Ethical Considerations of the Public Sector Lobbyist

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I. INTRODUCTION

On January 21, 2009, President Barack Obama, in an effort to rid government of unethical and corruptible influences, fulfilled a campaign promise to prevent lobbyists from working for and with his administration. Shortly thereafter, President Obama praised the work of public servants and called on citizens of the United States to make a commitment to public service. But what if a public servant is a lobbyist? The same public servant President Obama praised one day would be denied employment with his administration the next, simply for being a lobbyist.

Much of the literature focusing on the lobbying profession is concerned with special interests’ undue influence and ability to gain access to policymakers. Literature also concentrates on the role money plays in politics. However, this fixation with money’s role in politics ignores a large and expanding segment of the lobbying profession—the public sector lobbyist.

Over the years, government has grown more complex. Traditional notions of federalism and separation of powers have begun to take on varied meanings in light of the ever-increasing complexity of governmental hierarchy. Additionally, there has been an increase in new forms of government designed to address and protect highly specialized interests. Some of these new forms of governmental entities include municipal corporations, joint powers authorities, and special districts. With this expansion, all levels and types of government have become interconnected and are often in some form of conflict with one another. To resolve these conflicts, different forms of government often find themselves advocating before or against one another. However, government-to-government advocacy is paid for with public funds, and certain restrictions exist on the use of these funds. Additionally, other provisions of law, such as the requirement that the public’s business be conducted in public view, impact a public entity’s ability

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to advocate. Together, these requirements impact the advocacy methods a public sector lobbyist uses.³

Part II of this Essay describes the lobbying profession generally while focusing on the growing number of public sector lobbyists. Part III reviews two of the primary legal limitations imposed on public entities that impact the advocacy methodologies available to public sector lobbyists (as compared to the advocacy methods available to private sector lobbyists). Finally, Part IV discusses how these different limitations and advocacy methods impact public sector lobbyists’ ethical considerations. This Essay takes the point of view that, because public sector lobbyists represent the public, the advocacy methods they employ are different and require different ethical considerations.

II. PUBLIC SECTOR AND PRIVATE SECTOR LOBBYISTS

A. A Brief History of Lobbying

There is a long and storied, sometimes sordid, history of lobbyists and the role they play in government.⁴ The origins of the lobbying profession can be traced back to the Constitution, which recognizes “the right of the people . . . to petition the government for a redress of grievances.”⁵ Long before the terms “lobbyist” or “lobbying” were made popular in American politics by President Ulysses S. Grant, “petitioners” sought to interact, inform, and influence government officials.⁶

Today, the practice of lobbying is alive and well, and, according to some assertions, the size of the lobbying industry “is proportional to the size of government.”⁷ Although it is difficult to accurately calculate the exact number of lobbyists, because many jurisdictions have adopted different definitions of “lobbyist,”⁸ it is safe to assume that the number far exceeds what our most visionary forefathers anticipated.

³ As used, the terms “public sector lobbying” and “public sector lobbyist” are meant to include all lobbyists representing any governmental entity, whether they are independent contractors or employees of the governmental entity.
⁵ U.S. CONST. amend. I, § 1.
⁶ See DEANNA R. GELAK, LOBBYING AND ADVOCACY: WINNING STRATEGIES, RECOMMENDATIONS, RESOURCES, ETHICS AND ONGOING COMPLIANCE FOR LOBBYISTS AND WASHINGTON ADVOCATES 6-13 (2008) (noting that although the exact origin of words such as “lobbyist” and “lobbying” is disputed, these terms have been documented in the context of their meaning in the United States government as early as the 1820s). Cf. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 683 (10th ed. 1999) (“lobby”; dating the origin of the word back to 1837). These references to the word and profession predate when President Ulysses S. Grant took office and began to use the word in reference to interactions with “petitioners” at the Willard Hotel in Washington, D.C. GELAK, supra.
⁷ Jan Witold Baran, Can I Lobby You? Don’t Let One Bad Abramoff Spoil the Whole Bunch, WASH. POST, Jan. 8, 2006, at B01.
⁸ See Debra Mayberry, 37,000? 39,402? 11,500? Just How Many Lobbyists Are There in Washington,
It is well established that the regulation of the lobbying industry is permissible. In fact, the federal government and all fifty states regulate the lobbying profession in some manner. Additionally, many local jurisdictions impose their own regulations on lobbyists.

Not only is lobbying regulated at every level of government, but the types of laws, regulations, and standards imposed on lobbyists and their clients vary in each jurisdiction. There are laws and regulations covering everything from disclosure and reporting requirements to activities and conduct. In addition, the Supreme Court has permitted tax regulations on activity that qualifies as lobbying. Specific ethical guidelines and prohibitions on certain interactions between lobbyists and government employees also exist. There is no shortage of lobbying regulation, yet both the press and watchdog groups continue to rail against the undue influence and ethical lapses of the lobbying profession and those it seeks to persuade.

B. Lobbyists Share a Common Objective but Are Not All the Same

When it comes to public discourse, lobbyists often fall victim to over-generalization. In reality, individual lobbyists are unique. Each lobbyist has different styles, skills, and, perhaps most importantly, clients and employers. The following sections highlight some of these variations within the lobbying profession.

\[\text{Anyway?}, \text{ WASH. POST, Jan. 29, 2006, at B03. Mayberry focuses only on federal lobbyists and does not include state and local lobbyists. Including state and local government lobbyists brings the count up to a much higher figure.}
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10. See JAN WITOLD BARAN ET AL., PRACTICING LAW INSTITUTE, CORPORATE POLITICAL ACTIVITIES 2008: COMPLYING WITH CAMPAIGN FINANCE, LOBBYING & ETHICS LAWS 254 (2008) (“All states regulate, to some degree, lobbying of state legislators, including attempts to influence the passage or defeat of legislation and, often, executive approval or veto of legislation.”).


1. “Lobbying” and “Lobbyist,” Defined

Since there are over fifty different jurisdictions regulating the lobbying industry, there are dozens of definitions of “lobbying” and “lobbyist.” This Essay uses a broad definition of “lobbying,” under which “‘lobbying’ refers to addressing or soliciting members of a legislative body for the purpose of influencing their votes.”17 A “lobbyist” is one who performs the act of lobbying for compensation.18 The compensation requirement is an important distinction because, without it, one is considered to be a “citizen lobbyist” and is usually not subject to regulation.19

Scholars have attempted to divide lobbying into three broad categories: public policy, land use, and procurement.20 However, this Essay focuses exclusively on public policy lobbying, because it is the most common form of lobbying and the only type that is regulated in every jurisdiction.21

2. Lobbying at the Federal, State, and Local Levels

It is worth emphasizing that “[l]obbying occurs at all three levels of government”—the federal, state, and local22—because each level of government has a different role or “interest at stake.”23 The sovereign powers of each level of government and notions of federalism and separation of powers determine the interests at stake at each level, which means that lobbying interests differ at each

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18. Most laws defining “lobbyist” establish a minimum dollar amount or level of compensation that one is paid to perform lobbying activities. See, e.g., CAL. GOV’T CODE § 82039 (West 2005) (defining a lobbyist as one “who receives two thousand dollars ($2,000) or more . . . in a calendar month . . . other than reimbursement” to perform lobbying activities).

19. BRIAN E. ADAMS, CITIZEN LOBBYISTS: LOCAL EFFORTS TO INFLUENCE PUBLIC POLICY 8 (2007) (“Citizen lobbyists engage in the same activities as conventional lobbyists . . . [a]lthough they differ from conventional lobbyists in that they are not paid by a third party.”).

20. ANTHONY J. NOWNES, TOTAL LOBBYING: WHAT LOBBYISTS WANT (AND HOW THEY TRY TO GET IT) 4 (2006). “Public policy lobbying” attempts to influence changes in law or regulation by legislative and executive bodies, “land use lobbying” refers to decisions made at the local level regarding zoning issues, and “procurement lobbying” involves advocating for the award of government contracts. Id.

21. In some states, procurement lobbying is not considered lobbying, while in other states it is subject to lobbying regulations. Compare FLA. STAT. ANN. § 112.3148 (West 2008) (defining a lobbyist as one “who, for compensation, seeks . . . to influence the governmental decisionmaking of a . . . procurement employee”) with ARIZ. REV. STAT. ANN. § 41-1232.04 (West 2004) (exempting “a person who contacts a state officer . . . in connection with the procurement” from the definition of a lobbyist).

22. NOWNES, supra note 20, at 2.

23. ALAN ROSENTHAL, THE THIRD HOUSE: LOBBYISTS AND LOBBYING IN THE STATES 60 (2d ed. 2001). Chapter 4 focuses on this notion of “interests at stake.” Essentially, the type of lobbying that occurs is determined by the level of government that has greater jurisdiction. For example, a defense contractor does not typically lobby at the local government level as the federal government has primary jurisdiction over defense issues. Similarly, developers do not typically lobby for changes in zoning laws before the federal government, because land use issues are typically matters within the jurisdiction of local governments. Id.
level. To illustrate this point, a brief mention of separation of powers doctrine and federalism is warranted.

In United States v. Lopez, the Supreme Court encapsulated the notion of separation of powers and the different interests at stake. The Court stated that “[j]ust as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” The Framers intended that “[t]he powers delegated by the proposed Constitution in the Federal Government[] are few and defined,” while the states’ powers are vast and expansive and include those not specifically delegated to Congress. The states’ powers are commonly called the police powers and permit the regulation of matters concerning health, safety, morality, and public welfare. The powers granted to local governments (such as land use) are delegated by the states to local governments under their authority to establish municipal corporations and political subdivisions. Ours is a government system of divided, diluted, and scattered powers, allowing lobbying to occur at every level. Therefore, separation of powers and federalism dictate which level of government a lobbyist interacts with and which regulatory entity maintains jurisdiction over the lobbyist.

3. Contract v. In-House

Not only does lobbying occur at all levels of government, but lobbyists themselves can be categorized in a number of ways. Generally, lobbyists are either contract lobbyists or in-house lobbyists. A contract lobbyist is, as the label suggests, a lobbyist for hire and may represent multiple interests. Conversely, an in-house lobbyist is employed exclusively by the interest for which he or she lobbies.

25. Id. at 552 (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).
26. THE FEDERALIST NO. 45 (James Madison).
27. See discussion infra Part II.C.1.
28. See, e.g., Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, § 213, 121 Stat. 735, 750 (referring to both lobbying firms (i.e., contract lobbyists) and lobbyists (i.e., in-house lobbyists)).
29. It is worth noting that some in-house lobbyists may not meet the definition of a lobbyist in every jurisdiction. For example, there are many people who possess the title of Public Affairs, Government Relations—and, in the context of the public sector employer, Intergovernmental Liaison—but still attempt to influence government action. In order to determine whether these individuals must comply with lobbying regulations, some statutes apply a formula to determine the amount of time an individual spends advocating and attempting to influence government action. See, e.g., CAL. GOV’T CODE § 86116 (West 2005).
4. Private Sector v. Public Sector

Distinctions within the lobbying industry do not end there (nor do the descriptions contained in this Essay provide an exhaustive list). However, there is a growing distinction within the lobbying industry between two sectors of organized interests—the private and public sectors. While private and public sectors lobby governmental entities with equal vigor, the private sector lobbyists get most of the attention. Nearly every article on the subject of lobbying discusses money’s role in the campaign and political process while virtually ignoring the role government itself plays in this industry. Because the number of public sector lobbyists continues to grow, a narrower discussion is warranted.

C. Growth of Government and Public Sector Lobbyists

1. Growth of Government

There are many ways to analyze the growth of government. The amount of growth over time may vary depending on how it is measured. However, it is well established that government has expanded over the years. Aside from merely measuring the growth of government based on the number of persons employed, there has been a different kind of growth occurring in government that is more relevant to a discussion about lobbying—the creation of additional governmental entities. Since the Supreme Court opened the floodgate on the creation of “municipal corporations” in the 1907 case Hunter v. City of Pittsburgh, states have been forming governmental entities to address the many additional and changing needs of the public. The states’ power to create additional governmental entities has gone largely unchecked with few exceptions.

The well-documented “proliferation” of various types of governmental entities continues. With this growth, communication between governmental entities—including cities, counties, joint powers authorities, and special...
districts\textsuperscript{35}—has increased, resulting in a rising demand for public sector lobbyists.

2. Interdependency and Inter-Governmental Communications

Various levels of government have become increasingly interdependent as government has grown. Government mandates provide an example of how this growing interdependence has increased the role of public sector lobbying. Government mandates are requirements imposed by one level of government on another level of government. These mandates are often either “unfunded” or “underfunded,” which means that the entity imposing the mandate does not adequately pay all or some of the costs required to implement these new requirements. Unfunded and underfunded mandates essentially force the government on which they are imposed to comply by utilizing existing resources. Congress addressed the increasing frequency of unfunded mandates when it passed the Unfunded Mandates Reform Act of 1995.\textsuperscript{36} The stated purpose of this legislation was to “end the imposition . . . of Federal mandates on State, local, and tribal governments.”\textsuperscript{37} The increase in government mandates, which intensifies the interdependence of government entities that must comply with the mandates, is not isolated to the federal government. Local governments, which are creations of state law, have also become increasingly interdependent with state governments as a result of state mandates.\textsuperscript{38}

A specific example of this interdependency is the federal Medicaid program, which is an expansive program intended to provide healthcare services to the needy. “Medicaid is a state administered program and each state sets its own guidelines regarding eligibility and services.”\textsuperscript{39} Since it is a federally funded program, the federal government sets forth criteria for the states to follow. If the criteria do not work within a state, the state may seek a “waiver” from the

\textsuperscript{35} See KIMIA MEZANY & APRIL MANATT, WHAT’S SO SPECIAL ABOUT SPECIAL DISTRICTS?, CAL. S

\textsuperscript{36} Id. § 2(2).

\textsuperscript{37} Changes in State and Local Public Finance Since Proposition 13, Issue No. 18 (Pub. Pol’y Inst. of Cal.), Mar. 1999 (“The decline in discretionary revenues represents an increasing presence of higher levels of government in the local community and growing constraint on the choices of local public officials, who must administer programs mandated by the state and federal governments.”). Specifically, the local government is dependent on the state and federal governments, whereas the state is only dependent on the federal government, and the federal government is generally not dependent on either state or local governments. Therefore, a local government typically lobbies both the state and federal governments, but with a greater emphasis on the state, which is the source of the local government’s inception.

requirements imposed by the federal government. Similarly, since it is left to the states to administer the federally mandated program, many states have delegated the responsibility for enrollment, eligibility requirements, and delivery of certain services to local governments. In this specific situation, the federal, state, and local levels must communicate with one another to ensure that the Medicaid program operates successfully.

The rules governing virtually every aspect of the Medicaid program have become exceedingly complicated and subject to constant interpretation. Because billions of dollars are at stake, thousands of individuals throughout the country engage with federal, state, and local governments about the implementation and operation of the program. All of these individuals are lobbying on behalf of government and the citizens of their respective jurisdictions—in essence, it is government lobbying government.

3. Growth of Public Sector Lobbyists

The Medicaid program is just one example of how the need for intergovernmental communication has increased, resulting in the growth of public sector lobbying. California alone has seen its public sector lobbying corps more than double. In 1968, only eight percent of all California lobbyists represented other governmental interests. Forty years later, at the end of the 2008 legislative session, about one out of every five lobbyists advocated on behalf of government. This growth is not confined to California. Other states, such as Illinois and Arizona, have recently documented similar growth. Nevertheless, with few exceptions, the expansion of public sector lobbyists has gone unnoticed.

42. Id.; see also Centers for Medicaid & Medicare Services, supra note 39 (documenting growth in California).
43. See CALIFORNIA LEGISLATURE, LEGISLATIVE ADVOCATES AND ORGANIZATIONS (1968). According to the list, of the 392 lobbyists, 32 represented government.
46. See Jim Sanders, Local Government Lobbying Costs Soar in California, SACRAMENTO BEE, Feb. 8, 2009, available at http://www.sacbee.com/capitolandcalifornia/story/1607969.html (focusing on local government lobbying at the state level). This article focuses on local government lobbying at the state level for the simple reason mentioned in note 38, that most of the public sector lobbying is by local governments (which would include school districts and other political subdivisions) before state government.
III. ADVOCACY METHODS OF THE PUBLIC SECTOR LOBBYIST

Although all lobbyists have a common objective—to influence public policy and policymakers—the advocacy methods and resources used to achieve this objective differ. While strategy and tactics differ among lobbyists regardless of their clients, there are some fundamentally different options and tools available to public sector lobbyists based on their clientele. Because of the public nature of government decision-making, public sector lobbyists face a greater level of transparency and rigidity regarding their clients’ positions. However, as they relate to public entities, advocacy methods for influencing public policy and policymakers are determined by several other factors, most notably legal requirements.

A. Legal Requirements

The two most notable and significant legal restrictions on advocacy methodologies employed by public sector lobbyists are (1) limits on participation in the campaign and political process 47 and (2) requirements imposed by open meeting laws.

1. Campaigning and the Political Process

Whether public funds may be used for campaign purposes and the political process is a question that has concerned state courts for decades. 48 State courts that have addressed this issue have determined that the use of public funds for campaign purposes is generally prohibited, but it is permissible in very specific instances. 49 These cases can generally be divided into two categories: instances involving ballot measures and those relating to candidate elections.

a. Ballot Measures

It was Justice William Brennan, while serving on the New Jersey Supreme Court, who focused state courts’ discussions defining the scope of permissible uses of public funds for campaign purposes. 50 Justice Brennan distinguished between public expenditure for argumentation, which is unlawful, and

47. The term “campaign and political process” refers to the use of campaign contributions as a means to obtain “access” to policymakers.
49. See Mines v. Del Valle, 201 Cal. 273, 287 (1927) (concluding that the use of public funds for campaign purposes is improper and noting that an expenditure of public funds for campaign purposes may not be “sustained unless the power to do so is given . . . in clear and unmistakable language”); see also Elsenau v. City of Chicago, 334 Ill. 78 (1929).
dissemination of information about a ballot measure, which is permissible.\textsuperscript{51} Since then, state courts have further defined the scope of permissible campaign expenditures for ballot measures.\textsuperscript{52} However, lobbyists rarely use funding ballot measures as a method of advocacy.\textsuperscript{53}

\textit{b. Candidate Elections}

Campaign contributions are commonly used by lobbyists to gain access to policymakers.\textsuperscript{54} Such use of public funds has also been extensively discussed in the courts. The Supreme Court has concluded that publicly financed candidate elections are generally permissible provided that they are accomplished in a way that grants equal access to candidates regardless of party affiliation.\textsuperscript{55} However, an election in which all candidates have access to public funds is very different from an election in which only one candidate has access to public funds and his opponents do not. In fact, the framers of the Constitution seemed to be wary of a government too closely involved in the electoral process and likely never intended the use of public funds for specific candidates.\textsuperscript{56}

Because the use of public funds for campaigning is significantly restricted, a public sector lobbyist may not use public funds for campaign contributions.\textsuperscript{57} This means that a public sector lobbyist may not direct a client to make contributions to a particular candidate’s campaign. Additionally, many jurisdictions prevent lobbyists from making campaign contributions to candidates for an office before which they lobby.\textsuperscript{58} These restrictions typically prevent public sector lobbyists from using advocacy methods that are available to private sector lobbyists.\textsuperscript{59}

\begin{itemize}
\item[51.] \textit{Id.}
\item[52.] See Vargas v. City of Salinas, 205 P.3d 207 (Cal. 2009); Stanson v. Mott, 551 P.2d 1, 8-9 (Cal. 1976). These two cases define the current construction of the law in California, which permits the use of public funds for ballot measures in very narrow circumstances.
\item[53.] For example, some “candidate-controlled ballot measure committees” exist where a publicly elected official essentially raises funds to promote a cause that is on a ballot in an upcoming election. However, this Essay focuses primarily on use of candidate campaign contributions, because it is the most popular advocacy methodology used to increase “access” to policymakers.
\item[54.] See Minn. Citizens Concerned for Life, Inc. v. Kelley, 427 F.3d 1106 (8th Cir. 2005) (discussing Minnesota’s definitions of “political committee” and “political fund” as well as the role of a lobbyist’s use of campaign contributions).
\item[55.] Buckley v. Valeo, 424 U.S. 1, 97 (1976).
\item[56.] See \textsc{The Federalist} No. 53 (James Madison) (explaining the dangers of governmental alteration of the course and timing of elections).
\item[57.] See, \textit{e.g.}, Vargas, 205 P.3d 207 (allowing the use of public funds for state and local government ballot measures in only limited circumstances); Stanson, 551 P.2d 1 (same).
\item[58.] See, \textit{e.g.}, Inst. of Governmental Advocates v. Fair Political Practices Comm’n, 164 F. Supp. 2d 1183 (E.D. Cal. 2001) (upholding a ban on lobbyist contributions to policymakers that they lobby).
\item[59.] I say “typically” here because I am suggesting that this limitation does not exist for \textit{all} public sector lobbyists, because not all public sector lobbyists exclusively represent public sector clients.
\end{itemize}
Therefore, public funds may only be used in ballot measure campaigns when the expenditure of those funds is for the purpose of providing information to the public and a public entity is charged with that responsibility. For candidate elections, the use of public funds for lobbying is even more limited because public funds may only be used where funding is available equally to all candidates. The use of public funds in favor of specific candidate campaigns to the exclusion of other candidates is prohibited.

c. Lobbying

While the use of public funds in the campaign and political process is extremely limited, public entities have long been permitted to spend public funds to influence legislation.60 Today, most states have specific statutes that expressly authorize public entities to expend public funds for legislative advocacy services.61 The issue of using public funds for legislative advocacy has historically presented fewer legal issues than the use of public funds in electoral matters.

For example, in enacting California’s statute authorizing public entities to use public funds for legislative advocacy, Governor Earl Warren received assurances from the Attorney General of California that there were “no legal objections to the bill.”62 Today, the use of public funds for lobbying continues to be virtually unquestioned from a legal perspective.

Limits on public sector lobbyists’ participation in the campaign and political process affect the way in which public sector interests obtain access to policymakers. Another important legal constraint on a public sector lobbyist is open meeting laws.

2. Open Meeting Laws

Open meeting statutes require a governmental entity to perform the public’s business in a public setting. “All fifty states and the District of Columbia have enacted open meeting statutes.”63 This practice has a long history and is considered to be a fundamental tenet of American democracy.64

60. See Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 324-25 (1927). In Crawford, the California Supreme Court upheld a public entity’s contract for advocacy services for the purposes of presenting arguments in support of legislation before a legislative committee. Id.

61. See, e.g., CAL. GOV’T CODE § 50023 (West 1983) (“[A] local agency, directly or through a representative, may attend” legislative committee hearings to present information and advocate a position and “may meet with representatives of executive or administrative agencies” to accomplish this purpose).


64. See ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 108-45 (Francis Bowen ed., Henry Reeve
Open meeting laws usually apply to a wide range of governmental entities. Additionally, open meeting laws typically cover meetings at which discussion, deliberation, or decisions may take place. Many open meeting laws also require public notice. Therefore, in some jurisdictions, public entities covered by open meeting laws must hold public meetings when discussing, deliberating, or deciding on how and whether to advocate a public policy position before another governmental entity. By forcing advocacy decisions to be made in public settings, open meeting laws impact the manner in which a governmental entity may advocate before other governmental entities.

Open meeting laws usually impact a public sector lobbyist’s ability to advocate in two ways. First, the development of a strategy on a particular policy initiative occurs in plain view for all, including opponents, to see. Second, because open meeting laws have specific public notice requirements, the timeline for the adoption of a policy position at a public meeting may not coincide with a legislative hearing on the matter. Thus, a delay in conducting an open meeting may impede a public sector lobbyist’s ability to advocate a policy initiative at the appropriate time in the legislative process.

B. Advocacy Methods

Legal limitations that impact a public entity’s ability to advocate before other governmental entities affect the advocacy methods employed by public sector lobbyists. Because public sector lobbyists do not participate in the campaign and political process (as private sector lobbyists do), and the development of an advocacy strategy is completed in full view of the public, public sector lobbyists rely on subject matter expertise, public input, and communications between elected officials to advocate various public policy initiatives.

65. See, e.g., Laman v. McCord, 432 S.W.2d 753 (Ark. 1968) (holding that Arkansas open meeting laws applied to municipality governing bodies); Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors, 60 Cal. Rptr. 480 (Ct. App. 1968) (applying California’s open meeting statutes broadly to encompass legislative bodies of local agencies); Wolf v. Zoning Bd. of Adjustment, 192 A.2d 305 (N.J. Super. Ct. App. Div. 1963) (applying New Jersey’s open meeting law to zoning boards).


67. See, e.g., MICH. COMP. LAWS § 15.264(2) (2004) (requiring public notice ten days prior to meetings); ARIZ. REV. STAT. ANN. § 38-431.02(C) (2001) (requiring notice at least twenty-four hours prior to public meetings).

68. Some governmental entities discuss policy initiatives in very broad terms and vote to adopt guidelines for their lobbyists to follow so that a public meeting is not necessary for each and every advocacy decision. See Memorandum from William T. Fujioka, Chief Exec. Officer, County of L.A., to All Dep’t Heads, Procedures for Development of Legislative Policy and Positions, and Advocacy of County Interests (Aug. 8, 2007), available at http://file.lacounty.gov/bos/supdocs/08082007_MEMO.pdf (on file with the McGeorge Law Review).
1. **Subject Matter Expertise: “On the Merits”**

Perhaps the most effective way to advocate any public policy is to be equipped with “credible policy-analytic information,” regardless of whether the lobbyist represents public or private interests.\(^{69}\) However, for a public sector lobbyist who is unable to obtain access to policymakers through the campaign and political process, subject matter expertise is vital. In addition, because many of the issues public sector lobbyists advocate relate directly to a government program with overlapping responsibilities,\(^{70}\) it is common that public sector lobbyists are more versed “on the merits” of a given policy proposal.

2. **Public Input: “Grassroots Efforts”**

Though the open meeting requirement is imposed on certain government entities, open meetings are not one-way streets. Specifically, conducting the public’s business in a public setting fosters a more informed populace, and, in turn, public entities become more knowledgeable about the public’s viewpoints.\(^{71}\) In addition to having access to first-hand accounts about how the community views a policy or program, government entities and their lobbyists may also have greater access to grassroots support.

Equipped with this information, public sector lobbyists may utilize the public directly to support the public entity’s position. While using the public in a similar grassroots manner is possible for the private sector, doing so typically comes at a significant cost. Generally, utilizing the public can be a very beneficial advocacy tactic.\(^{72}\) Since public sector lobbyists, by definition, represent the public, the public is in many ways more accessible to public sector lobbyists than to its private sector counterpart.

3. **“Elected-to-Elected” Communication**

Meeting with policymakers and their staff is essential in lobbying public policy.\(^{73}\) Such meetings are essential because the public sector lobbyist, as discussed above, has limited access to elected officials through the campaign and political process. Therefore, for public sector lobbyists, these meetings with elected officials and their staff take on a higher level of importance given that communications between elected officials is sometimes the best way to gain

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70. See discussion *supra* Part II.B.
72. See *Nownes*, supra note 20, at 88-89.
73. *Id.* at 90.
access to policymakers. Efforts at so-called “Cap-to-Cap” trips are increasing in popularity as a way for elected officials to talk with other elected officials and to advocate for projects that mutually benefit the region they represent. 74

In sum, public sector lobbyists must rely on subject matter expertise, public input, and communication between elected officials, because legal limitations on campaign contributions and participation in other channels of the political process close off other effective advocacy methods used by private sector lobbyists. Because government entities lobby on issues affecting either programs they operate or services they provide, public sector lobbyists are often expected to be more versed on the merits of a particular policy proposal affecting that program. In addition, open meetings give public sector lobbyists access to the public, and, to the extent a public sector lobbyist utilizes the public to support his client’s policy objectives, he is likely to be more effective. Finally, because public sector lobbyists also represent entities governed by elected policymakers, utilizing these public officials is often a substitute for obtaining access to policymakers through the campaign and political process. Given that the advocacy methods used and emphasized by the public sector lobbyist vary, so too do the ethical considerations of the public sector lobbyist.

IV. ETHICAL CONSIDERATIONS

The restrictions that apply to public sector lobbyists impact the ethical considerations that they face. This final section first demonstrates that there is precedent for applying different ethical standards to distinct divisions within a profession. Next, this section provides a brief account of the existing ethical requirements imposed on both public and private sector lobbyists as well as public sector employees. This section concludes by suggesting that we should consider the unique position of public sector lobbyists when judging the ethicality of their behavior.

A. Unique Clients Require Different Advocacy Methods, Which Trigger Special Ethical Considerations

No two professions have identical ethical standards, because every profession has responsibilities specific to the population it serves. 76 Less obvious

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74. “Cap-to-Cap” is a term used to refer to trips by legislators from one capitol city to another capitol city.


is the fact that ethical standards sometimes vary within professions based on the different clients being served.

Lawyers, for example, have different ethical obligations based on the clients they serve. A prosecutor represents “the people” and bears the burden of putting forth all incriminating and exculpatory evidence. Because a prosecutor represents the government—and therefore the public at large—a different, and arguably higher, ethical duty is owed by the prosecutor than the defense attorney. Thus, different ethical standards exist within a profession based on “the identity of the client” served.

The lobbying and legal professions have some meaningful similarities. Both represent clients concerning matters of law. Often, the legislative process can be adversarial in nature. Additionally, the methods of advocacy are prescribed by law depending on the client served for both the lawyers and lobbyists.

B. Ethical Guideposts for Lobbyists and the Public Sector

1. Ethical Standards for Lobbyists

Ethical standards for lobbyists exist in many forms. Some ethical standards are codified in statutes, such as the Honest Leadership and Open Government Act of 2007. In recent years, as a result of corporate and political scandals, it has become more popular for various professions to adopt and follow their own ethical codes of conduct, and the lobbying profession is no exception. However, unlike codes and regulations that govern other professions, the American League of Lobbyists’ (ALL) Code of Ethics and existing lobbying codes and regulations that govern other professions, the American League of Lobbyists’ (ALL) Code of Ethics and existing lobbying

77. ABA MODEL RULES, supra note 76, at R. 3.8 (requiring prosecutors to present exculpatory evidence in a criminal case if such evidence exists). The same ethical duty is not imposed on defense attorneys that may come across incriminating evidence. This differentiation is based on the fact that the prosecutor serves a specific client—the people at large.

78. Id.


82. See Witkin, supra note 81; see also discussion supra Part II.B.


85. See AM. LEAGUE OF LOBBYISTS, CODE OF ETHICS (2000), available at http://www.alldc.org/ethicscode.cfm (on file with the McGeorge Law Review) (establishing a code of ethical conduct). Like any good ethical code, the ALL provides for honesty, integrity, and even a duty of loyalty. Id.
laws do not distinguish based on a lobbyist’s client or practice.\textsuperscript{86} State and local governments also place very specific ethical requirements on lobbyists. In fact, many jurisdictions even require lobbyists to attend ethics classes so that they are informed about the laws that regulate their profession.\textsuperscript{87} In addition to these regulations, many scholars have discussed the use of formulaic tests to determine whether certain types of lobbying are consistent with the “public good.”\textsuperscript{88}

Unfortunately, both the popular\textsuperscript{89} and scholarly literature on the lobbying profession is dominated by pejorative discussions of money’s role in politics.\textsuperscript{90} This myopic focus has dictated many of the discussions and questions concerning lobbyists’ legal and ethical standards.\textsuperscript{91} However, because restrictions on public sector lobbyists’ use of public funds prevent them from gaining access through the campaign and political process generally, these typical myopic discussions about ethical standards are not helpful.

2. Ethical Standards for the Public Sector

While the public’s demand for high ethical standards for public servants continues to increase,\textsuperscript{92} this quest to achieve a government of high ethical and moral values is not new.\textsuperscript{93} Not only has a broader notion of public service equating public service with public good existed, but our laws reflect these
values. This brief mention of public servants is relevant, because public sector lobbyists are public servants and, in many cases, public employees.

Just as certain ethics laws apply to lobbyists, laws exist that require government employees to learn and understand what ethical obligations apply to them as public servants.\footnote{See, e.g., Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101 (2009) (requiring federal employees to be informed of ethics law and to avoid the appearance of impropriety).} These laws are intended to convey a message that public employees owe a duty to the public at large.\footnote{See, e.g., id. § 2635.101(a) (“Public service is a public trust.”).} Many laws concerning public employees’ ethical standards regulate specific topics. For example, laws impose specific requirements on public servants regarding financial disclosure (to prevent a public employee from obtaining private gain),\footnote{See, e.g., U.S. OFFICE OF GT ETHICS, PUBLIC FINANCIAL DISCLOSURE REPORT (SF-278 FORM) (on file with the McGeorge Law Review) (requiring certain federal employees to report gifts and other potential sources of income).} conflict of interest,\footnote{See, e.g., CAL. GOV’T CODE § 1090 (West 1995 & Supp. 2009) (prohibiting self-dealing in the making of contracts involving a public official’s agency).} and use of public resources.\footnote{People v. Battin, 143 Cal. Rptr. 731 (Ct. App. 1978) (declaring a public employee’s participation in certain activities on public time a misuse of public resources).} The ethical standards that apply to lobbyists and public employees are important to understand when considering what ethical standards should apply to public sector lobbyists.

C. Ethical Considerations for the Public Sector Lobbyist

When discussing public sector lobbyists’ ethical considerations, there are several paths to explore. This Essay suggests that some perceptions of the lobbying profession dictate what ethical standards currently apply to lobbyists. It is not the intent of this Essay to imply that these perceptions should have no role in determining ethical standards. Rather, this Essay attempts to highlight a segment of the lobbying profession that is virtually ignored when it comes to the discussion and development of ethical standards.\footnote{I say that this sector of the lobbying profession is ignored because there remains a belief that public funds are not used for lobbying, even within informed scholarly literature. See Briffault, supra note 90, at 110 (“[T]here are no public funds for lobbying; lobbying is financed entirely out of private resources.”).}

1. Ethics of the Public Sector Lobbying Practice

As previously demonstrated, public sector lobbyists must comply with certain requirements which affect the ways in which they advocate. From an ethical perspective, one might consider whether it matters that public sector lobbyists must use different advocacy methods.\footnote{Stated another way, since discussions of ethical standards seem to be born from common perceptions of the way the lobbying profession employs certain advocacy tactics, should public sector lobbyists be perceived as practicing to a higher ethical standard?}
Certainly, the public sector lobbyist does not participate on behalf of his or her public entity clients in the campaign and political process in the same way that the private sector lobbyist participates. Merely contributing money to a campaign is not inherently unethical and, hence, a public sector lobbyist is not more ethical simply because he or she cannot directly contribute.\(^\text{101}\) In campaign contributions, most ethical deviations involve the “source and timing” of the contributions relative to government action.\(^\text{102}\) Therefore, public sector lobbyists’ non-participation in the campaign and political process by itself does not place the public sector lobbyist on an ethical pedestal.

Open meeting requirements, however, may bestow some level of additional ethical creditability on public sector lobbyists. Public sector lobbyists advocate on behalf of public entities for positions that have been developed after transparent and public meetings.\(^\text{103}\) Arguably, a position advocated by public sector lobbyists has been vetted to a higher degree because of the public meeting requirement. Accordingly, when this 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.

2. Ethical Standards for the Public Sector Lobbyist

The ethical standards imposed on the entire lobbying profession also apply to public sector lobbyists. However, these standards do not fully address the practice of public sector lobbying. The closest guideline on point in the ALL’s Code of Ethics pertains to the duty owed to the government institution before which a lobbyist advocates.\(^\text{104}\) Article IX specifies that the lobbyist shall not “undermine public confidence and trust in the democratic governmental process” in the context of advocating before government institutions as opposed to representing them.\(^\text{105}\) Aside from this provision, there are no other specific ethical obligations owed to government.

\(^{101}\) Campaign contributions are protected by the First Amendment. See Buckley v. Valeo, 424 U.S. 1 (1976).

\(^{102}\) See, e.g., H.R. Res. 228, 111th Cong. (2009) (referencing House Resolution 189, which calls for an investigation of the relationship between earmark requests and the sources and timing of campaign contributions).

\(^{103}\) See, e.g., Memorandum from William T. Fujioka, Chief Exec. Officer, County of Los Angeles, to Supervisor Don Knabe, Chairman, Supervisor Gloria Molina, Supervisor Mark Ridley-Thomas, Supervisor Zan Yaroslavsky, and Supervisor Michael D. Antonovich, Motion to Support SB 600 (Padilla)—Tobacco Tax and Heath Protection Act of 2009 (June 16, 2009) (on file with the McGeorge Law Review).


\(^{105}\) Id. § 9.1.
3. A Lobbyist Is a Lobbyist Is a Lobbyist

A final point on ethical considerations of the public sector lobbyist is that the public sector lobbyist is still a lobbyist. This Essay does not mean to suggest that the restrictions imposed on or the different advocacy methodologies used by public sector lobbyists are so different as to warrant consideration as a separate profession. In this author’s opinion, an effective lobbyist is an expert that is extremely well-versed in the legislative process. In addition to this expertise, an effective lobbyist is one with a measureable political acumen who is able to identify opposition coalitions and sources of support. Equipped with these skills and tools, a lobbyist will employ the various advocacy methodologies available to achieve favorable results for his or her client. A capable and competent lobbyist possesses these characteristics regardless of whether the client is private or public. Thus, a rewrite of the ethical standards for lobbyists is not necessary, but an acknowledgement of the varied practices within the lobbying industry is appropriate.

V. CONCLUSION

This Essay provides a brief overview of, and perhaps an introduction to, public sector lobbying. At the very least, this Essay aims to provoke a discussion about the differences within the lobbying profession and an awareness of some of the ethical standards that currently apply to lobbyists. Moreover, this Essay indirectly suggests that more thought should be given to both common perceptions of the lobbying profession and the standards that emanate from these perceptions. Because public sector lobbyists represent the general public, legal requirements impact the advocacy methods that public sector lobbyists may employ. These methods, though not entirely unique, differ from those employed by private sector lobbyists. Thus, different ethical considerations arise. In turn, these varied ethical considerations provide a basis for a different ethical standard both in how public sector lobbyists are perceived and how they practice.