobbying enforcement actions at the local level. Very few lobbying program websites even mention enforcement. El Paso County unusually has a button called "Violations Found," but it links to a page that says only, "At this time, there are no found violations." No mention of complaints filed, settlements, dismissals, or decisions short of a finding of a violation.

The only place to find detailed information about lobbying enforcement actions is in the annual reports of New York City's city clerk. These reports provide detailed information about complaints, fines, and audits. There is statistical analysis, charts, top ten lists, the works. These reports should be the model for all lobbying oversight offices.

San Diego does list some lobbying proceeding resolutions in its page of links to proceeding resolutions in all the areas over which the ethics commission has jurisdiction.

h. **Privileged Lobbying Communications**

A 2014 brief from the U.S. House Ways and Means Committee in *S.E.C.* v. *Ways and Means Committee* argues (on pp. 30, 34-37) that communications between industry lobbyists and the staff director of the committee's subcommittee on health are privileged under the Speech or Debate Clause of the Constitution, and therefore may not be subpoenaed by the SEC in an investigation of alleged insider trading-related leaks. On p. 34 of its brief, the committee asserts:

> Communications with lobbyists, of course, are a normal and routine part of Committee information-gathering. … Any communications [the staff director] may have had with lobbyists — or any information he may have received from them — regarding the impact of the MA payment rates on industry falls squarely within the realm of protected legislative information-gathering, i.e., the gathering of information to inform the Committee's views on the necessity for, and appropriate content of, legislation.

Effectively, the committee argued that public information-gathering (the testimony of citizens) is not privileged, but when the information-gathering is done in private (by lobbyists), the same information and communications are privileged and can, therefore, be kept confidential.

In a July 9, 2014 comment on the Point of Order blog, Joe Dowley, who was a member of the same committee's staff and became a registered lobbyist, takes a practical and preferable approach to official-lobbyist communications, based on the fact that no one considers them privileged. Because of this, he says, "heightened ethical awareness" is required in order to determine "what information is appropriate to convey and when." In other words, the parties should communicate responsibly rather than under the supposed protection of a constitutional clause never intended to protect official-lobbyist communications. He writes:

> I never gave any thought to privilege in such settings, regardless of the side of the desk I was on. As a staff guy, anything I might have said to a lobbyist, in nearly every setting, I had to conclude would be repeated or used in some fashion, or was fair game to be made public. That instilled its own discipline. As a lobbyist, it would never occur to me that something told to me by a staff person enjoyed any protection other than if he or she admonished me not to say anything. Everyone knows we get paid to share information. To extend the Speech or Debate Clause protection to these relationships appears to me, also, to be a real stretch. Are we to protect bar-stool conversations because they happen to be partially about legislation, or a hearing? What this case points up is the need for heightened ethical awareness regarding what information is appropriate to convey and when. With instant communications should come increased focus. When commercial interests are affected, as they so often are, by government decisions, it is incumbent on staff and Members to insure that release of that information isn't done in a selective manner

such that some interests are improperly advantaged over their competitors. Sticking to official channels of communication tends to avoid that result. But, this is Washington, where information is gold, so things are going to happen. It just seems unwise to me to extend a protection intended to cover official actions to this time-honored practice.

9. **Conclusion**

Much of what is recommended in this book is based on the principal difference between lobbying at the federal and state levels and lobbying at the local level. At the local level, most lobbying is done by business owners and organization officers, not by professional lobbyists who are hired to represent the principal or by special employees hired to do a business or organization's lobbying. Although, especially in larger cities and counties and with respect to big projects and contracts in smaller jurisdictions, professional lobbyists are hired to represent businesses and organizations, local lobbying codes should not follow federal and state lobbying codes that assume this is the norm. If they do, the majority of lobbyists will not be required to register, most lobbying will remain secret, and most lobbyists will not be prohibited from engaging in inappropriate conduct.

What this means in practice is that the definition of "lobbyist" should reflect the character of local lobbying and, therefore, have the same rules for principals who lobby for themselves as for lobbyists who lobby for their clients or employers. In any event, principals should be recognized as the true lobbyists, whether or not they engage in lobbying activities, because those who represent them are only agents doing the principal's bidding. The interests that are being pushed are the principal's interests, not the lobbyist's interests.

The City Ethics Model Lobbying Code reflects this. Most of its language comes from local lobbying codes and lobbying sections of local ethics codes. The goal was to find the best approaches and language. There was a lot to choose from, since most drafters of lobbying codes seem to have struck out on their own (or, on the other hand, copied the code of a big city or county in their state). But the result of this variety is that there are no norms. The only consistent thing about lobbying codes is that a great deal of lobbying activity is not covered and that disclosure of lobbying activities is not very timely, although this is starting to change due to the ease and cost of digital technology. Sometimes, only the most stereotypical lobbying — by a professional contract lobbyist regarding council bills — is covered, even though this is only a small part of the lobbying of local governments. In other jurisdictions, the focus is on procurement.

Lobbying codes should not focus. Their goal should be to require the disclosure of all lobbying activity, unless there is a good reason not to. Therefore, the model code starts with

the assumption that everyone who seeks to influence their local government is engaging in a lobbying activity, even a citizen speaking out on a public policy issue at a council meeting or trying to get the assessment on his house lowered. These activities should not be exceptions from the definition of "lobbying activities." Instead, they should be exceptions from the requirement to register as a lobbyist.

This places the focus on the main reason individuals and entities should be required to register and disclose their lobbying activities: they are seeking special benefits or opposing special benefits to others. Public policy issues other than these situations are less prevalent at the local level. In any event, when public policy campaigns are organized, there is no reason not to require that they too be disclosed.

The other principal kind of communication is the ordinary day-to-day, bureaucratic interactions that do not involve special benefits. It is these communications that represent the great majority of the exceptions to who is required to register.

When it comes to lobbying for special benefits, it doesn't matter whether the lobbying is being done by a for-profit entity for a contract or a not-for-profit entity for a grant, or whether the lobbyist is being paid for lobbying, is acting as an officer, employee, or board member, or is acting strictly for herself or as an agent of another. All of these are distinctions that reduce the amount of lobbying transparency for reasons that have nothing to do with the value of such transparency.

It also doesn't matter what the context or even the content of a communication. Seeking goodwill and the development of a personal relationship is just as important to lobbying as drafting language or meeting about a change order, because without that goodwill and that relationship, the drafted language will be ignored and the request for a change order is not likely to be accepted. There is no reason to except any contacts, direct or indirect, that are part of an ongoing effort to obtain special benefits. And it would be unfair to except the efforts of those who oppose special benefits, at least when they have their own financial interests (beyond their home) or are acting in an organized manner through representatives.

Take constituent services. A council member helping a constituent who wants help with getting his child special care for a mental health problem is working on a purely personal issue. A council member helping a constituent win an insurance contract with the city is working on a purely business issue. The parent's lobbying is not something that needs

to be disclosed; the insurance broker's should be disclosed.

Most lobbying codes require that a lobbyist be compensated for lobbying, which effectively excepts those who lobby for themselves. But at the local level, many lobbyists are small business owners who lobby for themselves and are not compensated for their lobbying, except when they succeed in getting a contract, permit, license, or other benefit, which is not what is meant by "compensated." Effectively, they lobby on a contingency basis, which is illegal in most jurisdictions, and yet what they do is not even considered lobbying. Leaving some lobbyists out does not make for a fair lobbying oversight program. And without a perception of fairness, a lobbying program will not be widely accepted or followed, and is unlikely to have sufficient resources to do its job.

Appendix I - **City Ethics Model Lobbying Code**

300. **Purpose and Intent**

Lobbying involves private interests seeking access to public servants, seeking to influence public servants, and seeking to obtain special public benefits. Because of their public nature, lobbying activities need to be disclosed to the public. And due to the appearance of impropriety that accompanies the intersection of private interests and the public interest, those who lobby have certain obligations and certain of their activities need to be restricted.

It is, therefore, the purpose and intent of the legislative body in drafting this lobbying code to:

> In the name of transparency and the integrity of the government's decision-making processes, ensure the community and those who manage the community easy, timely access to information about attempts to influence the government's decisions;
>
> In the name of fairness, apply the same rules to all persons engaged in lobbying activities, regardless of their position, training, or license, whether or not they are represented by others, or whether or not they consider themselves "lobbyists";
>
> Prohibit improper influence on government officials and employees, and prohibit government officials from exerting improper coercion on those who seek to influence them;
>
> Avoid corruption and the appearance of corruption; and
>
> Reinforce the community's trust in the integrity of its government.

Each city/county department, office, and agency must incorporate this lobbying code in all city/county contracts, purchase orders, standing orders, direct payments, as well as requests for proposals (RFP), requests for qualifications (RFQ), requests for letters of interest (RFLI), and invitations for bids issued by the city/county, as well as all requests for a grant, loan, or license, applications for land-use permits, development agreements, and for changes in zoning map designation as well as future land use map changes, so as to notify

possible principals of the rules embodied herein. The lobbying code must be provided in at least a 10-point font and may be provided on paper, in an electronic format, or through a hyperlink to an online version of this code. This code is not required to be printed in a newspaper notice of any solicitation.

301. **Definitions**

The definitions in the City Ethics Model Ethics Code apply here, as well. When terms defined in this ethics code are used, they are starred in this code. Unless otherwise stated or unless the context otherwise requires, when used in this code:

"Affiliated Independent Agency" means an agency, district, or authority, including a school district, that (1) has jurisdiction over the same community, (2) receives more than 25% of its budget from the city/county, (3) has more than one board member and/or the CEO selected by city/county officials, or (4) reports to or is overseen by a city/county agency, body, or official.

"Agent Lobbyist" means any individual or entity that engages in lobbying activities on behalf of, or with compensation from, another individual or entity, that is, for a principal lobbyist*. An agent lobbyist may be the principal lobbyist's employee, member, contractor, or subcontractor.

"Compensation" means payment or agreement to pay or give, directly or indirectly, any money, anything of value, or reimbursement of expenses (in whole or in part), in consideration for the performance of lobbying activities.

"Constituent Services" involves help by elected officials provided to individual residents of the city/county in minor matters that will not benefit their or their family's business or special financial interests (other than the value of their home).

"Contingency Fee" means a fee, bonus, commission, or nonmonetary benefit as compensation* which is dependent on or in any way contingent on any action or inaction, or on the passage, defeat, or modification of any decision or recommendation, by any official or employee* during the time period of the entire decision-making process regarding such

action, decision, or recommendation.

"Contract Lobbyist" is an agent lobbyist* that represents a principal pursuant to a contract or subcontract.

"Grassroots Lobbying" includes any activity undertaken to encourage others to influence a city/county official, employee, or consultant to favor or oppose, recommend or not recommend, vote for or against, or take or refrain from taking action on any matter at any level of government. It includes such activities as advertising, mailings, phone banks, and door-to-door campaigns, the creation and use of an organization through which issue-oriented activities and campaign expenditures may pass, and the conciliatory lobbying of groups in opposition to the lobbyist's goals.

"Lobbying Activities" includes any activity undertaken to influence a city/county official, employee, consultant, adviser, candidate, official-elect, or nominee, directly or indirectly, to favor or oppose, recommend or not recommend, vote for or against or abstain, or take or refrain from taking action on, or trying to influence or obtain the goodwill of an official with respect to, any matter before or which may foreseeably come before any level of government. It also includes any activity undertaken to support such influencing, including research, investigation, drafting, advising, monitoring, socializing, preliminary contacts to facilitate lobbying activities, and attending meetings and events related to lobbying goals or attended by targeted officials. Grassroots lobbying* involves lobbying activities, with the exception of communications by an entity generally with its members, employees, and/or stockholders. Any contact with a city/county official, employee, consultant, adviser, candidate, official-elect, or nominee, by someone who might specially benefit, directly or indirectly, from any government action or inaction is deemed to have been "undertaken to influence," whatever the content of the contact may have been or whoever may have initiated any particular contact. Exceptions appear in the section on Registration.

"Lobbyist" means any individual or entity, including an attorney, that engages in lobbying activities*, whether directly or through the acts of another and regardless of whether he or she receives any compensation* for this work. If an agent lobbyist engages in lobbying activities on behalf of a principal*, both the agent lobbyist and the principal are lobbyists.

Placement agents* are lobbyists.

“Official or Employee” means any official or employee of the city/county, whether paid or unpaid, and includes all members of an office, board, body, advisory board, council, commission, agency, department, district, administration, division, bureau, committee, or subcommittee of the city/county, as well as of an affiliated independent office or agency or quasi-public or public-private body. The term also includes candidates for office, elected candidates prior to the time they take office, and nominees for public office, as well as anyone engaged in the performance of a governmental function. "Official or Employee" does not include: (a) A judge, justice, or official or employee of the court system; or (b) A volunteer fire fighter or civil defense volunteer, except a fire chief or assistant fire chief.

“Placement Agent” means an individual hired, engaged, or retained by, or serving for the benefit of or on behalf of, an external manager, or on behalf of another placement agent, who acts or has acted for compensation* as a finder, solicitor, marketer, consultant, broker, or other intermediary in connection with the offer or sale of the securities, assets, or services of an external manager to a public retirement system that covers local officials or employees*, or an investment vehicle, either directly or indirectly.

“Principal” means an individual or entity on whose behalf another individual or entity engages in lobbying activities*, as well as a “principal lobbyist,” that is, an individual who engages in lobbying activities on his or her own behalf or on behalf of an entity that he or she owns or directs or on whose board he or she sits. When there is doubt who is a principal, the most important consideration is, Is the individual or entity a real party in interest? Will the individual or entity benefit from the lobbying?

“Restricted Source” means an individual or entity that has received or sought a special financial benefit, directly or through a relationship with another individual or entity, from the city within the previous three years, or intends to seek a financial benefit in the future.

302. **Registration**

1. Persons Required to Register as Lobbyists.

Except as provided below, in order to legally engage in lobbying activities*, directly or

through the acts of another, an individual or entity must register with the lobbying oversight office by filling in and filing a Registration Form. If an agent, employee, member, board member, officer, or owner is to engage in lobbying activities on behalf of a principal*, both the agent, etc. and the principal must register as lobbyists*. If an agent lobbyist is to lobby on a principal's behalf, the principal must not only register, but also file a copy of the contract between the two parties. Any individual lobbying an official or employee* on behalf of a political subdivision, an agency, or the government, must register like anyone else. The lobbying oversight office may reject a non-conforming Registration Form. No one may continue to engage in lobbying activities related to a rejected Registration Form until it has been corrected and accepted by the lobbying oversight office.

2. Voluntary Registration.

Any individual or entity that is not required to register and report on lobbying activities* may voluntarily register and report.

3. Exceptions to Requirement to Register.

An individual need not register as a lobbyist* if the individual's only lobbying activities* will be those described below.

a. An individual expressing an opinion (including one inspired by a grassroots lobbying* effort), unless (1) it relates to a matter with respect to which the individual, an individual's business, business associate, or client, or an individual's immediate family member may, directly or indirectly, benefit financially in a way that is not shared with a large number of residents of the municipality or (2) the individual is representing a group or organization. Lobbying with respect to benefits to an individual's owner-occupied home does not require registration. Questions about whether a particular benefit is sufficiently widespread to require registration should be directed to the lobbying oversight office before a decision is made whether or not to register.

b. An individual who files a complaint or tip, or seeks information or advice, regarding a matter that does not involve possible financial benefit to a business with which the individual is involved or whose interests the individual is representing.

c. An individual resident of the city/county requesting information or seeking, or an official providing, constituent services*. However, entities and individuals that have or are seeking special financial benefits from a government (local, regional, state, or federal), such

as a contract, grant, loan, permit, or license, are deemed not to be seeking constituent services* and are not excepted from registration. Officials should report any communication with such entities and individuals as lobbying contacts.

d. A ministerial matter, such as asking a clerk for a form or scheduling an appointment, when no other lobbying activity is involved.

e. An attorney, other professional, or *pro se* party when representing a client or self in a pending or imminent publicly noticed judicial or quasi-judicial proceeding. The attorney, other professional, or *pro se* party must register as a lobbyist* before engaging in an ex-parte communication regarding such a proceeding or its settlement. Whenever engaged in lobbying activities*, attorneys and other professionals must register and follow all the rules in this code just like any other lobbyist and may not use lawyer-client or other professional confidentiality rules as a defense.

f. An individual whose sole communications with the city/county are directed to an official formally designated in bid documents to receive such information and involve (1) the submission of a bid on a competitively bid contract or a written response to a request for proposals or qualifications; and/or (2) communications in connection with the administration of an existing contract, but excluding change orders, extensions, and anything else that involves further compensation under the contract.

g. An individual who is invited by a city/county body or agency to give expert testimony relating to scientific, technical, or other specialized information or to make a required oral presentation, if the individual, or a colleague, employer, or agent, engages in no other lobbying activities*.

h. An individual who advertises the availability of goods or services with fliers, leaflets or other advertising circulars, or who makes no more than two sales-related inquiries or solicitations a year less than fifteen minutes each, if the individual engages in no other lobbying activities*.

i. A communication made in the ordinary course of gathering and disseminating news, or a news item, editorial, commentary, or paid advertisement that directly or indirectly urges action on a city/county matter published in the ordinary course of business by a news medium of general circulation, a website or blog, or a publication whose primary audience is an organization's membership. However, there is no exception when a communication is only incidental to a lobbying effort and includes not only the gathering of

information, but also an attempt to influence. Any individual associated with a news medium who engages in other lobbying activities* must register as a lobbyist*. An official or employee* who believes that such a communication was in fact intended to influence him or her for the personal benefit of the communicator or the communicator's principal*, or that such a news item, etc. was part of a lobbying campaign, should make a report of the communication or news item, etc. to the lobbying oversight office.

j. Designated union representatives negotiating a collective bargaining agreement with designated city/county representatives, and unions communicating with their members.

k. A political party officer or representative communicating with an elected official or candidate for an elected position, to the extent the communication does not relate to a matter that may specially benefit the party officer/representative or a family member, business associate, or client of the party officer/representative.

l. Officials and employees* of any government or independent agency, including consultants, lobbying another official or employee in his or her official capacity or within the scope of his or her employment. However, this exception does not apply to individuals specifically employed, internally or by contract, to lobby (at least in part), or to individuals representing political subdivisions of the county [*this last phrase applies only to* county *lobbying programs*]. Despite this exception, in the interest of full transparency, all officials and employees who seek special benefits for their department or agency from the city/county are encouraged to register as lobbyists* and disclose their lobbying activities*.

m. A 501(c)(3) organization that receives funding from a federal, state, or local government agency for the purpose of representing the interests of indigent persons and whose primary purpose is to provide direct services to those persons, if the individual or individuals represented by the organization provide no payment to the organization for that representation. This exception does not apply to attempts to influence a city/county decision with regard to any funding or loan that the organization is seeking.

n. A principal*, and anyone lobbying on the principal's behalf (to the extent of this representation alone), may seek to be excepted from the registration requirements of this code by demonstrating to the lobbying oversight office that there is a reasonable probability that the disclosure of identifying information will subject the principal* and/or agent lobbyists* to threats, harassment, arrest, or reprisals. This is the only situation where an

exception or waiver may be provided by the lobbying oversight office without a public hearing and decision.

4. Identification.
Each registered agent and principal lobbyist* will be given a unique identifying number and a separate identification badge for each principal* represented. The number and the name of the principal(s) being represented must be conspicuously used in any communication with an official or employee* and in any communication that is part of a grassroots lobbying* effort. The identification badge must be worn in a clearly visible manner whenever visiting a city/county facility, the facility of any affiliated independent agency*, and any event attended by multiple officials or employees.* In addition, each registrant appearing before a city/county body must complete a speaker identification card prior to the appearance and orally identify him/herself and the principal(s) before addressing the body. No official or employee* may permit an individual who would be required to register under this code to communicate with him or her regarding any official matter before being given the lobbyist's unique identifying number or, if in person, being presented with the lobbyist's identification badge.

5. Registration Fee.
Upon registering and every January 1 thereafter while active, a lobbyist* will pay an annual fee, pro-rated according to the registration date, plus a fee for each additional principal. A principal* will pay a fee for each in-house employee, officer, or board member who lobbies on its behalf. The amount of each fee will be set by the lobbying oversight office with the approval of the local legislative body. A lobbying firm must pay the registration fee for each employee or partner who lobbies, but it need pay only once for each principal represented by the firm. The registration fee will be waived for all those lobbying on behalf of nonprofit organizations with annual expenditures of less than $100,000 and all those lobbying on behalf of governmental bodies. Other nonprofits, as well as individuals, may apply for a waiver on the grounds of inability to pay. All registration fees will be deposited into the account of the lobbying oversight office and used solely by that office to perform its duties. Those who have not paid their fees by February 1, or at the time of filing a first registration form, may not engage in lobbying activities*, nor may anyone engage in lobbying activities*

on their behalf until the fees have been paid, with penalty as determined by the lobbying oversight office.

6. Registration Form.

In order to register, the following information must be provided by each lobbyist — including agent lobbyists*, principals*, and principal lobbyists* — on an online Registration Form, to be drafted by the lobbying oversight office. In the event that the online filing system is not capable of accepting a registration form, a registrant must file the form in paper format with the lobbying oversight office. By engaging an attorney to lobby, a principal* waives attorney-client confidentiality to the extent of disclosures required by this code. This waiver will appear on the Registration Form. Individuals who work for principals or lobbying firms need not register separately, but must be included in the principal or lobbying firm's registration. Amendments must be filed for changes relating to employees, principals, or lobbyists, or changes in other information provided on the Registration Form. Following the filing of a Registration Form, the lobbying oversight office must forward the form to each official, office, board, department, or agency listed on the form as "objects of lobbying" and any others associated with the stated "subjects of lobbying."

a. *Lobbyist Information*. Contact information for each lobbyist* and his or her spouse or domestic partner, the date the lobbyist was initially (or, if previously registered, once again) retained or began to engage in lobbying activities*, whether the lobbyist is an employee, consultant that provides more than lobbying services, or a contract lobbyist, and the name and acronym of any affiliated political action committee or campaign committee. If a lobbyist is an entity, the contact information for each officer or employee (1) who engages in lobbying activities, (2) who is employed in the division of the entity that engages in lobbying activities, (3) who has engaged in fundraising activities or provided campaign-related services for a current city/county official or campaign committee in the past two years (with the name of the official(s)), or (4) who has provided services under a contract with the city/county in the past two years (with the name of the department, agency, or board for which the services were provided). This information should be reported in four separate lists, and the spouse or domestic partner of each individual should be included. Include home addresses, for the purpose of checking against campaign contribution databases; however, these addresses will not be made public.

b. *Principal Information*. Contact information for each principal*, that is, for anyone by whom or on whose behalf the lobbyist* is directly or indirectly retained, employed, designated, supervised, compensated, or reimbursed, with a description of the principal's business in sufficient detail to inform the public of the nature and purpose of the lobbying. This includes a principal's parent company, subsidiaries, affiliates, and related companies with a financial interest in the outcome of the lobbying activities* or which control a principal's activities or contribute funds or advice with respect to the lobbying activities; this applies to both for-profit and nonprofit entities. For a corporation or association, the name of the chief executive officer; for a general partnership or joint venture, the names of all general partners; for a limited partnership, the names of the general and limited partners; for a trust, the names of all trustees and beneficiaries. In addition, except where a publicly traded company, the names of all individuals holding, directly or indirectly, at least 5% or more ownership interest in the entity. If the principal is an association or membership organization, the number of members, the methods by which members make decisions about positions on policy, and the name of any member who pays an extra fee for lobbying, directly or as part of a membership category. If the principal is an informal group or coalition of individuals or entities, contact information for each member of the group (a single registration form may be filed for all of them). If the principal is an organization, the contact information for the organization and for any individual or entity that, in any of the past three years, paid more than 20% of the organization's revenues. Also, the name and acronym of all political action committees affiliated with each principal.

c. *Lobbying Agreement*. Contract lobbyists* must attach a written agreement of engagement or a statement of the substance of an oral agreement, as well as any relevant motion, minutes, or other documentation of the action authorizing the lobbyist's engagement. The agreement or statement must include the terms of compensation*; whether the lobbyist is authorized to incur expenditures (and, if so, of what nature); whether any such expenditures will be reimbursed by the principal* or by another individual or entity, in part or in whole; and a statement that the principal has not offered and the lobbyist has not agreed to accept a contingency fee* from anyone. If a lobbyist is an employee, officer, board member, or volunteer of the principal, and no extra compensation* will be provided based on the

lobbyist's lobbying activities*, attach a written authorization from the principal's chief executive officer or someone delegated by the CEO or the board of directors, and a statement whether the relationship is expected to involve compensation*, expenditures, or both.

d. *Subjects of Lobbying*. A description of the subjects and matters about which each lobbyist* expects to lobby, including information sufficient to identify the local law or resolution, contract, grant, loan, subsidy, program, decision, permit, license, regulation, report, real property or building project, rule, proceeding, board, commission, or agency determination or recommendation, or other matter, as well as specific parts or aspects with which the lobbyist is concerned. Also, which side of the issue the principal(s)* are on, how the principal(s) might benefit, and any other specific outcomes sought. [*For example, if the lobbyist expects to oppose a development, is it because the principal owns a nearby business or land whose value may be negatively affected, or is it because the principal is a group of people in the neighborhood who do not want the nature of the neighborhood to change?*]

e. *Objects of Lobbying*. The name of the city/county officials, employees, and departments, boards, and agencies each principal lobbyist* expects to lobby, directly or indirectly, and that each agent lobbyist* is authorized to lobby, expects to lobby, or expects to engage another person to lobby. The name and position of each city/county official or employee* or member of a city/county official's immediate family who has a business or professional services relationship with the registrant, with a lobbyist or lobbying firm of the registrant, with an employee or office of the registrant, or with any entity related to the registrant or the registrant's principal* (also describe the nature of the relationship).

f. *Grassroots Lobbying*. If the registrant or a lobbyist* on behalf of the registrant expects to engage in grassroots lobbying*, the contact information of any entity with which the registrant or lobbyist expects work, the media which the registrant, lobbyist, or entity expects to employ, and the names of the officials and employees*, and a description of the members of the public, to be targeted by the grassroots appeal.

g. *Relationship with Principal*. If a lobbyist*, or a member of his or her immediate family, has a direct or indirect financial interest in or relationship (other than as lobbyist) with the

principal* or with the principal's contract, project, or other matter about which the principal is seeking a special benefit from the government or agency to be lobbied, information as to the extent of such interest or relationship and the date on which it was acquired or begun.

h. *Possible Conflicts of Interest*. Any familial relationship or business or professional association of any executive, officer, board member, partner, or owner of a principal* or its parent, subsidiary, or affiliate, or of a lobbyist*, with a high-level city/county official, or his or her aide, or with any official of the department, board, or agency the lobbyist expects to lobby or expects to influence through lobbying others, or with the spouse or domestic partner of any of these.

i. *Campaign Contributions*. All contributions (funds or in-kind) made or delivered in the past two years by any principal*, by an owner or officer of a principal, by any lobbyist* or by the lobbyist's firm, by any lobbyist firm partner or employee who engages in lobbying activities*, by the spouse, domestic partner, or dependent child of any of these, or by a political action committee affiliated with a principal, lobbyist, or lobbying firm, to a candidate for city/county office, an elected official, a candidate for another office who is currently a city/county official or employee*, or to a committee that provides campaign funds to such a candidate or official (including for non-campaign-related travel and other gifts) or is controlled by such a candidate or official, even if that committee was organized to support or oppose a ballot measure or other candidates, or to an organization that independently supports such a candidate or opposes such a candidate's opponent. Also any such contribution arranged by a principal or by an agent lobbyist* representing a principal, or with respect to which the lobbyist acted as an agent or intermediary. For each contribution, the following information must be provided:

(1) The amount of the contribution;

(2) The date of the contribution;

(3) The name of the contributor;

(4) The occupation of the contributor, if not the principal;

(5) The employer of the contributor; if self-employed, the contributor's business;

(6) The name of the committee or organization to which the contribution was made.

(7) The principal and/or lobbyist's role with respect to the contribution, other than contributor;

(8) A description of the ballot measure, where this is relevant.

j. *Other Campaign-Related Activities*. A full description of all other campaign-related services provided in the past two years by a principal*, one or more of its officers, or a lobbyist* or other agent for the principal, to a candidate or candidate-controlled committee, and any compensation* promised or received.

k. *Government Employment History*. Any position with the city/county government held within the past three years by a lobbyist*, by a member of the lobbyist's firm, by an owner, officer, or board member of the lobbyist's principal* (or its parent, subsidiary, or affiliate), or by a member of the immediate family of any of the above. If there has been any such employment, an affirmation that the registrant's lobbying activities* will not violate any provision of this lobbying code or of the city/county or state's ethics codes.

l. *Additional Funding*. With respect to any funding received from the city/county government by the principal*, directly or indirectly, within the past five years, information about the amount and nature of the funds and each office, agency, or program that provided the funding. This includes federal or state funds that are handed out by the city/county government or an agency affiliated with it.

m. *Responsibility for Disclosure*. Each principal* who lobbies through an agent lobbyist* must state who will be charged with the responsibility of providing ongoing and quarterly disclosure reports.

n. *Further Disclosure*. Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

o. *Affirmation Statement*. A statement that the registrant has reviewed and understands the requirements of the city/county's lobbying and ethics codes, has reviewed the contents of

the Registration Form, and verifies that, based on personal knowledge or on information and belief, he or she believes the information on the Registration Form is true, correct, and complete. For first-time registrants, a statement that no lobbying activities* have been engaged in (if lobbying activities were engaged in, full disclosure of the activities must accompany the registration form).

7. Amendments to and Termination of Registration

An Amendment to Registration Form must be filled out online within 30 days after one of the following events occurs:

a. Lobbying firm adds or loses a lobbyist* employee.

b. Contract lobbyist or lobbying firm adds or loses a principal*.

c. Principal* adds or drops a contract lobbyist or lobbying firm.

d. Principal* adds or loses an in-house lobbyist.

e. Changes to information on registration form, such as changing the responsible officer, address, or contact information.

f. Termination of lobbying activities*, with no likelihood of recommencing them again during the current or following calendar year.

8. Ongoing Disclosure

Each principal who lobbies through an employee or contractor must decide who will be charged with providing disclosure of lobbying activities*, expenditures, and campaign contributions.

9. Filing of Forms. All forms, including for registration, disclosure, termination, and amendment, must be submitted electronically into the Lobbying Database. Each filer's unique identifying number will be used in place of a physical signature for submitting and verifying data.

303. **Ongoing Disclosure**

Whoever is charged with the responsibility of providing disclosure of lobbying activities* and campaign contributions, as stated on the Registration Form, will enter, or have someone

else enter, the following information electronically, into the Lobbying Database, within three business days after any lobbying activity or campaign contribution. In the event that the online filing system is not capable of accepting a disclosure report, a filer must file the report in paper format with the lobbying oversight office. By engaging an attorney to lobby, a principal* waives attorney-client confidentiality to the extent of disclosures required by this code.

In addition, all elected officials, board and commission members, and departments and agencies must log all lobbying activities* that involve them and their employees, to be placed online on no more than a weekly basis.

1. Lobbyists. The name, unique identifying number, and role of all lobbyists* engaged in the lobbying activity or campaign contribution. (If any unregistered individual was involved in the activity or contribution, in anything more than a support position, provide that individual's name and have that individual register as a lobbyist within three business days.)

2. Date and Time Spent. The date of the lobbying activity or campaign contribution. With respect to meetings, the number of contacts and the approximate time spent with each official or employee*. If the activity extended over more than a day, enter the range of dates. If an activity extends more than three days, disclose the activity at least every three days.

3. Subject and Object of Lobbying. A list of the names and positions of all officials and employees*, including the name of their office, agency, or board, who were lobbied; a description of the topics about which the lobbyists* lobbied; information sufficient to identify the local law or resolution, contract, grant, loan, program, decision, permit, license, regulation, report, real property or building project, tax matter, rule, proceeding, board or commission determination, or other matter to which the lobbying activity* related; and the outcomes sought.

4. Lobbying Activity. A description of the lobbying activity*, including the techniques of communication, whether direct or indirect (and, if indirect, through what processes and intermediaries, and targeted at which members of the public), research, materials provided,

etc. Also, a description of any activities, and the identities, of individuals and entities hired by the lobbyist* or principal* to support the lobbying effort ("lobbying supporters"), which activities include research, planning, advising, monitoring, facilitating contacts, public and media relations, polling, coalition building, and legal actions, whether or not they have registered as lobbyists. A description of any event held or sponsored, in whole or in part, by the lobbyist or principal, including the venue and date, and a list of all officials and employees* in attendance.

5. Campaign Contributions. All contributions (funds or in-kind) made or delivered by a lobbyist*, the lobbyist's firm, or by any lobbyist firm partner or employee who engages in lobbying activities*, by a lobbyist's principal*, by an owner or officer of the principal, or by the spouse, domestic partner, or dependent child of any of these, to a candidate for city/county office, a city/county elected official, a candidate for another office who is currently a city/county official or employee*, or to a committee that provides funds to such a candidate or official (including for non-campaign-related travel and other gifts) or is controlled by such a candidate or official, even if that committee was organized to support or oppose a ballot measure or other candidates. Also any such contribution arranged by a lobbyist or by the lobbyist's principal or with respect to which the lobbyist acted as an agent or intermediary. For each contribution, the following information must be provided:

a. The amount of the contribution;

b. The date of the contribution;

c. The name of the committee to which the contribution was made

d. The name of the contributor, and the contributor's relationship to the lobbyist or principal;

e. The occupation and employer of the contributor, if not the principal; if self-employed, the contributor's business;

f. A description of the ballot measure, where relevant.

6. Further Disclosure. Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

304. **Quarterly Disclosure**

Each principal* or principal lobbyist* must enter, or have someone else enter on their behalf, the following information into the Lobbying Activities Database within seven business days after the end of each calendar quarter. In the event that the online filing system is not capable of accepting a disclosure report, a filer must file the report in paper format with the lobbying oversight office. By engaging an attorney to lobby, a principal waives attorney-client confidentiality to the extent of disclosures required by this code. If lobbying activities* and expenditures are completed for the quarter at an earlier date, it is preferable to enter the information at that time, so that the information is as timely as possible. Filers may request an extension of time from the lobbying oversight office before the seven-day period ends.

1. Lobbyists. A list of all individuals and firms (with their unique identifying numbers) that engaged in lobbying activities* for the principal during the period, including the principal*, officers, employees, and members of the principal, and contractors and subcontractors.

2. Subjects of Lobbying. A description of the subjects about which these lobbyists* lobbied during the period, including the names of all officials, employees, consultants, and advisers, and of their offices, boards, and agencies, who were lobbied, the date of each lobbying activity and approximate time spent with each official (if multiple contacts occur in a short space of time, a range of dates may be disclosed, along with the total number of contacts during the period), and information sufficient to identify the local law or resolution, contract, grant, loan, subsidy, program, decision, permit, license, regulation, report, real property or building project, tax matter, rule, proceeding, board or commission determination, or other matter to which the lobbying activity related. Also, the outcomes sought.

3. Lobbying Activities. A description of the lobbyists'* lobbying activities* during the period, including the techniques of communication, whether direct or indirect (and, if indirect, through what processes and intermediaries), research, materials, etc. Also, a description of the activities, and the identities, of individuals and entities used by a lobbyist

or principal* to support the lobbying effort ("lobbying supporters"), which activities include research, planning, advising, monitoring, facilitating contacts, public and media relations, polling, coalition building, and legal actions, whether or not they are registered as lobbyists. A description of any grassroots lobbying* activities during the period, including the format, the time period, and the public office holders lobbied or to be lobbied, and a description of the officials and employees, and of the members of the public, who were the target of the grassroots lobbying effort.

4. Compensation and Expenses. Compensation* and reimbursement that each lobbyist*, lobbyist's firm, or lobbying supporter was entitled to receive for his or her lobbying-related activities engaged in during the period (even if not to be paid until a later time), and expenses expended, received, or incurred by the lobbyist, the lobbyist's firm, or the lobbying supporter for the purpose of this lobbying. The expenses of the lobbyist, of the lobbyist's firm, and the lobbying supporter related to lobbying city/county officials or employees* must be detailed as to the amount, the payee (and beneficiary, if different from the payee), and the purpose of the payment and, if over $50, must not be paid in cash and must be substantiated by a check copy or a receipt upon request. Expenses should be listed in categories as determined by the lobbying oversight office, including the categories of direct and indirect communications, reimbursements to lobbyists and to others, compensation* to lobbyists and to others, and office expenses. Expenses less than $50 each may be listed in the aggregate, but must be listed under the payee's name. Expenses for the lobbyist's or lobbying supporter's personal sustenance, lodging, and travel must also be listed in the form of aggregate per diems, without the need to list the payees. If a lobbyist engages in both lobbying activities* and other activities on behalf of a principal* or other lobbyist, compensation* for lobbying includes all amounts received from that person, if the lobbyist has structured the receipt of compensation* in a way that unreasonably minimizes the value of the lobbying activities.

5. Activity Expenses. The date, amount, and description of any payment (except routine purchases from a commercial retailer) made during the reporting period to, or on behalf of, any official or employee*, member of an official or employee's immediate family, or business entity in which the registrant knows, or should know, the official or employee has a

financial interest or serves as a director, officer, or in another policy-making position, by the principal*, a lobbyist*, the lobbyist's firm, or by anyone acting on behalf of any of these, including but not limited to, to the extent permitted, gifts, meals, fees, salaries, and reimbursements, with the exception of campaign contributions ("activity expense"). The name, title, and agency of the official or employee, and of the payee (if different), and the name of each lobbyist and/or other individual who participated in making the payment. The date, description, invitation list (and list of officials and employees who attended), and cost of any special event to which officials or employees were invited (if all members of a body or agency were invited, the invitation list may state the name of the body or agency instead of its members). An activity expense shall be considered to be made on behalf of a principal if the principal requested or authorized the expense or if the expense was made in connection with an event at which the lobbyist attempted to influence the official on behalf of the principal. Officials and employees mentioned in disclosures of activity expenses may, within sixty days after the disclosure is made online, file a written exception to inclusion of their name or that of a member of their immediate family or a business they are involved with.

6. Campaign-Related Activities. A full description of all non-prohibited campaign-related services provided by the principal*, one or more of its officers, or a lobbyist* or other agent for the principal to a candidate or candidate-controlled committee during the reporting period, other than campaign contributions, and any compensation* promised or received.

7. Background Support. The identity and activities of any individual or entity that, during the period, has made an expenditure of $1,000 or more to a lobbyist* or principal* or that has actively participated in the planning, supervision, or control of the lobbying activities* of the principal* or its lobbyists*. Also, the identity of anyone who, during the past two periods, has contributed to such an entity in an amount greater than $5,000.

8. Business with Officials or Employees [*if permitted*]. Any business transaction or series of business transactions during the period by the principal*, one or more of its officers, or a lobbyist* or other agent for the principal with any of the following individuals or entities:

a. the spouse, parent, child, or sibling of an official or employee*;

b. a business entity in which an official or employee* is a proprietor or partner; or

c. a business entity in which an official or employee* has an ownership interest of 10% or more.

The date or dates of the transaction or series of transactions, the name and title of the official(s) or employee(s) involved in the transaction or series of transactions, the nature of the transaction or series of transactions; and the nature and value of anything exchanged in the transaction or series of transactions.

9. Further Disclosure. Any other information required by the lobbying oversight office, consistent with the purposes and provisions of this lobbying code.

10. Affirmation Statement. A statement by the filer or by an authorized owner or officer of the filer that he or she has reviewed and understands the requirements of the lobbying and ethics codes, has reviewed the contents of the report, and verifies that, based on personal knowledge or on information and belief, he or she believes such contents to be true, correct, and complete. A similar statement by the principal* (if different), which may attach a statement to the report describing the limits of its knowledge concerning the information contained in the report. If it engaged in lobbying activity during the reporting period which was not reported by a lobbyist*, the principal must file its own report.

305. **Prohibitions and Obligations**

1. Incorporated from the City Ethics Model Ethics Code

a. *Gift Ban*. An official or employee*, his or her spouse or domestic partner*, child or step-child, parent, or member of his or her household*, may not solicit nor accept anything of value, directly or indirectly, from any person or entity that the official or employee knows, or has reason to believe, has received or sought a financial benefit*, directly or through a relationship with another person or entity, from the city/county within the previous three years, or intends to seek a financial benefit in the future ("restricted source"). If in doubt, the official or employee should refrain from soliciting or refuse a gift, and should first inquire into the person or entity's relationship with the city/county or with a restricted source. [*or: If the official or employee* does not know whether a person or entity fits this description, he or she should*

inquire and, if it is discovered that the person or entity does fit this description, the gift should be returned (or its monetary value if it cannot be returned) and no further gifts accepted during the relevant period.]

A person or entity that has, in the last three years, received or sought, or is seeking, a financial benefit, directly or indirectly, from the city/county, may not give or seek to give anything of value to any official or employee*.

Gifts of property, money, or services given nominally to the city must be accepted by a resolution of the legislative body.

b. *Fees and Honorariums*. No official or employee* may accept a fee or honorarium for an article, for an appearance or speech, or for participation at an event, in his or her official capacity. However, he or she may receive payment or reimbursement for necessary expenses related to any such activity.

c. *Confidential Information*. An official or employee*, a former official or employee, a contractor or a consultant* may not use confidential information, obtained formally or informally as part of his or her work for the city or due to his or her position with the city, for his or her own benefit or for the benefit of any other person or entity, or make such information available in a manner where it would be reasonably foreseeable that a person or entity would benefit from it.

d. *Post-Employment*.

(1) **Representation.** For a period of two years after the termination of his or her city/county service or employment, an official or employee* may not, on behalf of any other person, for compensation*, directly or indirectly, formally or informally, act as agent, attorney, lobbyist*, or other sort of representative, to or before his or her former agency, department, authority, board, or commission. For the purposes of this provision, a mayor, chief of staff or vice-mayor, city/county manager or assistant manager, council member or council aide is deemed to have worked for every city/county department, agency, authority, board, and commission. Acting indirectly includes action by a partner, associate, and other professional employee of an entity in which the former official or employee* is a partner, associate, or professional employee, as well as acting by a member of the former official or

employee's* immediate family.

(2) **Particular Matters**. With respect to particular matters on which the official or employee personally and substantially worked while in city service or employment, the foregoing prohibition is permanent.

(3) **Area of Responsibility**. With respect to matters for which the official or employee had official responsibility, but were not personally and substantially involved, the foregoing prohibition is for a period of two years after termination of city service or employment.

(4) **Employment**. An official or employee*, or a member of his or her immediate family, may not accept employment with, or with the help of, (a) a party to a contract with the city/county, within two years after the contract was signed, when he or she participated personally and substantially in the preparation, negotiation, or award of the contract, and the contract obliged the city/county to pay an aggregate of at least $25,000; or (b) an individual or entity who has, within the previous two years, benefited directly from any decision made by, or based on advice or information supplied by, the official or employee* or by a subordinate. For the purposes of this section, "employment" includes full-time and part-time jobs, and professional and other work for hire, given directly or indirectly.

(5) **Exceptions**. Former officials and employees* are not prohibited from acting if:

(a) They are working for the city on a volunteer basis.

(b) They are acting on behalf of another federal, state, or local government.

(c) They are giving testimony under oath and not being compensated for it.

(d) They are providing scientific or technological information at the government's request.

(e) They performed only ministerial acts*.

(6) **Waivers**. The Ethics Commission may waive a prohibition of this provision if it

determines that the situation does not create a potential for undue influence, unfair advantage, or a serious appearance of impropriety. See §210 for the waiver process. …

e. Complicity with Others' Violations. No one may, directly or indirectly, induce, encourage, or aid anyone to violate any provision of this code. One who has knowledge of another's possible violation is encouraged to report it to the appropriate authority.

2. Lobbyist Prohibitions and Obligations.

a. *Contingency Fees*. No person may retain or employ a lobbyist* for compensation* on a contingency fee* basis, and no person may accept any such employment or render any service on a contingency fee* basis. However, a sales employee who is paid on a commission basis for the sale of goods or services may contact an official or employee* regarding the purchase of such goods or services, provided that such sales employee is contacting only those officials or employees* who have responsibility for making purchasing decisions regarding such goods or services in the normal course and that the contact is permitted pursuant to procurement rules.

b. *Correcting Misinformation*. If he or she discovers that information provided to an official or employee* is not materially correct, a lobbyist* should provide accurate and updated information to the official or employee,* specifying the nature of the misinformation.

c. *False Appearances*. No lobbyist* may attempt to create a fictitious appearance of public support for or opposition to any governmental action. No lobbyist* may cause any communication to be sent to an official or employee* in the name of any fictitious person, or in the name of any real person except with the consent of such real person. No lobbyist* may represent, either directly or indirectly, orally or in writing, that he or she can control or obtain the vote or action of any official or employee.* If such a representation is made to a lobbyist*'s principal*, including by an employee to one or more of an entity's officers or directors, the principal must immediately report the representation to the lobbying oversight office and stop employing the services of whoever made the representation and of that individual's firm.

d. *Wrongful Influence*. A lobbyist* or principal* may not attempt to influence an official or employee* by coercion, by threat of economic sanction, through an outside employer or client of an official, through an official's spouse, domestic partner, or child, by the promise of financial support or by the threat of financing opposition to the candidacy of the official or employee.* Nor may a lobbyist* or principal retaliate against an official or employee* by reason of his or her action on a matter upon which the lobbyist* has lobbied.

e. *Gifts*. A lobbyist or principal, or any parent, subsidiary, or affiliate of any lobbyist or principal, or any of their officers or employees, may not give, seek to give, or arrange to give anything of value to any official or employee,* or to a an official or employee's immediate family member or business, nor act as an agent or intermediary in the making of such a gift.

f. *Campaign Contributions and Independent Expenditures*

(1) No lobbyist*, principal*, or other restricted source* may, directly or indirectly, give a campaign contribution to, or solicit or collect a campaign contribution from, a city/county candidate, a candidate who is an official or employee,* the campaign committee or related political committee of such a candidate, or an entity that makes independent expenditures in support of such a candidate or in opposition to such a candidate's opponent. All proposed city/county contracts, purchase orders, standing orders, direct payments, as well as requests for proposals (RFP), requests for qualifications (RFQ), requests for letters of interest (RFLI), and bids issued by the city/county, as well as all applications for grants, permits, licenses, development agreements, and changes in zoning map designation as well as future land use map changes, must incorporate this paragraph so as to notify vendors, grantees, real estate developers, licensees, and lobbyists* of the proscription embodied herein.

(2) No city/county candidate or campaign or related political committee of a city/county candidate or of a candidate who is an official or employee* may deposit into such a candidate's campaign or political committee account any campaign contribution directly or indirectly from a lobbyist*, principal*, or other restricted source*. Candidates, and those acting on their behalf, must ensure compliance with this code section by confirming with the lists to be placed online by the procurement office, city planning

department, grantmaking and licensing agencies, and the lobbyist oversight office to verify the status of each potential donor.

g. *Political Activity*. Neither a lobbyist* nor an officer or employee of a principal* may serve as a treasurer or other officer for the political committee or political action committee of any candidate seeking a city/county elected office or of any candidate for another elected office who is a city/county official or employee.* City/county officials may not speak at political fundraising events sponsored in whole or in part by lobbyists* or other restricted sources*. No campaign consultant or employee of a campaign consultant may lobby any official or employee* who is a current or former client of the campaign consultant or whose superior is a current or former client of the campaign consultant. "Former" in this provision means within the past two election cycles.

h. *Pay to Play*. A lobbyist* may not charge a fee or receive economic consideration based on a contract, either written or oral, that any part of the fee or economic consideration will be converted into a contribution to a candidate for any public office or to any political committee.

i. *Lobbying Venues*. Lobbyists* may not engage in lobbying activities* at a charitable event, a community or civic event, or a similar public gathering. So far as possible, business meetings between lobbyists* and officials should be conducted in a business environment, during business hours and at city/county offices whenever possible.

j. *Confidential Information*. A lobbyist* may not use confidential information, obtained formally or informally as part of his or her lobbying activities*, for his or her own benefit or for the benefit of any other person or entity, or make such information available in a manner where it would be reasonably foreseeable that a person or entity would benefit from it.

k. *City/County Lobbyists*. Any individual or entity that receives compensation* pursuant to a contract or subcontract to lobby on behalf of, or otherwise represent (including as an attorney), the city/county may not lobby the city/county.

l. *Lobbying Conflicts of Interest*. No lobbyist* or principal* may propose or undertake any

action that would bestow a financial benefit on an official or employee* or an official or employee's spouse, domestic partner, family member, or business associate. No city/county official, employee, or consultant, or any high-level official's spouse, domestic partner, child, or sibling, may lobby the city/county or any affiliated independent agency*. No one may lobby a relative (immediate family, parent or grandparent, child or grandchild, including the equivalent step-family members), a relative of a member of his or her lobbying firm, a relative of the principal or an owner, partner, or officer of his or her principal, or a business associate. No city/county official may allow a relative or business associate to lobby him or her. No county legislator or his or her staff member may lobby any local government entity within the county. Nor may any official or employee* allow a higher-level representative of all or part of the city/county's residents to lobby him or her. And no political party officer or other representative may lobby a local official or employee* other than an elected official. [*An alternative is to prohibit government officials and employees from lobbying or working for a firm that lobbies.*]

m. *Revolving Door*. For a period of two years from the date of employment or becoming a city/county official, an official or employee* may not participate in a matter that may benefit his or her immediate former employer or immediate former client. If a lobbyist* is hired by or takes a position with the city/county, the lobbyist* must immediately cease engaging in lobbying activities*, terminate his or her registration, and within 30 days file any remaining disclosure reports. The lobbyist's firm may no longer represent principals* before the former lobbyist's board or agency or, if the lobbyist serves on the local legislative body or is the mayor or other CEO, the government. The lobbying oversight office may waive this rule upon a determination that there is no conflict of interest and that the lobbyist's position cannot be used to influence officials or employees* with respect to the areas or topics for which he or she was lobbying. No individual may lobby an official or employee for two years after that individual has left city/county service or after a member of his or her firm or an owner, partner, or office of his or her principal has left city/county service.

n. *Cone of Silence*. Agent and principal lobbyists*, as well as lobbying supporters,* are prohibited from lobbying officials and employees* regarding a proposed contract from the time a Request for Proposal (RFP), a Request for Qualifications (RFQ), or other solicitation

has been released until the contract is posted as a legislative agenda item. If contact is required, such contact will be done in accordance with procedures incorporated into the solicitation document. Violation of this provision may lead to disqualification of an offer or avoidance of a contract. In the event of a conflict or inconsistency between this provision and any other provision of this code, this provision prevails.

o. *Endorsements*. No lobbyist* may ask an official or employee* for an endorsement of his or her work to others, nor may any official or employee* provide such an endorsement. Nor may an official or employee* suggest a possible client to a lobbyist*.

p. *Service on Boards*. No lobbyist* or principal* (including owners, partners, officers, board members, and employees) may serve on a city/county board or commission, including advisory boards, in any area related to a principal's financial interests, business, or assets.

q. *Loans*. No official or employee,* member of his or her immediate family, or associated business may request or make a loan from or to a lobbyist* or principal*, or any officer, partner, owner, or employee of a lobbying firm or principal.

r. *Charitable Fundraising*. No lobbyist* or principal* may engage in any charitable fundraising activity at the request of an official or employee.* "Fundraising activity" includes the solicitation, transmission, and transmission of a solicitation of a charitable contribution.

s. *Bell Ringing*. A lobbyist* may not initiate or encourage a governmental action for the purpose of creating future business for the lobbyist*, such as opposing the governmental action or being employed or retained to secure the passage or defeat of legislation. Nor may an official or employee* be complicit in such a scheme.

t. *Retention of Records*. All lobbyists* and principals* must retain, for a period of five years, all books, papers, and documents necessary to substantiate the disclosures required to be made under this code.

u. *Informing Principals*. All agent lobbyists* must inform their principals* about any law that might limit or prohibit their hiring, expenditures, or other acts or be jointly liable for their

violations of such laws.

v. *Reporting Violations*. Officials, employees*, and consultants, as well as lobbyists* and principals* (and their officers and employees), are required to report to the lobbying oversight office possible violations of this code of which they have knowledge, including the failure of a lobbyist* to register or fully disclose.

w. *Indirect Means*. Agent and principal lobbyists* may not attempt to evade the prohibitions or obligations in this code through indirect efforts or through the use of their or their principals'* agents, associates, employees, or family members, or through the agents, associates, employees, or family members of officials or employees.*

306. **Oversight**

1. Authority. The ethics commission/campaign finance board/lobbying officer/auditor/clerk ("lobbying oversight office") is hereby given authority to oversee administration and enforcement of this lobbying code. The lobbying oversight office has jurisdiction over all former and current city/county officials and employees*, consultants, and candidates, and over all lobbyists*, principals*, lobbying supporters*, and other restricted sources.* The termination of an official or employee's* term of office or employment with the city/county, or the termination of a lobbyist* or principal's registration, does not affect the jurisdiction of the lobbying oversight office with respect to the requirements imposed by this lobbying code.

2. Administration. The lobbying oversight office has the following powers and duties, and will engage in the following activities or designate another office, agency, or individual to engage in these activities on its behalf:

a. To solely render, index, and maintain on file informal advice and advisory opinions rendered pursuant to this lobbying code, as well as interpretations of this code;

b. To solely dispose of waiver requests made pursuant to this lobbying code;

c. To solely provide lobbying training and education to officials, employees, consultants, candidates, lobbyists*, and principals*;

d. To solely prepare and provide online forms and databases for lobbying registration and disclosure, and for filing lobbying-related complaints and reporting suspected undisclosed lobbying activity and lobbying activity by unregistered individuals or entities;

e. To solely review, index, maintain on file, and place on its website, registration and disclosure forms filed with the lobbying oversight office pursuant to this lobbying code, and to audit the records of registrants, for cause or on a random basis;

f. To solely review, index, maintain on file, and dispose of lobbying-related complaints, investigate possible violations of this lobbying code (whether pursuant to a complaint or on its own initiative), subpoena witnesses and records, enter into settlements with alleged violators of this lobbying code, advocate for the city/county at and/or conduct public hearings, apply and recommend sanctions, assess penalties, make referrals, and initiate appropriate actions and proceedings;

g. To prepare and place on its website an annual report of its operations, proceedings, revenues, and expenditures, which also may include recommendations to the local legislative body for changes to this lobbying code;

h. To provide for public inspection of certain of its records, as required by law.

i. To promulgate such rules and regulations as deemed necessary for administration of this lobbying code.

j. To perform other duties as may be assigned by the local legislative body.

3. Access to Registration and Disclosure Information. The lobbying oversight office must make all registration and disclosure information available online in an easily accessible manner, as follows:

a. Information must be made available via a Lobbying Database on the lobbying oversight office's website, in an open format that is machine readable or structured, easy to search, sort, analyze, download, and reuse with a variety of common software, and capable of being bulk downloaded.

b. All data will be tied to the filer's unique identifying number, as well as to the numbers of their agents and principals*, to facilitate sorting and analysis.

4. Review of Registration and Disclosure Information. The lobbying oversight office must review all registration and disclosure forms filed with it to determine whether any person required to file such a form has failed to file it on time, has filed deficient or inaccurate information, or has filed a form that reveals a possible or potential violation of this lobbying code. The lobbying oversight office must also develop a protocol to review sources of information that may provide evidence of lobbying misconduct, including state lobbying registration documents, notices of appearances before city/county agencies that identify the representative of an applicant, the city/county's "doing business" database, and newspaper articles and blog posts about public meetings and lobbyists*. If the lobbying oversight office determines that a registration or disclosure form is late, deficient, inaccurate, or reveals another possible violation of this lobbying code, the lobbying oversight office must notify the registrant in writing of the possible violation and of the possible penalties for failure to comply with this lobbying code.

5. Advice

a. Upon the written request of any official or employee,* any former official or employee, any candidate or consultant, any lobbyist*, principal*, lobbying supporter, restricted source*, or any individual or entity that believes it or one of its officers, employees, or agents might be engaging in lobbying activities*, the lobbying oversight office must render, within fifteen days [*or, if a board, "within fifteen days after the date of its next regular meeting"]*, a written advisory opinion with respect to the interpretation or application of this lobbying code, with respect to future actions only. If an earlier response is desired, or if the office determines that the situation does not require a formal advisory opinion, an informal verbal, mailed, or e-mailed opinion will be provided. No one but the lobbying oversight office, or an individual it designates, may provide ethics advice; any other advice is not binding on the lobbying oversight office and does not protect the advisee.

b. Any person or entity may request informal advice from the lobbying oversight office or its designee about any situation, including hypothetical situations, but such advice is not binding and there are no time requirements.

c. A written advisory opinion rendered by the lobbying oversight office, until and unless amended or revoked, is binding upon the office in any subsequent proceeding concerning

the individual or entity that requested the opinion, or to which the advisory opinion referred, and acted in good faith, unless the requester omitted or misstated a material fact in requesting the advisory opinion. The advisory opinion may also be used as a defense in any civil action brought by the lobbying oversight office or by the city/county. A written advisory opinion is also binding on any individual or entity under the lobbying oversight office's jurisdiction to whom it directly applies. If the lobbying oversight office has reason to believe that a written advisory opinion has not been complied with, it will take appropriate action to ensure compliance.

d. To the extent each subject permits, advisory opinions (with unnecessary financial and personal details redacted on request) will be indexed and maintained on file by the lobbying oversight office and will also be made available, in a searchable manner, on the office's website. Officials and employees*, and registered lobbyists* and principals*, should be notified about advisory opinions that directly affect their conduct.

e. A requester or subject of lobbying advice may seek reconsideration of a written advisory opinion. A request for reconsideration must allege that (1) a material error of law has been made; (2) a material error of fact has been made; or (3) a change in materially relevant facts or law has occurred since the request for advice was made. A decision by the lobbying oversight office upon reconsideration is final and may not be appealed. The office may reconsider its advice on its own initiative, providing notice to whoever originally requested the advice and to any individual or entity under its jurisdiction that will be directly impacted by the advice. Advice stands until it has been amended; it is not suspended pending reconsideration or an attempt to appeal.

6. Training. The lobbying oversight office will (1) within six months after its passage make this lobbying code, and explanations of its provisions (including information on how to fill out all forms and statements), available (including, but not limited to, on the office's website) to all those under its jurisdiction, and (2) develop educational materials and a required educational program regarding the provisions and purposes of this code for all those under its jurisdiction. The educational program will commence no more than one year after this code goes into effect and, after current registrants and appropriate officials and employees have been trained, the program will be provided at least every two months for

new registrants, new employees of registrants, and new officials and employees*. Every individual who is required to register as a lobbyist*, or who lobbies the city/county for a lobbying firm or principal* that registers, must attend a lobbying training session conducted by the lobbying oversight office no less than once every two calendar years. In addition, the lobbying oversight office will hold an annual workshop to discuss this code, its values and goals, its enforcement, and the ways in which the code has affected its work and the working of the city/county government.

7. Annual Reports. The lobbying oversight office must prepare and submit an annual report to the local legislative body, summarizing the activities, decisions, and advisory opinions of the office. The report may also recommend changes to the text or administration of this code. The lobbying oversight office should, in its publications and on its website, ask for recommendations to improve the lobbying program. The report must be submitted no later than October 31 of each year, covering to the year ended August 31, and must be filed with the clerk and made available on the city/county website.

307. **Enforcement**

[*If lobbying oversight is administered by an independent ethics commission or the like, it can employ the enforcement process set forth in City Ethics Model Ethics Code §§213-215.2. If lobbying oversight is administered by an administrative office, such as a clerk or lobbying registrar, it is best to employ the government's administrative hearing process or to contract with a hearing officer for a process where the lobbying oversight office acts as investigator (unless there is an independent investigative office available) and advocate (with its own or contracted counsel, not with the city or county attorney).*]

For officials and employees*, investigations and hearings are governed by §§213-215.2 of the City Ethics Model Ethics Code. For lobbyists*, investigations and hearing are governed by the following provisions.

1. Late Filings. For late filing violations of this lobbying code, a truncated procedure requires notice and an opportunity to plead mitigating circumstances to lessen fines. No hearing is required, and the lobbying oversight office may make determinations and apply per diem fines as set forth below. There is no appeal from a finding of a late filing.

2. Filing Complaints. A complaint must be filed within one year after the complainant

discovered the alleged violation. The lobbying oversight office may, on it own initiative, determine through an inquiry into informal allegations or information provided directly to the Commission, through a hotline, by referral, in the public news media, or otherwise, that a violation of this code may exist, and prepare a complaint of its own. The lobbying oversight office may also amend a complaint that has been filed with it by adding further allegations, by adding respondents involved in the same conduct, directly or indirectly, by action or inaction, or by deleting allegations that would not constitute a violation of this code, have been made against persons or entities not covered by this code, or do not appear to be supported by the facts. The lobbying oversight office may also consolidate complaints where the allegations are materially related.

3. Acceptance of Complaints. Upon receipt of a complaint on a form prepared by the lobbying oversight office, which any individual or entity may file, the lobbying oversight office will first determine if it, in fact, alleges an action or inaction that, if the allegations are true, might constitute a violation of this code, and that at least one person or entity accused of a violation is covered by this code. If the lobbying oversight office determines that no such action or inaction has been alleged or that no one accused is covered by this code, then it will dismiss the complaint with notice to the complainant. Similarly, if the lobbying oversight office determines that an alleged violation is so minor that it is not worthy of investigation, then it will dismiss the complaint with notice to the complainant. The lobbying oversight office must make this determination within thirty days after receipt of a complaint.

4. Referrals. The lobbying oversight office may refer any matter to an authority or person or body authorized by law to impose disciplinary action pursuant to applicable law or collective bargaining agreement or, if it determines there are possible criminal violations, to the appropriate prosecutor.

5. Notification of Complaints. The lobbying oversight office will send notification of an accepted or self-initiated complaint, as amended, as well as any further amendment, to the respondent against whom the complaint was filed, not later than seven days after making the determination in subsection 3 or the preparation of a complaint or amendment pursuant to subsection 2. A copy of the complaint, and of any amendments, must accompany such

notice. The lobbying oversight office will also send notification to the complainant in writing of its receipt and acceptance of the complaint, and of any amendments. Here and elsewhere, "complainant" and "respondent" might consist of more than one individual or entity.

6. Settlement Agreements

a. At any time after a complaint has been filed or self-initiated, the lobbying oversight office may seek and enter into a settlement agreement with the respondent. The settlement agreement will include the nature of the complaint, findings of fact, conclusions of law, the Commission's reasons for entering into the agreement, an admission of violation by the respondent, and a waiver of the right to a hearing and to appeal. It will also, where relevant, include a promise by the respondent not to do certain actions, the imposition of penalties permitted by this code, remedial action to be taken, and oral or written statements to be made by the respondent.

b. In determining whether a matter is appropriate for settlement, the lobbying oversight office should consider the following factors, as well as other factors it considers relevant: (i) the severity of the alleged conduct; (ii) the respondent's apparent level of knowledge and willfulness regarding the alleged conduct; (iii) whether the alleged conduct appears to be an isolated event or part of a pattern of conduct; (iv) the complexity of issues or evidence, and the likely scope of an investigation and hearings; (v) the involvement of other agencies in the investigation of the respondent's conduct; (vi) the existence of lobbying oversight office precedent concerning the alleged conduct; (vii) the age of the facts alleged in the complaint; (viii) the resources and priorities of the lobbying oversight office; and (ix) whether the respondent self-reported the alleged conduct or sought an advisory opinion regarding it.

c. Any settlement agreement approved by the lobbying oversight office will be a public record. However, all meetings held and documents relating to the settlement negotiations will be kept confidential, unless the parties agree otherwise.

d. If a settlement agreement is breached by the respondent, the lobbying oversight office may rescind the agreement and reinstitute the proceeding. However, no information obtained from the respondent in reaching the settlement, which is not otherwise

discoverable, may be used in the proceeding.

7. Investigations. If a complaint is accepted or prepared pursuant to subsections 2 or 3, the lobbying oversight office will conduct an investigation. From this point on, the complainant may not withdraw his or her complaint, although he or she may suggest a settlement with the respondent. In conducting such an investigation, the lobbying oversight office may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records it deems relevant and material. All city/county departments, agencies, bodies, officials and employees* are required to respond fully and truthfully to all enquiries and cooperate with all requests of the lobbying oversight office or its agents relating to an investigation. It is a violation of this code for any official or employee to deny access to information requested by the lobbying oversight office in the course of an investigation or a public hearing, except to the extent that such denial is required by federal, state, or local law. During the investigation period, the lobbying oversight office may amend a complaint to include other violations which it reasonably suspects to have occurred. It must send a copy of any such amendment to the respondent and complainant within seven days after the amendment has been made. The goal of the investigation is to determine whether there is sufficient cause to believe that a violation of this code has occurred in order to complete the investigation and move on to a hearing.

8. Responses to Complaints. The respondent may file with the lobbying oversight office a response to the complaint, or to an amendment to the complaint, within thirty days after his or her receipt of the complaint or amendment. The response will be sent to the complainant by the lobbying oversight office within five days after its filing and, within fifteen days after receipt, the complainant may file with the lobbying oversight office a response to the respondent's response, which the lobbying oversight office will send to the respondent within five days after its filing.

9. Confidentiality. The investigation will be confidential unless the respondent requests that it be public or unless the respondent makes public the fact of or any information concerning the proceeding. The respondent has the right to appear and be heard, and the complainant has the right to attend any such hearing and be heard.

10. Dismissal of Complaints. If the lobbying oversight office determines that there is insufficient cause to proceed with the investigation or proceeding, it will dismiss the complaint and send notification of this dismissal to the complainant and respondent. If it determines that there is sufficient cause to proceed, it will send notification of this finding to the complainant and respondent. In its letter of dismissal or notification of finding, which will be sent within five days after the vote on sufficient cause to proceed, the lobbying oversight office will set forth a brief summary of the facts and the reasons for dismissal.

11. Complaints Against Lobbying Oversight Office. Nothing in this section may be construed to permit the lobbying oversight office to conduct an investigation of itself or of any of its members or staff. If the lobbying oversight office receives a complaint alleging that the office or any of its members or staff has violated any provision of this code, or any other law, the office must promptly transmit to the legislative body a copy of the complaint.

12. False Allegations. If an allegation in a complaint is made under this section with the knowledge that it is without foundation in fact, the respondent has a cause of action against the complainant for damages caused by the complaint. If the respondent prevails in such an action, the court may award the respondent the costs of the action and reasonable legal fees.

13. Public Hearing Process

a. After a determination of sufficient cause to proceed and the end of the investigation, and if there is no settlement, the lobbying oversight office will hold one or more public hearings. The goal of these public hearings is to determine whether or not a violation of this lobbying code has occurred. The hearings will be held with reasonable promptness.

b. Any person who is, in the opinion of the lobbying oversight office, adversely affected by comments made during a hearing, may testify in response at a hearing, directly or through a representative.

c. Extensions of time to any of the time limitations specified in this section may be granted by the lobbying oversight office, for cause, which must be stated in granting the extension. If no meeting can be held before such time limit runs out, the chair may extend the limit until

the following meeting. The lobbying oversight office must give written notice of any extension(s) of time to the respondent and the complainant.

d. Rules and Procedures

(1) Public hearings will be conducted by a hearing officer selected from a pool of administrative or retired judges or hearing officers. The lobbying oversight office will act as advocate, presenting the case for the city/county. The lobbying oversight office will draft rules and regulations that include the following: oral evidence will be taken under oath; documentary evidence may be received in the form of copies or excerpts, if the original is not readily available and, upon request, parties and the hearing officer will be given the opportunity to compare the copy to the original; the state's administrative rules of evidence, rather than strict rules of judicial evidence, will be followed, to allow a liberal introduction of testimony and documentary evidence; and the respondent has the right:

(a) To be represented by counsel.

(b) To present oral or written documentary evidence which is not irrelevant, immaterial, or unduly repetitious.

(c) To examine and cross-examine witnesses required for a full and true disclosure of the facts.

(2) The lobbying oversight office may subpoena, and its advocate may question verbally or in writing, witnesses to testify and may compel production of documents and other effects as evidence, and failure to obey such subpoena shall constitute a misdemeanor.

(3) At all hearings relating to a complaint, a court stenographer will record the proceedings.

(4) Upon the request of either the complainant, the respondent, or the lobbying oversight office, the hearings will be tape-recorded or filmed, and a transcript made. If this is requested by either a respondent or complainant, the requesting party will bear the costs.

14. Determinations.

a. Within thirty days after the last hearing, the hearing officer will determine whether to

dismiss the complaint or, upon a finding of a violation of this code, to apply any of the sanctions set forth below to the respondent.

b. A determination that a respondent is in violation requires a finding there is clear and convincing evidence that the respondent has violated a provision of this code. The hearing officer's written final decision must specify the code sections violated and provide a factual explanation supporting each violation or, if no violation is found, findings of fact and the reasons for dismissal. When determining the appropriate penalty, the mitigating and aggravating circumstances set forth in §307.18(f) should be taken into account. Another consideration is whether the respondent has depended on advice of counsel, but this cannot be used as a defense against the finding of a violation; only advice of the lobbying oversight office may considered as a defense. The hearing officer will file its memorandum of decision with the City/County Clerk, and the lobbying oversight office will send it to the complainant and respondent within ten days.

c. The determination of a hearing officer may be appealed to [*the appropriate court*].

15. Compensatory Action and Apology. Violation of any provision of this lobbying code should raise conscientious questions for the violator as to whether an admission, sincere apology, compensatory action, and a settlement are appropriate to promote the best interests of the community and to prevent the cost – in time, money, and emotion – of an investigation and hearings.

16. Joint Liability. If two or more individuals or entities are responsible for any violation, they may be jointly and severally liable.

17. Orders to Show Cause. The lobbying oversight office may, on its own initiative or upon the request of any official, employee, or citizen, issue an order to any unregistered individual or entity to appear and provide evidence that he, she, or it is excepted from registration requirements.

18. Sanctions. The lobbying oversight office will suspend the registration or refuse the registration form of any individual or entity that owes the office a fine or other penalty,

unless the office's decision is on appeal.

a. *Late Filing Fines***.** The lobbying oversight office will e-mail a reminder two weeks before each quarterly or annual report is due. Any filer of an ongoing, quarterly, or annual report who has not previously been found to have filed late will be charged an administrative fine of ten dollars for each day after it has been notified by the lobbying oversight office that its filing is late. Any filer that has been previously found to have filed late will be charged a fine of twenty-five dollars for each day after the filing is due. After thirty days, the filer will be suspended from engaging in lobbying activities* or from having anyone lobby on its behalf for a period of one year. After sixty days, the suspension increases to two years. The maximum per diem fine for a particular late filing is $5,000.

Upon request, late filing fines may be reduced or waived by the lobbying oversight office. A decision regarding such a reduction or waiver must be placed on the lobbying oversight office website in a clearly designated section and must take the following factors into account:

(i) the significance of the impediments to timely filing faced by the filer;

(ii) whether the filer received reminder or notice of an overdue report;

(iii) whether and how often the filer has filed late in the past;

(iv) the annual operating budget of or fees paid to the filer;

(v) whether the lobbyist* lobbies solely on its own behalf; and

(vi) for ongoing and quarterly disclosure, the number of lobbying matters, number of hours spent working on those matters, and amount of compensation* and expenditures that were not reported during the relevant period.

b. *Deficient Filing Fines***.** When, upon reviewing a registration form or disclosure report, or based on information read or received, the lobbying oversight office finds that such a form or report is incomplete, it must notify the registrant or filer in writing of the possible violation and of the penalties for such a violation. The registrant or filer must supply the missing information, or explain why the information provided was complete, within

fourteen days of receipt of this notice, or the deficiency will be treated as an inaccuracy, pursuant to subsection (c) below.

c. *Inaccurate Filing Penalties***.** When, upon reviewing a registration form or disclosure report, or based on a complaint or on information read or received, the lobbying oversight office finds that such a form or report may be materially inaccurate, it will notify the registrant or filer in writing of the possible violation and of the penalties for such a violation. If the lobbying oversight office finds that there was one or more material inaccuracies, it may impose an administrative fine of up to $5,000 per inaccuracy, suspend the violator from engaging in lobbying activities*, void a contract, grant, loan, license, permit, or other benefit with respect to which the violator engaged or had others engage in lobbying activities, and/or debar the violator from obtaining a city/county contract, grant, or other special benefit for up to five years and/or from lobbying for the city/county or any affiliated independent agency*. In setting the amount of an administrative fine for this violation, the lobbying oversight office will take into account mitigating and aggravating circumstances as well as the amount of the lobbyist's* fees, the principal's* lobbying expenditures, and the size of the benefits sought in the particular matter.

d. *Penalties for Failure to Register***.** Any individual or entity who seeks to influence city/county officials or employees*, directly or indirectly, should either register or seek the advice of the lobbyist oversight office to determine whether the registration requirement is applicable to them. If the lobbying oversight office finds that an individual or entity has engaged in lobbying activities* without registering, the violator will be charged an administrative fine of $100 for each day since it first engaged in lobbying activities. If the lobbying oversight office finds the violation egregious, the violator may be suspended from engaging in lobbying activities or from having anyone lobby on its behalf for a period of up to three years. The maximum per diem fine for this violation is $25,000. Debarment may also be applied to someone who has engaged in lobbying activities without registering. The lobbying oversight office will take into account mitigating and aggravating circumstances.

e. *Penalties for Other Violations***.** In determining penalties, the lobbying oversight office or hearing officer should consider mitigating and aggravating circumstances.

(1) Warning Letter.

(2) Reprimand.
(3) Injunctive Relief. The lobbying oversight office, on behalf of the city/county, may order a violator to cease and desist a violation if the violation is still ongoing, or it may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a violation of this code or to compel compliance with this code, including the payment of fines and other sanctions. The lobbying oversight office may also order a violator of a disclosure requirement to file an unfiled disclosure report or to add information to a filed disclosure report.
(4) Administrative Fine. The lobbying oversight office or hearing officer may impose an administrative fine of up to $5,000 per violation (unless otherwise stated above), or three times any amount not properly reported, or three times any amount given or received in excess of the gift limit, whichever is greater.
(5) Suspension of Lobbying Activities. A registrant may be suspended from engaging in lobbying activities* or from having anyone lobby on its behalf for up to three years.
(6) Avoidance. The lobbying oversight office may, upon its own decision or that of a hearing officer, void a violator's contract, grant, permit, subsidy, tax abatement, license, or other benefit with respect to which the violator directly or indirectly lobbied. In order to best consider the consequences to the community of an act of avoidance, the office should discuss the matter with any agency, department, or body involved with the benefit, as well as with the local legislative body.
(7) Damages. The lobbying oversight office, on behalf of the city/county, may initiate an action in a court of appropriate jurisdiction to obtain damages.
(8) Debarment. If the lobbying oversight office or hearing officer finds that an individual or entity has knowingly violated any provision of this code in a more than *de minimis* way, that individual or entity may be prohibited from entering into any contract (including a lobbying contract) with, or obtaining any grant, loan, permit, license, or other benefit from, the city/county for a period not to exceed three years.
(9) Prosecutions. The lobbying oversight office may refer possible criminal violations to the appropriate prosecutor. Nothing contained in this code may be construed to restrict the authority of any prosecutor to prosecute any violation of any law.

f. *Mitigating and Aggravating Circumstances*. The following mitigating and aggravating circumstances should be taken into account in determining sanctions for violations of this lobbying code.

The nature and severity of the respondent's misconduct

The duration of the misconduct

Whether the incident appears to have been singular or part of a pattern

Whether the violation appears to have been inadvertent, negligent, or deliberate

The position and responsibilities of the respondent

The amount of any financial or other loss to the city/county government as a result of the misconduct

The value of anything received or sought

The efforts taken by the respondent to either disclose and correct the misconduct, or to conceal it from, or otherwise deceive or mislead officials, the lobbying oversight office, or the public

Whether the respondent in any way coerced or intimidated subordinates, colleagues, or others into participating in or failing to report the misconduct

The costs incurred in investigation and enforcement

Whether or not the respondent sought advice from the lobbying oversight office [*or a government attorney if the office does not offer advice*], and what that advice was (failure to follow advice is a serious aggravating circumstance)

Whether a violation is a first violation, or the respondent has been found to have violated the provision, or other government ethics-related provisions, before

Whether the conduct appears to have been induced, encouraged, or aided by a superior, colleague, or someone in the city/county government

Whether the respondent cooperated with the lobbying oversight office both with respect to his or her own conduct and with respect to related conduct of others

Whether the respondent had prior notice or reason to believe, due to the handling of similar situations, that the conduct was prohibited

g. *Professional Discipline***.** The lobbying oversight office will notify the professional disciplinary board of any lobbyist* or principal* who is found to have violated this lobbying code.

h. *Effect on Government Action*. The local legislative body, a board or commission, or a department or agency may take into account a violation of this lobbying code in making its determinations, including the award, rejection, or termination of a grant, loan, permit, zoning change, license, subsidy, tax abatement, extension, renewal, change order, and other special benefits.

l. *Use of Campaign Funds*. Lobbying-related fines may not be paid from campaign funds.

308. **Severability**

If any provision of this lobbying code is held by any court, or by any federal or state agency of competent jurisdiction, to be invalid as conflicting with any federal, state, or city/county law or charter provision, or is held by such court or agency to be modified in order to conform to the requirements of such provision, the conflicting provision of this code is to be considered a separate, independent part of this code, and such holding shall not affect the validity or enforceability of this code as a whole or any part other than the part modified or declared to be invalid.

Appendix II - **Books and Articles of Interest**

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Susman, Thomas M., "Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good," 19 *Stanford Law & Policy Review*,

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