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Presentation: The ethical implications of using social networking in the practice of law - One CLE Credit Available

Thursday, September 15, 2016
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Sessions Room

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ATTORNEY ETHICS & SOCIAL MEDIA

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A study by the American Bar Association about five years ago estimated that more than half of all attorneys belong to at least one social media site.\(^1\) That number has certainly grown since then and will continue to grow.\(^2\) Attorneys are just as likely to use social media in their everyday lives as non-attorneys. They post pictures on Instagram and snap chat, “check in” on Facebook, and tweet about politics, music, and what they ate for dinner just like everyone else. But, where a hasty post or comment might lead only to embarrassment for some, a seemingly innocent disclosure by an attorney could lead to serious ethical repercussions.

I. **Benefits of Social Media**

Social media offers users a diverse array of benefits.\(^3\) Attorneys can “reach out directly to their constituents, take a more active role in shaping their public image, and overcome longstanding institutional barriers.”\(^4\) Social networking also provides attorneys with opportunities to network within the legal field, as well as to market their practice to potential clients. Social media provides attorneys a unique advantage in building relationships with others that might otherwise be impossible or impractical because of barriers like distance and time.

How are attorneys taking advantage of these benefits? Attorneys are blogging, tweeting, and posting on a variety of social networking sites, both personally and professionally. Like others, attorneys have set up personal, professional, and even law firm profiles on sites such as Facebook, Twitter, and LinkedIn. Attorneys and law firms are also increasingly establishing legal-oriented blogs where they post summaries of cases and new laws. As new social networking sites are established, it is likely that attorneys will follow online trends and find new ways to establish a presence on social media.

II. **Social Media and Ethics**

Attorneys are in a unique position because of their special ethical obligations. Thus, they must be careful in their use of social media to avoid engaging in any unprofessional or unethical conduct. While some might argue that the rules of ethics (designed for print and verbal mediums) do not carry over into emerging technologies, at least one commentator reminds us that:

> Fifteen years ago people were saying the same thing about e-mail. Eighty years ago they were worried about telephones. Any time there’s a new form of communication, there’s fear. Yes, social media are different, but there’s no reason we can’t apply the same rules we’ve used before.\(^5\)

Because each jurisdiction has its own ethical rules in place for attorneys practicing in their state, it is important that attorneys consult their own applicable rules and opinions. This article offers an

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\(^1\) Am. Bar Ass’n, 2010 Legal Technology Survey Report, 4 WEB & COMM’N TECH. 23–24 (2010).


overview of the more common ways social media use could lead to ethical violations using the ABA Model Rules of Professional Conduct as a general reference.

III. Giving Legal Advice Outside Your Jurisdiction

Attorneys can only practice law in jurisdictions in which they are licensed, with very few exceptions. Model Rule 5.5 states: “A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.” Obviously, state lines can become blurred in a social media setting. Accessing a blog written by an attorney in another state (or country for that matter) takes just as much time as accessing one from right down the street. While ease of access and availability of information are arguably the most beneficial aspects of social media, they present particular problems for attorneys.

Facebook “comments,” “Ask a Lawyer” sites, and blogs with reciprocal features are just a few examples of situations where attorneys might find themselves unknowingly yet unethically advising someone who does not live within their licensed jurisdiction. The key is to know when you are providing legal information (which would probably not trigger jurisdictional restrictions), as opposed to providing legal advice (which would). The D.C. Bar Association distinguished between the two as follows: legal information “involves discussion of legal principles, trends, and considerations,” while legal advice involves “offering recommendations tailored to the unique facts of a particular person’s circumstances.” Thus, an attorney who simply summarizes cases and legislation on a blog is not likely to implicate Model Rule 5.5. However, attorneys should be careful not to answer specific legal questions outside their practicing jurisdiction and instead should focus on providing more generalized information.

Physical presence in the non-licensed jurisdiction is not required to trigger a violation. An attorney has committed an ethical violation when he has “established an office or other systematic and continuous presence in this jurisdiction” outside the jurisdiction in which he is licensed. Ongoing electronic communications could certainly be considered a violation.

IV. Forming Attorney-Client Relationships

Attorneys should also be careful not to inadvertently form attorney-client relationships through online activities. Model Rule 1.18 provides that, “a person who discusses with a lawyer the possibility of forming an attorney-client relationship with respect to a matter is a prospective client.” Moreover, an attorney-client relationship could be inadvertently formed if a client “reasonably relies” on what they believe to be the attorney’s legal advice through social media.7 Thus, when using social media, attorneys should not only speak in generalized terms, but also post explicit disclaimers stating that any interaction does not form an attorney-client relationship in order to inform the user and ultimately rebut any reasonable belief that one exists.8

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7 Patricia E. Salkin, Social Networking and Land Use Planning and Regulation: Practical Benefits, Pitfalls, and Ethical Considerations, 31 Pace L. Rev. 54, 82 (2011).
8 Michael E. Lackey Jr. & Joseph P. Minta, Attorneys and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging, 28 Touro L. Rev. 149, 164 (2012); Model Rules of Prof’l Conduct R. 1.18 cmt. 2.
Compliance with this rule can be complicated for attorneys who represent organizations or government entities. The important thing to remember is that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This duty also applies to governments, although the model rules do concede that “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.” Government or organizational attorneys using social media should take the same measures mentioned above - post a disclaimer and avoid engaging in any kind of advice to non-clients that could produce a reasonable expectation on their part that an attorney-client relationship is formed.

V. Advertising and Solicitation

Model Rule 7.1 restricts the content of attorney advertisements, prohibiting attorneys from making “false or misleading communication about the lawyer or the lawyer’s services.” The rule defines a false or misleading communication as one containing “a material misrepresentation of fact or law” or one omitting “a fact necessary to make the statement considered as a whole not materially misleading.” Attorneys should understand that truthful information may nevertheless violate this rule if “omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading” or when there is a “substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.”

Model Rule 7.2 restricts the ways in which an attorney may advertise, prohibiting “in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain,” with limited exceptions for the person contacted being a lawyer or one with a family, close personal, or prior professional relationship with the contacting attorney. The rule goes on to prohibit such contact even for the exceptions previously mentioned “when the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or the solicitation involves coercion, duress or harassment.”

Whether social media sites are equivalent to “in-person” solicitation is up for debate. The answer varies from state to state, so it is important to research any applicable local opinions. For example, the Philadelphia Bar Association issued an advisory opinion holding that attorney participation in some social media forums where users are discussing legal problems is inappropriate where the attorney invites the users to send a message for further legal advice. However, the bar association found that blogs, emails, and chat rooms are not similarly prohibited.9 The bar opinion was based on a state rule similar to the Model Rule 7.1, that forbids in-person, over-the-phone, or real time electronic communication. The bar distinguished between “socially awkward moments” that can arise when a prospective client is in such close proximity through social media as to be the equivalent of an in-person solicitation, from those sites which allow users to ignore any advances and take their time to think and respond – the justification being that those seeking legal advice are often vulnerable and should not be taken advantage of.

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Taking a contrary view is the California Bar Association which issued an advisory opinion holding that communications occurring in chat rooms are different than communications occurring in-person or over the phone and would not violate the state rule prohibiting communications that intrude or cause duress.10

Even if local rules do not restrict a particular online communication, you should check the purpose of the social media forum before using it to advertise services. You should also incorporate any state-specific advertising language into online advertisements and social media sites such as those requiring inclusion of the words "Advertising Material" as well as the name and office address of at least one lawyer or law firm responsible for the online content.

VI. Using Social Media in Litigation

Attorneys are charged with being “zealous advocates” of their clients. To fulfill this role, it may be tempting for attorneys to use any avenue possible during litigation, such as “friending” witnesses, parties, and jurors though Facebook to collect personal information. Ethical guidelines might restrict these activities, however. For example, Model Rule 8.4 prohibits attorneys from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation,” sometimes directly conflicting with the charge of advocacy. As such, attorneys must be careful not to engage in unethical behavior even if it would benefit the client.

A number of state bars have issued opinions on attorney use of social media during litigation with regards to deceptive actions. For example, the Philadelphia Bar Association held that it was an ethical violation to “friend” a party or witness without disclosing the attorney’s identification, regardless of whether or not the party or witness would usually accept friend requests without any disclosure.11 Likewise, the San Diego Bar Association held that “friending” potential witnesses could not be done with the intention to deceive the witness and could be considered an improper ex parte communication.12 Similarly, the New York Bar Association held that “friending” an individual under false pretenses to obtain evidence was an unethical deception.13

Ethical considerations might also restrict attorneys from “friending” or otherwise accessing jurors through social media. For instance, the New York Bar Association issued an opinion holding that it is unethical for attorneys or those working on the attorney’s behalf to make friend requests of jurors, extending even to reviewing the juror’s comments, pages, or posts when the attorney is aware that the juror would be disclosed to those reviews.

Along the same lines, attorneys run the risk of engaging in improper ex parte communications and conflicts of interest though online relationships with judges. Model Rule 3.5 prohibits attorneys from contributing to a violation of the ABA’s Model Code of Judicial Conduct. States vary as to whether or not judges can be “friends” with attorneys on social media sites, so attorneys should consult the bar association opinions in their particular jurisdiction before accepting or soliciting a friend request with a judge.

Attorneys should also be aware of how these “friendships” can affect their client representation. In a recent Florida case, an appellate court disqualified the sitting judge in a criminal case because he was Facebook “friends” with the prosecutor. The defendant filed a motion to disqualify the trial judge, which was denied. On appeal, the appellate court looked to a bar association opinion prohibiting judges from “friending” lawyers who appear before the judge on social media sites and from allowing lawyers to add judges as friends. The court found the motion to disqualify well-founded because it raised sufficient facts to “prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.”

VII. Revealing Information

Model Rule 1.6 prohibits an attorney from revealing “information relating to the representation of a client,” with certain exceptions. Posting personal information online often seems innocent enough such as divulging seemingly unimportant details about one’s day.

People read what you post, and the seemingly informal forum of a social media site is no shield for ethical violations of improper client disclosures. An Illinois public defender found this out the hard way, being found to have unethically revealed confidential details about a case when she posted comments such as, “This stupid kid is taking the rap for his drug-dealing dirtbag of an older brother because ‘he’s no snitch’” and “Huh? You want to go back and tell the judge that you lied to him, you lied to the presentence investigator, you lied to me?” She lost her job.

Attorneys must also be careful what they post with regard to their own personal life. For example, a Texas attorney requested and received a continuance because her father had passed away. The judge who granted her continuance was subsequently notified of comments on Facebook chronicling days of drinking and partying. Another attorney was summoned to appear before the Florida Bar and fined $1,200 for calling a judge an “Evil, Unfair Witch” on the attorney’s blog.

Attorneys should also warn their clients about revealing information through social media during a pending case, as doing so could result in the client unknowingly waiving the attorney-client privilege, and opening up information for discovery. This happened in a 2010 case where the client discussed attorney-client conversations in his e-mails, blogs, and instant messages with family and friends. The court ultimately found that the client had waived his attorney-client privilege, entitling the opposition to discovery of the information disclosed online, including his motivation for pursuing litigation, the litigation strategy, and other facts surrounding the case.

VIII. Responsibility for Employee Activities

The Model Rules require attorneys to supervise employees and support staff. For example, Model Rule 5.3 provides that “a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer,” and holds the attorney responsible for any violation of the Rules by the non-lawyer.

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15 Schwartz, supra note 3.
17 Schwartz, supra note 3.
18 *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2010).
if: "(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." As a result, attorneys cannot claim immunity from ethical rules simply because they personally do not engage in social media because they may be held responsible for their employees' social media activities.

IX. Conclusion

Given the growing use of social media, attorneys must learn to weigh the benefits of networking, advertising, socializing, and zealous advocacy against the ethical rules restricting the profession. At stake are attorneys' careers, clients' interests, and the integrity of the legal process. First, be careful what you post online - this is good advice for everyone, but particularly for attorneys who have special ethical obligations. Second, law firms and other employers (including governments) should consider establishing and adopting a well-crafted social media policy that addresses the legal and ethical issues that arise with their employees' use of social media, and train their employees (and themselves) on the appropriate use of social media.

Finally, attorneys should be aware of their other role in the social media arena - that of advising their clients on appropriate use of social media. Thus, they must not only be aware of their own ethical obligations, they must also be knowledgeable about all of the ethical and legal issues with government use of social media, including regulating and monitoring employee usage, copyright protection, and a variety of other issues.19

19 For a study of the legal and ethical issues with government use of social media, see Patricia Salkin & Julie Tappendorf, "Social Media and Local Governments: Navigating the New Public Square" (ABA Press, 2013).
SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED JUNE 9, 2015

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Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association's House of Delegates or Executive Committee.
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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools used by legal professionals and those with whom they communicate. Particularly, in conjunction with the increased use of mobile technologies in the legal profession, social media platforms have transformed the ways in which lawyers communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethical issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association, which authored these social media ethics guidelines in 2014 to assist lawyers in understanding the ethical challenges of social media, is updating them to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the “Guidelines”). In particular, these Guidelines add new sections on lawyers’ competence,\(^1\) the retention of social media by lawyers, client confidences, the tracking of client social media, communications by lawyers with judges, and lawyers’ use of LinkedIn.

These Guidelines are guiding principles and are not “best practices.” The world of social media is a nascent area that is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Moreover, there can be no single set of “best practices” where there are multiple ethics codes throughout the United States that govern lawyers’ conduct. In fact, even where jurisdictions have identical ethics rules, ethics opinions addressing a lawyer’s permitted use of social media may differ due to varying jurisdictions’ different social mores, population bases and historical approaches to their own ethics rules and opinions.

These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)\(^2\) and ethics opinions interpreting them. However, illustrative ethics opinions from other jurisdictions may be referenced where, for instance, a New York ethics opinion has not addressed a certain situation or where another jurisdiction’s ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities. In New York State, ethics opinions are issued not just by the New York State Bar Association, but also by local bar associations located throughout the State.\(^3\)

Lawyers need to appreciate that social media communications that reach across multiple jurisdictions may implicate other states’ ethics rules. Lawyers should ensure compliance with the ethical requirements of each jurisdiction in which they practice, which may vary considerably.

One of the best ways for lawyers to investigate and obtain information about a party, witness, or juror, without having to engage in formal discovery, is to review that person’s social

\(^1\) As of April 2015, fourteen states have included a duty of competence in technology in their ethical codes. http://www.lawsitesblog.com/2015/03/mass-becomes-14th-state-to-adopt-duty-of-technology-competence.html (Retrieved on April 26, 2015).


\(^3\) A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but may be used as a defense in certain circumstances.
media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer's research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet "community," attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. It is not always readily apparent whether a lawyer's social media communications may constitute regulated "attorney advertising." Similarly, privileged or confidential information may be unintentionally divulged beyond the intended recipient when a lawyer communicates to a group using social media. Lawyers also must be cognizant when a social media communication might create an unintended attorney-client relationship. There are also ethical obligations with regard to a lawyer counseling clients about their social media posts and the removal or deletion of them, especially if such posts are subject to litigation or regulatory preservation obligations.

Throughout these Guidelines, the terms "website," "account," "profile," and "post" are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, such terms for purposes of complying with these Guidelines are functionally interchangeable and a reference to one should be viewed as a reference to each for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline. Finally, definitions of certain terminology used in the Guidelines are set forth in the Appendix.
1. ATTORNEY COMPETENCE

Guideline No. 1: Attorneys' Social Media Competence

A lawyer has a duty to understand the benefits and risks and ethical implications associated with social media, including its use as a mode of communication, an advertising tool and a means to research and investigate matters.

NYRPC 1.1(a) and (b).

Comment: NYRPC 1.1(a) provides "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

As Guideline No. 1 recognizes — and the Guidelines discuss throughout — a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer or his or her client may use. This is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association ("ABA") Formal Opinion 466 (2014)\(^4\) states:

As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features — which change frequently — prior to using such a network.\(^5\)

A lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the use of social media. "[A lawyer must] understand the functionality of any social media service she intends to use for... research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site."\(^6\)

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\(^5\) Competence may require understanding the often lengthy and unclear "terms of service" of a social media platform and whether the platform’s features raise ethical issues. It also may require reviewing other materials, such as articles, comments, and blogs posted about how such social media platform actually functions.


\(^7\) Id.
Indeed, the comment to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject (emphasis added).7

As NYRPC 1.1 (b) requires, “[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.” While a lawyer may not delegate his obligation to be competent, he or she may rely, as appropriate, on professionals in the field of electronic discovery and social media to assist in obtaining such competence.

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7 ABA Model Rules of Prof. Conduct, Rule 1.1, Comment 8; See N.H. Bar Ass’n, Ethics Corner (June 21, 2013) (lawyers “[have] a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation”).
2. **ATTORNEY ADVERTISING**

Guideline No. 2.A: **Applicability of Advertising Rules**

A lawyer’s social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules. Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.

NYRPC 1.0, 7.1, 7.3.

**Comment:** In the case of a lawyer’s profile on a hybrid account that, for instance, is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer’s LinkedIn profile may require that the profile be deemed “attorney advertising.” In general, a profile that contains basic biographical information, such as “only one’s education and a list of one’s current and past employment” does not constitute attorney advertising. According to NYCLA, Formal Op. 748, a lawyer’s LinkedIn profile that “includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising.”

NYCLA, Formal Op. 748 addresses the types of content on LinkedIn that may be considered “attorney advertising” and provides:

[i]f an attorney’s LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words “Attorney Advertising” on the lawyer’s LinkedIn profile. See RPC 7.1(f). If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2) statements that compare the lawyer’s services with the services of other

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9 NYRPC 1.0(a) defines “Advertisement” as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.”


11 Id.
lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer’s or law firm’s services, the attorney should also include the disclaimer “Prior results do not guarantee a similar outcome.” See RPC 7.1(d) and (e). Because the rules contemplate “testimonials or endorsements,” attorneys who allow “Endorsements” from other users and “Recommendations” to appear on one’s profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e). An attorney who claims to have certain skills must also include this disclaimer because a description of one’s skills—even where those skills are chosen from fields created by LinkedIn—constitutes a statement “characterizing the quality of the lawyer’s services” under Rule 7.1(d).3

An attorney’s ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a “tweet”) is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.4

Utilizing the disclaimer “Attorney Advertising” given the confines of Twitter’s 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, consideration should be given to only posting tweets that would not be categorized as attorney advertising.5

Rule 7.1(k) of the NYRPC provides that all advertisements “shall be pre-approved by the lawyer or law firm.” It also provides that a copy of an advertisement “shall be retained for a period of not less than three years following its initial dissemination,” but specifies an alternate one-year retention period for advertisements contained in a “computer-accessed communication” and specifies another retention scheme for websites.6 Rule 1.0(c) of the NYRPC defines “computer-accessed communication” as any communication made by or on behalf of a lawyer or law firm that is disseminated through “the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet

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12 NYRPC 7.1(e)(3) provides: “[p]rior results do not guarantee a similar outcome”.

13 NYCLA, Formal Op. 748.


16 Id.
presences, and any attachments or links related thereto.\textsuperscript{17} Thus, social media posts that are deemed "advertisements," are "computer-accessed communications, and their retention is required only for one year."\textsuperscript{18}

In accordance with \textit{NYSBA, Op. 1009}, to the extent that a social media post is found to be a "solicitation," it is subject to filing requirements if directed to recipients in New York. Social media posts, like tweets, may or may not be prohibited "real-time or interactive" communications. That would depend on whether they are broadly distributed and/or whether the communications are more akin to asynchronous email or website postings or in functionality closer to prohibited instant messaging or chat rooms involving "real-time" or "live" responses. Practitioners are advised that both the social media platforms and ethical guidance in this area are evolving and care should be used when using any potentially "live" or real-time tools.

\textbf{Guideline No. 2.B: Prohibited use of the term "Specialists" on Social Media}

Lawyers shall not advertise areas of practice under headings in social media platforms that include the terms "specialist," unless the lawyer is certified by the appropriate accrediting body in the particular area.\textsuperscript{19}

NYRPC 7.1, 7.4.

\textit{Comment:} Although LinkedIn's headings no longer include the term "Specialties," lawyers still need to be cognizant of the prohibition on claiming to be a "specialist" when creating a social media profile. To avoid making prohibited statements about a lawyer's qualifications under a specific heading or otherwise, a lawyer should use objective information and language to convey information about the lawyer's experience. Examples of such information include the number of years in practice and the number of cases handled in a particular field or area.\textsuperscript{20}

A lawyer shall not list information under the ethically prohibited heading of "specialist" in any social media network unless appropriately certified as such. With respect to skills or practice areas on a lawyer's profile under a heading such as "Experience" or "Skills," such information does not constitute a claim by a lawyer to be a specialist under \textit{NYRPC Rule 7.4}.\textsuperscript{21} Also, a lawyer may include

\textsuperscript{17} \textit{Id.}

\textsuperscript{18} \textit{Id.}


\textsuperscript{21} \textit{NYCLA, Formal Op. 748}.
information about the lawyer's experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under "specialist," but also under headings including "expert."

A limited exception to identification as a specialist may exist for lawyers who are certified "by a private organization approved for that purpose by the American Bar Association" or by an "authority having jurisdiction over specialization under the laws of another state or territory." For example, identification of such traditional titles as "Patent Attorney" or "Proctor in Admiralty" are permitted for lawyers entitled to use them.22

**Guideline No. 2.C: Lawyer’s Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer’s Social Media Page**

A lawyer that maintains social media profiles must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media network, account, blog or profile.23

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer’s social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she must ask that person to remove it.24

NYRPC 7.1, 7.2, 7.3, 7.4.

**Comment:** While a lawyer is not responsible for a post made by a person who is not an agent of the lawyer, a lawyer’s obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer’s social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than typical communications to which ethics rules have historically applied, they apply with the same force and effect to social media postings.

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22 See NYRPC Rule 7.4.
23 See also Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites (revised Apr. 16, 2013).
Guideline No. 2.D: Attorney Endorsements

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer’s social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must, as noted above, monitor and verify that posts about them made to profile(s) the lawyer controls26 are accurate. “Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists,” as well as to confirm the accuracy of any endorsements or recommendations.26 A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services.27 It should be noted that certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

25 Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.

26 NYCLA, Formal Op. 748.

3. **FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA**

**Guideline No. 3.A: Provision of General Information**

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer's responsive communications may be found to have created an attorney-client relationship and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

**Comment:** An attorney-client relationship must knowingly be entered into by a client and lawyer, and informal communications over social media could unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

**Guideline No. 3.B: Public Solicitation is Prohibited through “Live” Communications**

Due to the “live” nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not “solicit” business from the public through such means. If a potential client initiates a specific request seeking to

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28 “Computer-accessed communication” is defined by NYRPC 1.0(c) as “any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.” Official Comment 9 to NYRPC 7.3 advises: “Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.”

29 “Solicitation” means “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.” NYRPC 7.3(b).

retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format. Emails and attorney communications via a website or over social media platforms, such as Twitter, may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client — although the ethics rules would otherwise apply to such communications.

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

Comment: Answering general questions on the Internet is analogous to writing for any publication on a legal topic. “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites cannot be construed as a ‘specific request’ to retain the lawyer.” In responding to questions, a lawyer may not provide answers that appear applicable to all

The Philadelphia Bar Ass’n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania’s ethics rules. See Phila. Bar Ass’n Prof’l Guidance Comm’l, Op. 2010-6 (2010).

Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. See NYCBA, Formal Op. 2015-3 (“An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.”).

Whether a Twitter or Reddit communication is a “real-time or interactive” computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See NYSBA, Op. 1399 and page 7 supra.

Where “the inquiring attorney has ‘become aware of a potential case, and wants to find plaintiffs,’ and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, see Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer’s post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to “a specific incident involving potential claims for personal injury or wrongful death,” see Rule 7.3(e).” NYSBA, Op. 1049 (2015).


See id.

See NYSBA, Op. 1049 (“We further conclude that a communication that merely discussed the client’s legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute “advertising.” In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as “advertising” on the “first page” of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. See Rule 7.1(f), (h), (k).”).
apparently similar individual problems because variations in underlying facts might result in a different answer. A lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.” As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above. However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by email, telephone, etc., and second, the lawyer’s actual response should not be made through a real time communication.

Guideline No. 3.C: Retention of Social Media Communications with Clients

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

Comment: A lawyer’s file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a “writing” as “a tangible or electronic record of a communication or representation...”. Rule 1.0(n), Terminology. The NYRPC “does not explicitly identify the full panoply of documents that a lawyer should retain relating to a

37 Id.
38 See id.
39 See NYSBA, Op. 1049 (“When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See N.Y. State 1014 (2014). If the potential client invites contact by telephone or in person, the lawyer’s response in the manner invited by the potential client would not constitute ‘solicitation.’”).
40 Id.
representation. The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that "A lawyer should provide competent representation to a client." NYRPC 1.1(a) requires "skill, thoroughness and preparation."

The lawyer must take affirmative steps to preserve those emails and social media communications, such as chats and instant messages, which the lawyer believes need to be saved. However, due to the ephemeral nature of social media communications, "saving" such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted by the counterparty to the communication without the knowledge of the lawyer. Casual communications may be deleted without impacting ethical rules.

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to

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42 Id.
43 Id. See also Pennsylvania Bar Assn. Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney "should retain records of those communications containing legal advice.").
44 Id.
protect against a malpractice claim. Such a broad approach to
document retention may at times be prudent, but it is not required
by the Code.45

A lawyer shall not deactivate a social media account, which contains
communications with clients, unless those communications have been
appropriately preserved.

45 NYSBA, Op. 623 opines that, with respect to documents belonging to the lawyer, a lawyer may destroy all
those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise
require, and (ii) in the absence of extraordinary circumstances manifesting a client’s clear and present need for such
documents.”
4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 4.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person’s social media profile or public posts even if such person is represented by another lawyer. However, the lawyer must be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person’s social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation. "Public" means information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible without authorization to non-members.

However, unintentional communications with a represented party may occur if a social media network automatically notifies that person when someone views her account. In New York, such automatic messages, as noted below, sent to a juror by a lawyer or her agent that notified the juror of the identity of who viewed her profile may constitute an ethical violation. Conversely, the ABA opined that such a “passive review” of a juror’s social media does not constitute an ethical violation. The social media network may also allow the person whose account was viewed to see the entire profile of the viewing lawyer or her agent. Drawing upon the ethical opinions addressing issues concerning social media communications with jurors, when an attorney views the social media site of a represented witness or a represented opposing party, he or she should be aware of which networks might automatically notify the owner of that account of his or her viewing, as this could be viewed an improper communication with someone who is represented by counsel.

49 One network that sends automatic notifications that someone has viewed one’s profile is LinkedIn.
Guideline No. 4.B: Contacting an Unrepresented Party to View a Restricted Social Media Website

A lawyer may request permission to view the restricted portion of an unrepresented person's social media website or profile.\(^{50}\) However, the lawyer must use her full name and an accurate profile, and she may not create a different or false profile in order to mask her identity. If the person asks for additional information from the lawyer in response to the request that seeks permission to view her social media profile, the lawyer must accurately provide the information requested by the person or withdraw her request.

NYRPC 4.1, 4.3, 8.4.

Comment: It is permissible for a lawyer to join a social media network to obtain information concerning a witness.\(^{51}\) The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using “deception.”\(^{52}\)

In New York, there is no “deception” when a lawyer utilizes her “real name and profile” to send a “friend” request to obtain information from an unrepresented person's social media account.\(^{53}\) In New York, the lawyer is not required to disclose the reasons for making the “friend” request.\(^{54}\)

The New Hampshire Bar Association, however, requires that a request to a “friend” must “inform the witness of the lawyer's involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”\(^{55}\) In Massachusetts, “it is not permissible for the lawyer who is seeking information about an unrepresented party to access the personal website of X and ask X to “friend” her without disclosing that the requester is the lawyer for a potential plaintiff.”\(^{56}\) The San Diego Bar requires disclosure of the lawyer’s “affiliation and the purpose for the request.”\(^{57}\) The Philadelphia Bar Association notes that the failure to disclose that

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\(^{50}\) For example, this may include: (1) sending a “friend” request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.

\(^{51}\) See also N.H, Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2012).


\(^{53}\) Id.

\(^{54}\) See id.

\(^{55}\) N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05.


the “intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness” constitutes an impermissible omission of a “highly material fact.”58

In Oregon, there is an opinion that if the person being sought out on social media “asks for additional information to identify [the] lawyer, or if [the] lawyer has some other reason to believe that the person misunderstands her role, [the] lawyer must provide the additional information or withdraw the request.”59

Guideline No. 4.C: Viewing a Represented Party’s Restricted Social Media Website

A lawyer shall not contact a represented person to seek to review the restricted portion of the person’s social media profile unless an express authorization has been furnished by the person’s counsel.

NYRPC 4.1, 4.2.

Comment: It is significant to note that, unlike an unrepresented individual, the ethics rules are different when the person being contacted in order to obtain private social media content is “represented” by a lawyer, and such a communication is categorically prohibited.

Whether a person is represented by a lawyer, individually or through corporate counsel, is sometimes not clear under the facts and applicable case law.

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”60

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person that the lawyer has a “right” to view, such as a professional group where both the lawyer and represented person are members or as a result of being a “friend” of a “friend” of such represented person.

Guideline No. 4.D: Lawyer's Use of Agents to Contact a Represented Party

As it relates to viewing a person's social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

Comment: This would include, *inter alia*, a lawyer's investigator, trial preparation staff, legal assistant, secretary, or agent\(^{61}\) and could, as well, apply to the lawyer's client.\(^{62}\)


\(^{62}\) See also N.H Bar Ass'n Ethics Advisory Comm., Op. 2012-13/05.
COMMUNICATING WITH CLIENTS

Guideline No. 5.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made private on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media information or data is preserved, a party or nonparty, when appropriate, may not delete information from a social media profile that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer must ensure that potentially relevant information is not destroyed "once a party reasonably anticipates litigation" or in accordance with common law, statute, rule, or regulation. Failure to do so may result in sanctions. "[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to 'taking down' such material from social media publications, or prohibiting a client's lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user's computer." When litigation is not pending or "reasonably anticipated," a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after a litigation has commenced, as long as

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66 New York has not opined on a lawyer's obligation to produce a website link that a client has utilized, but Philadelphia Bar Ass'n, Guidance Comm. Op. 2014-5, noted that, with respect to a website link utilized by a client, if it is appropriately requested in discovery, a lawyer "must make reasonable efforts to obtain a link or other [social media] content if the lawyer knows or reasonably believes it has not been produced by the client."

social media is appropriately preserved in the proper format and such is not a violation of law or a court order.68

A lawyer needs to be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology. This similarly is the case if a “live” posting is simply made “unlive.”

Guideline No. 5.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on a social media website or profile, as long as the proposed content is not known to be false by the lawyer. A lawyer may also not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim.”69

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer may review what a client plans to publish on a social media website in advance of publication70 and guide the client appropriately, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the factual context of a post may affect a person’s perception of the post; and how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client to consider the possibility that someone may be able to view a private social media profile through court order, compulsory process, or unethical conduct. A lawyer may advise a client to refrain from or limit social media postings during the course of a litigation or investigation.


70 As social media-related evidence has increased in use in litigation, a lawyer may consider periodically following or checking her client’s social media communications, especially in matters where posts on social media would be relevant to her client’s claims or defenses. Following a client’s social media use could involve connecting with the client by establishing a LinkedIn connection, “following” the client on Twitter, or “friending” her on Facebook. Whether to follow a client’s postings should be discussed with the client in advance. Monitoring a client’s social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client’s posts on existing or future litigation or on their implication for other issues relating to the lawyer’s representation of the client.

Pennsylvania Bar Ass’n Ethics Comm., Formal Op. 2014-300 notes “tracking a client’s activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client’s legal dispute” and “an attorney can reasonably expect that opposing counsel will monitor a client’s social media account.”
Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client's social media posting that a client's lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion.71

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to "bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous."72 Frivolous conduct includes the knowing assertion of "material factual statements that are false."73 See also NYRPC 3.3; 4.1 ("in the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.").

Guideline No. 5.D. A Lawyer's Use of Client-Provided Social Media Information

A lawyer may review the contents of the restricted portion of the social media profile of a represented person that was provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain private information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a "client conceives the idea to communicate with a represented party," a lawyer is not precluded "from advising the client concerning the substance of the communication" and the "lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient."74 New York interprets "overreaching" as prohibiting "the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient."75

72 NYRPC 3.1(a).
73 NYRPC 3.1(b)(2).
75 Id.
NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not “cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,”

a lawyer may cause a client to communicate with a represented person . . . and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or “friending” a represented person and obtaining private information from that represented person’s social media site.

New Hampshire opines that a lawyer’s client may, for instance, send a “friend” request or request to follow a restricted Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations. 76 In addition, the client’s profile needs to “reasonably reveal[] the client’s identity” to the other person. 77

The American Bar Association opines that a “lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary.”78

77 Id.
Guideline No. 5.E: Maintaining Client Confidences and Confidential Information

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media communications and communications made on a lawyer's website or blog must comply with these limitations. This prohibition applies regardless of whether the confidential client information is positive or celebratory, negative or even to something as innocuous as where a client was on a certain day.

Where a lawyer learns that a client has posted a review of her services on a website or on social media, if the lawyer chooses to respond to the client's online review, the lawyer shall not reveal confidential information relating to the representation of the client. This prohibition applies, even if the lawyer is attempting to respond to unflattering comments posted by the client.

NYRPC 1.6, 1.9(c).

Comment: A lawyer is prohibited, absent some recognized exemption, from disclosing client confidences and confidential information of a client. Under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a "self-defense" exception to the duty of confidentiality set forth in Rule 1.6, which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer "may reveal or use confidential information to the extent that the lawyer reasonably believes necessary ... to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct." NYSBA Opinion 1032 applies such self-defense exception to "claims" and "charges" in formal proceedings or a "material threat of a proceeding," which typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other

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79 NYRPC 1.6.

80 Comment 17 to NYRPC Rule 1.6 provides:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to use a means of communication or security measures not required by this Rule, or may give informed consent (as in an engagement letter or similar document) to the use of means or measures that would otherwise be prohibited by this Rule.

procedure that can result in a sanction" and the self-defense exception does not apply to a "negative web posting." As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on websites such as Avvo, Yelp or Martindale Hubbell.

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300 (2014) opined that “[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.” Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events.”

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82 NYSBA, Opinion 1032.


6. **RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT**

Guideline No. 6.A: **Lawyers May Conduct Social Media Research**

A lawyer may research a prospective or sitting juror’s public social media profile, and posts.

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* "Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case."  

The ABA issued Formal Opinion 466 noting that “[u]nless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.”  

There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice."  

However, Opinion 466 does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors."  

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88 Id.
89 Id.
Guideline No. 6.B: A Juror’s Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.90

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.91

Contact by a lawyer with jurors through social media is forbidden. For example, ABA, Formal Op. 466 opines that it would be a prohibited ex parte communication for a lawyer, or the lawyer’s agent, to send an “access request” to view the private portion of a juror’s or potential juror’s Internet presence.92 This type of communication would be “akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.”93

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.94 They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing).

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that “[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation of the Rules of Professional Conduct (emphasis added).95 According to ABA, Formal Op. 466, this type of notice is “akin to a neighbor’s recognizing a lawyer’s car driving down the

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93 Id.
94 Id.
juror’s street and telling the juror that the lawyer had been seen driving down the street.96

While ABA, Formal Op. 466 noted that an automatic notice97 sent to a juror, from a lawyer passively viewing a juror’s social media network does not constitute an improper communication, a lawyer must: (1) “be aware of these automatic, subscriber-notification procedures” and (2) make sure “that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the proceeding.”98 Moreover, ABA, Formal Op. 466 suggests that “judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds,” including a juror’s or potential juror’s social media presence.99

The American Bar Association’s view has been criticized on the basis of the possible impact such communication might have on a juror’s state of mind and has been deemed more analogous to the improper communication where, for instance, “[a] lawyer purposefully drives down a juror’s street, observes the juror’s property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage.”100

A lawyer must take measures to ensure that a lawyer’s social media research does not come to the attention of the juror or prospective juror. Accordingly, due to the ethics opinions issued in New York on this topic, a lawyer in New York when reviewing social media to perform juror research needs to perform such research in a way that does not leave any “footprint” or notify the juror that the lawyer or her agent has been viewing the juror’s social media profile.101

The New York opinions cited above draw a distinction between public and private juror information.102 They opine that viewing the public portion of a social

96 Id. See Pennsylvania Bar Ass’n Ethics Comm., Formal Op. 2014-300 (“[t]here is no ex parte communications if the social networking website independently notifies users when the page has been viewed.”).

97 For instance, currently, if a lawyer logs into LinkedIn, as it is currently configured, and performs a search and clicks on a link to a LinkedIn profile of a juror, an automatic message may well be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror’s profile. In order for that reviewer’s profile not to be identified through LinkedIn, that person must change her settings so that she is anonymous or, alternatively, to be fully logged out of her LinkedIn account.

98 Id.

99 Id.


102 See Id.
media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror's profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror's view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members or whether access can be obtained, for instance, by being a "friend" of a "friend" of a juror on Facebook.

Guideline No. 6.C: Deceit Shall Not Be Used to View a Juror's Social Media.

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: An "attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable."103

Guideline No. 6.D: Juror Contact During Trial

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

A lawyer must exercise extreme caution when "passively" monitoring a sitting juror's social media presence. The lawyer needs to be aware of how any social media service operates, especially whether that service would notify the juror of such monitoring or the juror could otherwise become aware of such monitoring or viewing by lawyer. Further, the lawyer's review of the juror's social media shall not

103 See Id.
burden or embarrass the juror or burden or delay the proceeding.

These later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.104

While an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney's duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.105

ABA, Formal Op. 466 permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer's Internet "presence," even during trial absent court instructions prohibiting such conduct. In one New York case, the review by a lawyer of a juror's LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror's LinkedIn profile. The juror brought this to the attention of the court stating "the defense was checking on me on social media" and also asserted, "I feel intimidated and don't feel I can be objective."106 This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.107

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors' public social media. As noted in ABA, Formal Op. 466, "[d]iscussion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network."108

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104 Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.


107 Id.

Guideline No. 6.E: Juror Misconduct

In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror’s social media profile or posts, or otherwise, she must promptly bring it to the court’s attention.\(^\text{109}\)

NYRPC 3.5, 8.4.

Comments: An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, ABA, Formal Op. 466 pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, “including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding.”\(^\text{110}\)

New York, however, provides that “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.”\(^\text{111}\) If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.\(^\text{112}\) “Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.”\(^\text{113}\)


\(^{111}\) NYRPC 3.5(d).


\(^{113}\) Id. See Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-300 ("a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.").
7. **USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER**

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

NYRPC 3.5, 8.2 and 8.4.

*Comment:* There are few New York ethical opinions addressing lawyers' communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should not be surprised that any such communication is fraught with peril as the "intent" of such communication by a lawyer will be judged under a subjective standard, including whether retweeting a judge's own tweets would be improper.

A lawyer may communicate with a judicial officer on "social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication," which is consistent with NYRPC 3.5(a)(1) which forbids a lawyer from "seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal."115

It should be noted that *New York Advisory Opinion 08-176 (Jan. 29, 2009)* provides that a judge who otherwise complies with the Rules Governing Judicial Conduct "may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."116 *New York Advisory Committee on Judicial Ethics Opinion 08-176* further opines that:

[A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online

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115 NYRPC 3.5(a)(1).
116 New York Advisory Committee on Judicial Ethics Opinion 08-176
connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) ("the mere status of being a 'Facebook friend,' without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously 'friend[ed]' certain individuals who are now involved in some manner in a pending action.").
APPENDIX

DEFINITIONS

Social Media (also called a social network): An Internet-based service allowing people to share content and respond to postings by others. Popular examples include Facebook, Twitter, YouTube, Google+, LinkedIn, Foursquare, Pinterest, Instagram, Snapchat, Yik Yak and Reddit. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

Restricted: Information that is not available to a person viewing a social media account because an existing on-line relationship between the account holder and the person seeking to view it is lacking (whether directly, e.g., a direct Facebook “friend,” or indirectly, e.g., a Facebook “friend of a friend”). Note that content intended to be “restricted” may be “public” through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how the content is made available by the social media network or due to technological change.

Public: Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

Friending: The process through which the member of a social media network designates another person as a “friend” in response to a request to access Restricted Information. “Friending” may enable a member’s “friends” to view the member’s restricted content. “Friending” may also create a publicly viewable identification of the relationship between the two users. “Friending” is the term used by Facebook, but other social media networks use analogous concepts such as “Circles” on Google+ or “Follower” on Twitter or “Connections” on LinkedIn.

Posting or Post: Uploading public or restricted content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (e.g., “Tweets” on Twitter).

Profile: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person’s ability to view specified aspects of a member’s account or profile. A profile contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.
NEW YORK STATE LOBBYING ACT


Section 1-a. Legislative declaration. The legislature hereby declares that the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and governmental operations; and that, to preserve and maintain the integrity of the governmental decision-making process in this state, it is necessary that the identity, expenditures and activities of persons and organizations retained, employed or designated to influence the passage or defeat of any legislation by either house of the legislature or the approval, or veto, of any legislation by the governor and attempts to influence the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency, and the attempts to influence the passage or defeat of any local law, ordinance, or regulation be publicly and regularly disclosed.

§ 1-b. Short title. This article shall be known and may be cited as the "Lobbying act".

§ 1-c. Definitions. As used in this article unless the context otherwise requires:

(a) The term "lobbyist" shall mean every person or organization retained, employed or designated by any client to engage in lobbying. The term "lobbyist" shall not include any officer, director, trustee, employee, counsel or agent of the state, or any municipality or subdivision thereof of New York when discharging their official duties; except those officers, directors, trustees, employees, counsels, or agents of colleges, as defined by section two of the education law.

(b) The term "client" shall mean every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client.

(c) The term "lobbying" or "lobbying activities" shall mean any attempt to influence:

(i) the passage or defeat of any legislation by either house of the state legislature or approval or disapproval of any legislation by the governor;

(ii) the adoption, issuance, rescission, modification or terms of a gubernatorial executive order;

(iii) the adoption or rejection of any rule or regulation having the force and effect of law by a state agency;

(iv) the outcome of any rate making proceeding by a state agency;

(v) any determination:

(A) by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement, or

(B) by an officer or employee of the unified court system, or by a person or entity working in cooperation with an officer or employee of the unified court system related to a governmental procurement;

(vi) the approval, disapproval, implementation or administration of tribal-state compacts, memoranda of understanding, or any other tribal-state agreements and any other state actions related to Class III gaming as provided in 25 U.S.C. § 2701, except to the extent designation of such activities as "lobbying" is barred by the federal Indian Gaming Regulatory Act, by a public official or by a person or entity working in cooperation with a public official in relation to such approval, disapproval, implementation or administration;

(vii) the passage or defeat of any local law, ordinance, resolution, or regulation by any municipality or subdivision thereof;

(viii) the adoption, issuance, rescission, modification or terms of an executive order issued by the chief executive officer of a municipality;

(ix) the adoption or rejection of any rule, regulation, or resolution having the force and effect of a local law, ordinance, resolution, or regulation; or

(x) the outcome of any rate making proceeding by any municipality or subdivision thereof.

The term "lobbying" shall not include:

(A) Persons engaged in drafting, advising clients on or rendering opinions on proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other
written materials related to Class III gaming as provided in 25 U.S.C. § 2701, when such professional services are not otherwise connected with state or municipal legislative or executive action or such legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-agreements or other written materials related to Class III gaming as provided in 25 U.S.C. § 2701;

(B) Newspapers and other periodicals and radio and television stations, and owners and employees thereof, provided that their activities in connection with proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, tribal-state compacts, memoranda of understanding or other tribal-agreements related to Class III gaming as provided in 25 U.S.C. § 2701, or procurement contracts by a state agency, municipal agency, local legislative body, the state legislature, or the unified court system, are limited to the publication or broadcast of news items, editorials or other comments, or paid advertisements;

(C) Persons who participate as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency with respect to all participation by such persons which is part of the public record thereof and all preparation by such persons for such participation;

(D) Persons who attempt to influence a state or municipal agency in an adjudicatory proceeding, as "adjudicatory proceedings" is defined by section one hundred two of the state administrative procedure act;

(E) Persons who prepare or submit a response to a request for information or comments by the state legislature, the governor, or a state agency or a committee or officer of the legislature or a state agency, or by the unified court system, or by a legislative or executive body or officer of a municipality or a commission, committee or officer of a municipal legislative or executive body;

(F) Any attempt by a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a federal income tax return under paragraph 2(A)(i) of section 6033(a) of Title 26 of the United States Code or a religious order that is exempt from filing a federal income tax return under paragraph (2)(A)(iii) of such section 6033(a) to influence passage or defeat of a local law, ordinance, resolution or regulation or any rule or regulation having the force and effect of a local law, ordinance or regulation;

(G) Any activity relating to governmental procurements made under section one hundred sixty-two of the state finance law undertaken by (i) the non-profit-making agencies appointed pursuant to paragraph e of subdivision six of section one hundred sixty-two of the state finance law by the commissioner of the office of children and family services, the commission for the blind and visually handicapped, or the commissioner of education, and (ii) the qualified charitable non-profit-making agencies for the blind, and qualified charitable non-profit-making agencies for other severely disabled persons as identified in subdivision two of section one hundred sixty-two of the state finance law; provided, however, that any attempt to influence the issuance or terms of the specifications that serve as the basis for bid documents, requests for proposals, invitations for bids, or solicitations of proposals, or any other method for soliciting a response from offers intending to result in a procurement contract with a state agency, the state legislature, the unified court system, a municipal agency or local legislative body shall not be exempt from the definition of "lobbying" or "lobbying activities" under this subparagraph;

(H) Participants, including those appearing on behalf of a client, in a conference provided for in a request for proposals, invitation for bids, or any other method for soliciting a response from offers intending to result in a procurement contract;

(I) Officers who have been tentatively awarded a contract and are engaged in communications with a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body solely for the purpose of negotiating the terms of the procurement contract after being notified of such award or, when a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body is purchasing an article of procurement pursuant to an existing state procurement contract, offers who are engaged in communications with the procuring entity solely for the purpose of negotiating terms applicable to that purchase; or persons who currently hold a franchise and who are engaged in negotiating the terms of a tentative franchise renewal contract with a municipality, but such negotiations, which do not constitute lobbying, do not include communications to the local legislative body that must approve the contract;

(J) (i) Officers or other persons who are a party to a protest, appeal or other review proceeding (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding; or
(ii) Officers or other persons who bring complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or
(iii) Officers or other persons who submit written protests, appeals or complaints to the state comptroller's office during the process of contract approval, where the state comptroller's approval is required by law, and where such communications and any responses thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the state finance law; or
(iv) Officers or other persons who bring complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the state comptroller's office;

provided, however, that nothing in this paragraph shall be construed as recognizing or creating any new rights, duties or responsibilities or abrogating any existing rights, duties or responsibilities of any governmental entity as it pertains to implementation and enforcement of article eleven of the state finance law or any other provision of law dealing with the governmental procurement process;

(K) The submission of a bid or proposal (whether submitted orally, in writing or electronically) in response to a request for proposals, invitation for bids or any other method for soliciting a response from offers intending to result in a procurement contract;

(L) Officers submitting written questions to a designated contact of a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body set forth in a request for proposals, or invitation for bids or any other method for soliciting a response from offers intending to result in a procurement contract, when all written questions and responses are to be disseminated to all offers who have expressed an interest in the request for proposals, or invitation for bids, or any other method for soliciting a response from offers intending to result in a procurement contract;
(M) Contacts during governmental procurements between designated staff of a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body involved in governmental procurements and officers or employees of bidders or potential bidders, or officers or employees of subcontractors of bidders or potential bidders, who are charged with the performance of functions relating to contracts and who are qualified by education, training or experience to provide technical services to explain, clarify or demonstrate the qualities, characteristics or advantages of an article of procurement. Such authorized contacts shall:

(i) be limited to providing information to the staff of a state agency, either house of the state legislature, the unified court system, a municipal agency and local legislative body to assist them in understanding and assessing the qualities, characteristics or anticipated performance of an article of procurement;

(ii) not include any recommendations or advocate any contract provisions; and

(iii) occur only at such times and in such manner as authorized under the procuring entity's solicitation or guidelines and procedures.

For the purposes of this paragraph, the term "technical services" shall be limited to analysis directly applying any accounting, engineering, scientific, or other similar technical disciplines;

(N) Applications for licenses, certificates, and permits authorized by statutes or local laws or ordinances;

(O) The activities of persons who are commission salespersons with respect to governmental procurements;

(P) Communications made by an officer or employee of the officer after the award of the procurement contract when such communications are in the ordinary course of providing the article of procurement provided by the procurement contract and in the ordinary course of the assigned duties of the officer or employee; provided, however, that nothing herein shall exempt:

(i) an officer or employee whose primary purpose is to engage in lobbying activities with regard to governmental procurements, or

(ii) an agent or independent contractor hired by an offerer and whose primary duty is to engage in lobbying activities with regard to governmental procurements; and

(Q) Persons who communicate with public officials where such communications are limited to obtaining factual information related to benefits or incentives offered by a state or municipal agency and where such communications do not include any recommendations or advocate governmental action or contract provisions, and further where such communications are not otherwise connected with pending legislative or executive action or determinations; provided, however, that any person who is otherwise required to file a statement or report pursuant to this article by virtue of engaging in lobbying activities as defined in this section shall not be deemed to fall within the exception provided for under this paragraph.

(d) The term "organization" shall mean any corporation, company, foundation, association, college as defined by section two of the education law, labor organization, firm, partnership, society, joint stock company, state agency or public corporation.

(e) The term "state agency" shall mean any department, board, bureau, commission, division, office, council, committee or officer of the state, whether permanent or temporary, or a public benefit corporation or public authority at least one of whose members is appointed by the governor, authorized by law to make rules or to make final decision in adjudicatory proceedings but shall not include the judicial branch or agencies created by interstate compact or international agreement.

(f) The term "commission" shall mean the commission on public integrity created by section ninety-four of the executive law.

(g) The term "expense" or "expenses" shall mean any expenditures incurred by or reimbursed to the lobbyist for lobbying but shall not include contributions reportable pursuant to article fourteen of the election law.

(h) The term "compensation" shall mean any salary, fee, gift, payment, benefit, loan, advance or any other thing of value paid, owed, given or promised to the lobbyist by the client for lobbying but shall not include contributions reportable pursuant to article fourteen of the election law.

(i) The term "public corporation" shall mean a municipal corporation, a district corporation, or a public benefit corporation as defined in section sixty-six of the general construction law.

(j) The term "gift" shall mean anything of more than nominal value given to a public official in any form including, but not limited to money, service, loan, travel, lodging, means, refreshments, entertainment, discount, forbearance, or promise, having a monetary value.

The following are excluded from the definition of a gift:

(i) complimentary attendance, including food and beverage, at bona fide charitable or political events, and food and beverage of a nominal value offered other than as part of a meal;

(ii) complimentary attendance, food and beverage offered by the sponsor of an event that is widely attended or was in good faith intended to be widely attended, when attendance at the event is related to the attendee's duties or responsibilities as a public official or allows the public official to perform a ceremonial function appropriate to his or her position;

(iii) awards, plaques, and other ceremonial items which are publicly presented, or intended to be publicly presented, in recognition of public service, provided that the item or items are of the type customarily bestowed at such similar ceremonies and are otherwise reasonable in value and further provided that the functionality of such items shall not determine whether such items are permitted under this paragraph;

(iv) an honorary degree bestowed upon a public official by a public or private college or university;

(v) promotional items having no substantial resale value such as pens, mugs, calendars, hats, and t-shirts which bear an organization's name, logo, or message in a manner which promotes the organization's cause;
(vi) **goods and services, or discount for goods and services, offered to the general public or a segment of the general public defined on a basis other than status as a public official and offered on the same terms and conditions as the goods or services are offered to the general public or segment thereof:**

(vii) **gifts from a family member, member of the same household, or person with a personal relationship with the public official, including invitations to attend personal or family social events, when the circumstances establish that it is the family, household, or personal relationship that is the primary motivating factor in determining motivation, the following factors shall be among those considered: (A) the history and nature of the relationship between the donor and the recipient, including whether or not items have previously been exchanged; (B) whether the item was purchased by the donor; and (C) whether or not the donor at the same time gave similar items to other public officials; the transfer shall not be considered to be motivated by a family, household, or personal relationship if the donor seeks to charge or deduct the value of such item as a business expense or seeks reimbursement from a client:**

(viii) **contributions reportable under article fourteen of the election law:**

(ix) **travel reimbursement or payment for transportation, meals and accommodations for an attendee, panelist or speaker at an informational event when such reimbursement or payment is made by a governmental entity or by an in-state accredited public or private institution of higher education that hosts the event on its campus, provided, however, that the public official may only accept lodging from an institution of higher education: (A) at a location on or within close proximity to the host campus; and (B) for the night preceding and the nights of the days on which the attendee, panelist or speaker actually attends the event:**

(x) **provision of local transportation to inspect or tour facilities, operations or property owned or operated by the entity providing such transportation, provided, however, that payment or reimbursement of lodging, meals or travel expenses to and from the locality where such facilities, operations or property are located shall be considered to be gifts unless otherwise permitted under this subdivision:** and

(xi) **meals or refreshments when participating in a professional or educational program and the meals or refreshments are provided to all participants:**

(k) The term "municipality" shall mean any jurisdictional subdivision of the state, including but not limited to counties, cities, towns, villages, improvement districts and special districts, with a population of more than fifty thousand, and industrial development agencies in jurisdictional subdivisions with a population of more than fifty thousand; and public authorities, and public corporations, but shall not include school districts.

(I) The term "public official" shall mean:

(i) the governor, lieutenant governor, comptroller or attorney general;

(ii) members of the state legislature;

(iii) state officers and employees including:

(A) heads of state departments and their deputies and assistants other than members of the board of regents of the university of the state of New York who receive no compensation or are compensated on a per diem basis,

(B) officers and employees of statewide elected officials,

(C) officers and employees of state departments, boards, bureaus, divisions, commissions, councils or other state agencies,

(D) members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the governor, and employees of such authorities, corporations and commissions;

(iv) officers and employees of the legislature; and

(v) municipal officers and employees including an officer or employee of a municipality, whether paid or unpaid, including members of any administrative board, commission or other agency thereof and in the case of a county, shall be deemed to also include any officer or employee paid from county funds. No person shall be deemed to be a municipal officer or employee solely by reason of being a volunteer fireman or civil defense volunteer, except a fire chief or assistant fire chief.

(m) The term "restricted period" shall mean the period of time commencing with the earliest written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract with a state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section, and ending with the final contract award and approval by the state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of this section, and, where applicable, the state comptroller.

(n) The term "revenue contract" shall mean any written agreement between a state or municipal agency or a local legislative body and an offeror whereby the state or municipal agency or local legislative body gives or grants a concession or a franchise.

(o) The term "article of procurement" shall mean a commodity, service, technology, public work, construction, revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property, that is the subject of a governmental procurement.

(p) The term "governmental procurement" shall mean:

(i) the preparation or terms of the specifications, bid documents, request for proposals, or evaluation criteria for a procurement contract,

(ii) solicitation for a procurement contract,

(iii) evaluation of a procurement contract,

(iv) award, approval, denial or disapproval of a procurement contract, or
(v) approval or denial of an assignment, amendment (other than amendments that are authorized and payable under the terms of the procurement contract as it was finally awarded or approved by the comptroller, as applicable), renewal or extension of a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the offerer.

(g) The term "offerer" shall mean the individual or entity, or any employee, agent or consultant of such individual or entity, that contacts a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body about a governmental procurement.

(f) The term "procurement contract" shall mean any contract or other agreement for an article of procurement involving an estimated annualized expenditure in excess of fifteen thousand dollars. Grants, article XI-B state finance law contracts, intergovernmental agreements, railroad and utility force accounts, utility relocation project agreements or orders and eminent domain transactions shall not be deemed procurement contracts.

(e) The term "municipal agency" shall mean:

(i) any department, board, bureau, commission, division, office, council, committee or officer of a municipality, whether permanent or temporary; or

(ii) an industrial development agency, located in a jurisdictional subdivision of the state with a population of more than fifty thousand, or local public benefit corporation, as that term is defined in section sixty-six of the general construction law.

(i) The term "local legislative body" shall mean the board of supervisors, board of aldermen, common council, council, commission, town board, board of trustees or other elective governing board or body of a municipality now or hereafter vested by state statute, charter or other law with jurisdiction to initiate and adopt local laws and ordinances, whether or not such local laws or ordinances require approval of the elective chief executive officer or other official or body to become effective.

(u) The term "commission salesperson" shall mean any person the primary purpose of whose employment is to cause or promote the sale of, or to influence or induce another to make a purchase of an article of procurement, whether such person is an employee (as that term is defined for tax purposes) or an independent contractor for a vendor, provided that an independent contractor shall have a written contract for a term of not less than six months or for an indefinite term, and which person shall be compensated, in whole or in part, by the payment of a percentage amount of all or a substantial part of the sales which such person has caused, promoted, influenced or induced, provided, however, that no person shall be considered a commission salesperson with respect to any sale to or purchase by a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body if the percentage amount of any commission payable with respect to such sale or purchase is substantially in excess of any commission payable with respect to any comparable sale to a purchaser that is not a state agency, either house of the state legislature, the unified court system, a municipal agency or local legislative body.

(v) The term "unified court system" shall mean, for the purposes of this article only, mean the unified court system of the state of New York, or the office of court administration, where appropriate, other than town and village justice courts in jurisdictions with a population under fifty thousand, when it acts solely in an administrative capacity to engage in governmental procurements and shall not include the unified court system or any court of the state judiciary when it acts to hear and decide cases of original or appellate jurisdiction or otherwise acts in its judicial, as opposed to administrative, capacity.

§ 1-4. Lobby-related powers of the commission. In addition to any other powers and duties provided by section ninety-four of the executive law, the commission shall, with respect to its lobbying-related functions only, have the power and duty to:

(a) administer and enforce all the provisions of this article;

(b) conduct a program of random audits subject to the terms and conditions of this section. Any such program shall be carried out in the following manner:

(i) The commission may randomly select reports or registration statements required to be filed by lobbyists or clients pursuant to this article for audit. Any such selection shall be done in a manner pursuant to which the identity of any particular lobbyist or client whose statement or report is selected for audit is unknown to the commission, its staff or any of their agents prior to selection.

(ii) The commission shall develop protocols for the conduct of such random audits. Such random audits may require the production of books, papers, records or memoranda relevant and material to the preparation of the selected statements or reports, for examination by the commission. Any such protocols shall ensure that similarly situated statements or reports are audited in a uniform manner.

(iii) The commission shall contract with an outside accounting entity, which shall monitor the process pursuant to which the commission selects statements or reports for audit and carries out the provisions of paragraphs (i) and (ii) of this subdivision and certifies that such process complies with the provisions of such paragraphs.

(iv) Upon completion of a random audit conducted in accordance with the provisions of paragraphs (i), (ii) and (iii) of subdivision, the commission shall determine whether there is reasonable cause to believe that any such statement or report is inaccurate or incomplete. Upon a determination that such reasonable cause exists, the commission may require the production of further books, records or memoranda, subpoenas, witnesses, compel their attendance and testimony and administer oaths or affirmations, to the extent the commission determines such actions are necessary to obtain information relevant and material to investigating such inaccuracies or omissions;

(c) conduct hearings pursuant to article seven of the public officers law. Any hearing may be conducted as a video conference in accordance with the provisions of subdivision four of section one hundred four of the public officers law;

(d) prepare uniform forms for the statements and reports required by this article;

(e) meet at least once during each bi-monthly reporting period of the year as established by subdivision (a) of section one-h of this article and may meet at such other times as the commission, or the chair and vice-chair jointly, shall determine;

(f) issue advisory opinions to those under its jurisdiction. Such advisory opinions, which shall be published and made available to the public, shall not be binding upon such commission except with respect to the person to whom such opinion is rendered, provided, however, that a subsequent modification by such commission of such an advisory opinion shall operate prospectively only; and
§ 1-e. Statement of registration. (a) (1) Every lobbyist shall annually file with the commission, on forms provided by the commission, a statement of registration for each calendar year; provided, however, that the filing of such statement of registration shall not be required of any lobbyist who (i) in any year does not expend, incur or receive an amount in excess of two thousand dollars for years prior to two thousand six and in excess of five thousand dollars in the year two thousand six and the years thereafter of reportable compensation and expenses, as provided in paragraph five of subdivision (b) of section one-h of this article, for the purposes of lobbying or (ii) is an officer, director, trustee or employee of any public corporation, when acting in such official capacity; provided however, that nothing in this section shall be construed to relieve any public corporation of the obligation to file such statements and reports as required by this article. The amounts expended, incurred, or received of reportable compensation and expenses for lobbying activities shall be computed cumulatively for all lobbying activities when determining whether the thresholds set forth in this section have been met.

(2)(i) Through calendar year two thousand three, such filing shall be completed on or before January first by those persons who have been retained, employed or designated as lobbyist on or before December fifteenth who reasonably anticipate that in the coming year they will expend, incur or receive combined reportable compensation and expenses in an amount in excess of two thousand dollars; for those lobbyists retained, employed or designated after December fifteenth, and for those lobbyists who subsequent to their retainer, employment or designation reasonably anticipate combined reportable compensation and expenses in excess of such amount, such filing must be completed within fifteen days thereafter, but in no event later than ten days after the actual incurring or receiving of such reportable compensation and expenses.

(ii) For calendar year two thousand four, such filings shall be completed on or before January first by those persons who have been retained, employed or designated as lobbyist on or before December fifteenth, two thousand three who reasonably anticipate that in the coming year they will expend, incur or receive combined reportable compensation and expenses in an amount in excess of two thousand dollars; for those lobbyists retained, employed or designated after December fifteenth, two thousand three, and for those lobbyists who subsequent to their retainer, employment or designation reasonably anticipate combined reportable compensation and expenses in excess of such amount, such filing must be completed within fifteen days thereafter, but in no event later than ten days after the actual incurring or receiving of such reportable compensation and expenses.

(3) Commencing calendar year two thousand five and thereafter every lobbyist shall biennially file with the commission, on forms provided by the commission, a statement of registration for each biennial period beginning with the first year of the biennial cycle commencing calendar year two thousand five and thereafter; provided, however, that the biennial filing of such statement of registration shall not be required of any lobbyist who (i) in any year prior to calendar year two thousand six does not expend, incur or receive an amount in excess of two thousand dollars of reportable compensation and expenses, as provided in paragraph five of subdivision (b) of section one-h of this article, for the purposes of lobbying and commencing with calendar year two thousand six does not expend, incur or receive an amount in excess of five thousand dollars of reportable compensation, as provided in paragraph five of subdivision (b) of section one-h of this article for the purposes of lobbying or (ii) is an officer, director, trustee or employee of any public corporation, when acting in such official capacity; provided however, that nothing in this section shall be construed to relieve any public corporation of the obligation to file such statements and reports as required by this article.

(4) Such biennial filings shall be completed on or before January first of the first year of a biennial cycle commencing in calendar year two thousand five and thereafter, by those persons who have been retained, employed or designated as lobbyist on or before December fifteenth of the previous calendar year and who reasonably anticipate that in the coming year they will expend, incur or receive combined reportable compensation and expenses in an amount in excess of two thousand dollars in years prior to calendar year two thousand six and five thousand dollars commencing in two thousand six; for those lobbyists retained, employed or designated after the previous December fifteenth, and for those lobbyists who subsequent to their retainer, employment or designation reasonably anticipate combined reportable compensation and expenses in excess of such amount, such filing must be completed within fifteen days thereafter, but in no event later than ten days after the actual incurring or receiving of such reportable compensation and expenses.

(b) (i) Such statements of registration shall be kept on file for a period of three years for those filing periods where annual statements are required, and shall be open to public inspection during such period; (ii) Biennial statements of registration shall be kept on file for a period of three biennial filing periods where biennial statements are required, and shall be open to public inspection during such period.

(c) Such statement of registration shall contain:

(1) the name, address and telephone number of the lobbyist, and if the lobbyist is an organization the names, addresses and telephone numbers of any officer or employee of such lobbyist who engages in any lobbying activities or who is employed in an organization's division that engages in lobbying activities of the organization;

(2) the name, address and telephone number of the client by whom or on whose behalf the lobbyist is retained, employed or designated;

(3) if such lobbyist is retained or employed pursuant to a written agreement of retainer or employment, a copy of such shall also be attached and if such retainer or employment is oral, a statement of the substance thereof; such written retainer, or if it is oral, a statement of the substance thereof, and any amendment thereto, shall be retained for a period of three years;

(4) a written authorization from the client by whom the lobbyist is authorized to lobby, unless such lobbyist has filed a written agreement of retainer or employment pursuant to paragraph three of this subdivision;

(5) the following information on which the lobbyist expects to lobby:

(i) a description of the general subject or subjects,

(ii) the legislative bill numbers of any bills [and],

(iii) the numbers or subject matter (if there are no numbers) of gubernatorial executive orders or executive orders issued by the chief executive officer of a municipality,
(iv) the subject matter of and tribes involved in tribal-state compacts, memoranda of understanding, or any other state-tribal agreements and any state actions related to class III gaming as provided in 25 U.S.C. § 2701,

(v) the rule, regulation, and ratemaking numbers of any rules, regulations, or rates, or municipal ordinances and resolutions, or proposed rules, regulations, or rates (on which the lobbyist is lobbying or expects to lobby), or municipal ordinances and resolutions, and

(vi) the titles and any identifying numbers of any procurement contracts and other documents disseminated by a state agency, either house of the state legislature, the unified court system, municipal agency or local legislative body in connection with a governmental procurement;

(6) the name of the person, organization, or legislative body before which the lobbyist is lobbying or expects to lobby;

(7) if the lobbyist is retained, employed or designated by more than one client, a separate statement of registration shall be required for each such client.

(d) Any amendment to the information filed by the lobbyist in the original statement of registration shall be submitted to the commission on forms supplied by the commission within ten days after such amendment, however, this shall not require the lobbyist to amend the entire registration form.

(e) (i) The first statement of registration filed annually by each lobbyist for calendar years through two thousand three shall be accompanied by a registration fee of fifty dollars except that no registration fee shall be required of a public corporation. A fee of fifty dollars shall be required for any subsequent statement of registration filed by a lobbyist during the same calendar year; (ii) The first statement of registration filed annually by each lobbyist for the calendar year two thousand four shall be accompanied by a registration fee of one hundred dollars except that no registration fee shall be required from any lobbyist who in any year does not expend, incur or receive an amount in excess of five thousand dollars of reportable compensation and expenses, as provided in paragraph five of subdivision (b) of section one-h of this article, for the purposes of lobbying or of a public corporation. A fee of one hundred dollars shall be required for any subsequent statement of registration filed by a lobbyist during the same calendar year; (iii) The first statement of registration filed biennially by each lobbyist for the first biennial registration requirements for calendar years two thousand five and two thousand six and thereafter, shall be accompanied by a registration fee of two hundred dollars except that no registration fee shall be required from any lobbyist who in any year does not expend, incur or receive an amount in excess of five thousand dollars of reportable compensation and expenses, as provided in paragraph five of subdivision (b) of section one-h of this article, for the purposes of lobbying or of a public corporation. A fee of two hundred dollars shall be required for any subsequent statement of registration filed by a lobbyist during the biennial period; (iv) The statement of registration filed after the due date of a biennial registration shall be accompanied by a registration fee that is prorated to one hundred dollars for any registration filed after January first of the second calendar year covered by the biennial reporting requirement. In addition to the fees authorized by this section, the commission may impose a fee for late filing of a registration statement required by this section not to exceed twenty-five dollars for each day that the statement required to be filed is late, except that if the lobbyist making a late filing has not previously been required by statute to file such a statement, the fee for late filing shall not exceed ten dollars for each day that the statement required to be filed is late.

§ 1-f. Monthly registration docket. It shall be the duty of the commission to compile a monthly docket of statements of registration containing all information required by section one-e of this article. Each such monthly docket shall contain all statements of registration filed during such month and all amendments to previously filed statements of registration. Copies shall be made available for public inspection.

§ 1-g. Termination of retainer, employment, or designation. Upon the termination of a lobbyist's retainer, employment or designation, such lobbyist and the client on whose behalf such service has been rendered shall both give written notice to the commission within thirty days after the lobbyist ceases the activity that required such lobbyist to file a statement of registration; however, such lobbyist shall nevertheless comply with the bi-monthly reporting requirements up to the date such activity has ceased as required by this article and both such parties shall each file the semi-annual report required by section one-j of this article. The commission shall enter notice of such termination in the appropriate monthly registration docket required by section one-f of this article.

§ 1-h. Bi-monthly reports of certain lobbyists.

(a) Any lobbyist required to file a statement of registration pursuant to section one-e of this article who in any lobbying year reasonably anticipates that during the year such lobbyist will expend, incur or receive combined reportable compensation and expenses in an amount in excess of five thousand dollars, as provided in paragraph five of subdivision (b) of this section, for the purpose of lobbying, shall file with the commission a bi-monthly written report, on forms supplied by the commission, by the fifteenth day next succeeding the end of the reporting period in which the lobbyist was first required to file a statement of registration. Such reporting periods shall be the period of January first to the last day of February, March first to April thirtieth, May first to June thirtieth, July first to August thirty-first, September first to October thirty-first and November first to December thirty-first.

(b) Such bi-monthly report shall contain:

(1) the name, address and telephone number of the lobbyist;

(2) the name, address and telephone number of the client by whom or on whose behalf the lobbyist is retained, employed or designated;

(3) the following information on which the lobbyist has lobbied:

(i) a description of the general subject or subjects,

(ii) the legislative bill numbers of any bills [and],

(iii) the numbers or subject matter (if there are no numbers) of gubernatorial executive orders or executive orders issued by the chief executive officer of a municipality,

(iv) the subject matter of and tribes involved in tribal-state compacts, memoranda of understanding, or any other state-tribal agreements and any state actions related to class III gaming as provided in 25 U.S.C. § 2701,

(v) the rule, regulation, and ratemaking or municipal ordinance or resolution numbers of any rules, regulations, or rates or ordinance or proposed rules, regulations, or rates (on which the lobbyist has lobbied) or municipal ordinances or resolutions, and
(vi) the titles and any identifying numbers of any procurement contracts and other documents disseminated by a state agency, either house of the state legislature, the unified court system, municipal agency or local legislative body in connection with a governmental procurement;

(4) the name of the person, organization, or legislative body before which the lobbyist has lobbied;

(5)(i) the compensation paid or owed to the lobbyist, and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying.

(ii) expenses required to be reported pursuant to subparagraph (i) of this paragraph shall be listed in the aggregate if seventy-five dollars or less and if more than seventy-five dollars such expenses shall be detailed as to amount, to whom paid, and for what purpose; and where such expense is more than seventy-five dollars on behalf of any one person, the name of such person shall be listed.

(iii) for the purposes of this paragraph, expenses shall not include:

(A) personal sustenance, lodging and travel disbursements of such lobbyist;

(B) expenses not in excess of five hundred dollars in any one calendar year, directly incurred for the printing or other means of reproduction or mailing of letters, memoranda or other written communications.

(iv) expenses paid or incurred for salaries other than that of the lobbyist shall be listed in the aggregate.

(v) expenses of more than fifty dollars shall be paid by check or substantiated by receipts and such checks and receipts shall be kept on file by the lobbyist for a period of three years.

(c)(1) All such bi-monthly reports shall be subject to review by the commission.

(2) Such bi-monthly reports shall be kept on file for three years and shall be open to public inspection during such time.

(3) In addition to the filing fees authorized by this article, the commission may impose a fee for late filing of a bi-monthly report required by this section not to exceed twenty-five dollars for each day that the report required to be filed is late, except that if the lobbyist making a late filing has not previously been required by statute to file such a report, the fee for late filing shall not exceed ten dollars for each day that the report required to be filed is late.

§ 1-4. Bi-monthly reports of public corporations.

(a) Every public corporation required to file a statement of registration pursuant to section one-e of this article which in any lobbying year reasonably anticipates that during the year it will expend or incur expenses in an amount in excess of five thousand dollars, as provided in paragraph six of subdivision (b) of this section, for the purpose of lobbying shall file with the commission a bi-monthly written report, on forms supplied by the commission, by the fifteenth day next succeeding the end of the reporting period in which the public corporation was first required to file a statement of registration. Such reporting periods shall be the period of January first to the last day of February, March first to April thirtieth, May first to June thirtieth, July first to August thirty-first, September first to October thirty-first and November first to December thirty-first.

(b) Such bi-monthly report shall contain:

(1) the name, address and telephone number of such public corporation;

(2) the name, address and telephone number of each lobbyist retained, employed or designated by such public corporation;

(3) copies of any amendments relating to a retainer, employment or designation, as filed in the original statement of registration pursuant to section one-e of this article;

(4) a description of the general subject or subjects, the legislative bill numbers of any bills and the rule, regulation, and mitemaking numbers of any rules, regulations, or rates or proposed rules, regulations, or rates on which the lobbyist has lobbied, and on which such public corporation has lobbied;

(5) the name of the person, organization or legislative body before which the public corporation, or its lobbyists, has lobbied;

(6)(i) the compensation paid or owed to the lobbyist and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying; provided, however, any such expenses paid by such public corporation to a lobbyist for the purpose of lobbying on behalf of such public corporation shall be itemized in the same manner as if such public corporation had directly paid or incurred such expenses.

(ii) any expenses required to be reported pursuant to subparagraph (i) of this paragraph shall be listed in the aggregate if seventy-five dollars or less and if more than seventy-five dollars such expenses shall be detailed as to amount, to whom paid, and for what purpose; and where such expenses are more than seventy-five dollars on behalf of any one person, the name of such person shall be listed.

(iii) for the purposes of this paragraph, expenses shall not include:

(A) personal sustenance, lodging and travel disbursements of each such lobbyist;

(B) expenses not in excess of five hundred dollars in any one calendar year, directly incurred for the printing or other means of reproduction or mailing of letters, memoranda or other written communications.

(iv) expenses paid or incurred for compensation other than that of each lobbyist shall be listed in the aggregate.

(v) expenses of more than fifty dollars shall be paid by check or substantiated by receipts and such checks and receipts shall be kept on file by such public corporation for a period of three years.

(e)(1) All such bi-monthly reports shall be subject to review by the commission.

(2) Such bi-monthly reports shall be kept on file for a period of three years and shall be open to public inspection during such period.
§ 1-j. Semi-annual reports.

(a) Semi-annual reports shall be filed by any client retaining, employing or designating a lobbyist or lobbyists, whether or not any such lobbyist was required to file a bi-monthly report, if such client reasonably anticipates that during the year such client will expend or incur an amount in excess of five thousand dollars of combined reportable compensation and expenses, as provided in paragraph five of subdivision (c) of this section, for the purposes of lobbying.

(b) Such report shall be filed with the commission, on forms supplied by the commission, by the fifteenth day of July of the year and by the fifteenth day of January next following the year for which such report is made and shall contain:

(1) the name, address and telephone number of the client;

(2) the name, address and telephone number of each lobbyist retained, employed or designated by such client;

(3) the following information on which each lobbyist retained, employed or designated by such client has lobbied, and on which such client has lobbied:

(i) a description of the general subject or subjects,

(ii) the legislative bill numbers of any bill (s)

(iii) the numbers or subject matter (if there are no numbers) of gubernatorial executive orders or executive orders issued by the chief executive officer of a municipality,

(iv) the subject matter of and tribes involved in tribal-state compacts, memoranda of understanding, or any other state-tribal agreements and any state actions related to class III gaming as provided in 25 U.S.C. 2701,

(v) the rule, regulation, and ratemaking or municipal resolution or ordinance numbers of any rules, regulations, or rates, or municipal resolutions or ordinances or proposed rules, regulations, or rates [on which each lobbyist retained, employed or designated by such client has lobbied, and on which such client has lobbied], or municipal ordinances or resolutions and

(vi) the titles and any identifying numbers of any procurement contracts and other documents disseminated by a state agency, either house of the state legislature, the unified court system, municipal agency or local legislative body in connection with a governmental procurement;

(4) the name of the person, organization, or legislative body before which such client has lobbied;

(5) (i) the compensation paid or owed to each such lobbyist, and any other expenses paid or incurred by such client for the purpose of lobbying.

(ii) any expenses required to be reported pursuant to subparagraph (i) of this paragraph shall be listed in the aggregate if seventy-five dollars or less and if more than seventy-five dollars such expenses shall be detailed as to amount, to whom paid, and for what purpose; and where such expenses are more than seventy-five dollars on behalf of any one person, the name of such person shall be listed.

(iii) for the purposes of this paragraph, expenses shall not include:

(A) personal sustenance, lodging and travel disbursements of such lobbyist and client;

(B) expenses, not in excess of five hundred dollars, directly incurred for the printing or other means of reproduction or mailing of letters, memoranda or other written communications.

(iv) expenses paid or incurred for salaries other than that of the lobbyist shall be listed in the aggregate.

(v) expenses of more than fifty dollars must be paid by check or substantiated by receipts and such checks and receipts shall be kept on file by such client for a period of three years.

(c) (1) All such semi-annual reports shall be subject to review by the commission.

(2) Such semi-annual reports shall be kept on file for a period of three years and shall be open to public inspection during such period.

(3) Each semi-annual report filed by a client pursuant to this section shall be accompanied by a filing fee of fifty dollars. In addition to the filing fees authorized by this article, the commission may impose a fee for late filing of a semi-annual report required by this section not to exceed twenty-five dollars for each day that the report required to be filed is late, except that if the client making a late filing has not previously been required by statute to file an annual or semi-annual report, the fee for late filing shall not exceed ten dollars for each day that the report required to be filed is late.

§ 1-k. Contingent retainers. (a) No client shall retain or employ any lobbyist for compensation, the rate or amount of which compensation in whole or part is contingent or dependent upon:

(1) (A) the passage or defeat of any legislative bill or the approval or veto of any legislation by the governor,

(B) the terms, issuance, modification or rescission of a gubernatorial executive order,

(C) the terms, approval or disapproval, or the implementation and administration of tribal-state compacts, memoranda of understanding, or any other tribal-state agreements and any state actions related to class III gaming as provided in 25 U.S.C. 2701,
(D) the adoption or rejection of any code, rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency;

(2) (A) the passage or defeat of any local law, ordinance, regulation or resolution by any municipality or subdivision thereof,

(B) the terms, issuance, modification or rescission of an executive order issued by the chief executive officer of a municipality, or

(C) the adoption, rejection or implementation of any rule, resolution or regulation having the force and effect of a local law, ordinance or regulation or any rate making proceeding by any municipality or subdivision thereof;

(3) any determination by a state agency, either house of the state legislature, the unified court system, municipal agency or local legislative body with respect to a governmental procurement or a grant, loan or agreement involving the disbursement of public monies.

(b) No person shall accept such a retainer or employment. A violation of this section shall be a class A misdemeanor.

§ 1-1. Reports of lobbying involving disbursement of public monies. (a) Any lobbyist required to file a statement of registration pursuant to section one-e of this article who in any lobbying year reasonably anticipates that during the year they will expend, incur or receive combined reportable compensation and expenses in an amount in excess of five thousand dollars shall file with the commission, on forms supplied by the commission, a report of any attempts to influence determination by a public official, or by a person or entity working in cooperation with a public official, with respect to the solicitation, award, or administration of a grant, loan, or agreement involving the disbursement of public monies in excess of fifteen thousand dollars other than a governmental procurement as defined in section one-c of this article.

(b) Such public monies lobbying reports shall contain:

(i) the name, address and telephone number of the lobbyist and the individuals employed by the lobbyist engaged in such public monies lobbying activities;

(ii) the name, address, and telephone number of the client by whom or on whose behalf the lobbyist is retained, employed, or designated on whose behalf the lobbyist has engaged in lobbying reportable under this paragraph;

(iii) a description of the grant, loan, or agreement involving the disbursement of public monies on which the lobbyist has lobbied;

(iv) the name of the person, organization, or legislative body before which the lobbyist has engaged in lobbying reportable under this paragraph; and

(v) the compensation paid or owed to the lobbyist, and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying reportable under this paragraph.

(c) Public monies lobbying reports required pursuant to this section shall be filed in accordance with the schedule applicable to the filing of bi-monthly reports pursuant to section one-h of this article and shall be filed not later than the fifteenth day next succeeding the end of such reporting period.

(d) In addition to any other fees authorized by this section the commission may impose a fee for late filing of a report required by this subdivision not to exceed twenty-five dollars for each day that the report required to be filed is late, except that if the lobbyist making a late filing has not previously been required by statute to file such a report, the fee for late filing shall not exceed ten dollars for each day that the report required to be filed is late.

(e) All reports filed pursuant to this subdivision shall be subject to review by the commission. Such reports shall be kept in electronic form by the commission and shall be available for public inspection.

§ 1-n. Prohibition of gifts. No individual or entity required to be listed on a statement of registration pursuant to this article shall offer or give a gift to any public official as defined within this article, unless under the circumstances it is not reasonable to infer that the gift was intended to influence such public official. No individual or entity required to be listed on a statement of registration pursuant to this article shall offer or give a gift to the spouse or unemancipated child of any public official as defined within this article under circumstances where it is reasonable to infer that the gift was intended to influence such public official. No spouse or unemancipated child of an individual required to be listed on a statement of registration pursuant to this article shall offer or give a gift to a public official under circumstances where it is reasonable to infer that the gift was intended to influence such public official. This section shall not apply to gifts to officers, members or directors of boards, commissions, councils, public authorities or public benefit corporations who receive no compensation or are compensated on a per diem basis, unless the person listed on the statement of registration appears or has matters pending before the board, commission or council on which the recipient sits.

§ 1-n. Restricted contacts. 1. During the restricted period, no person or organization required to file a statement or report pursuant to this article shall engage in lobbying activities concerning a governmental procurement by a state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (s) of section one-c of this article, by contacting a person within the procuring entity who has not been designated pursuant to section one hundred thirty-nine-j of the state finance law to receive communications relative to the governmental procurement. Further, during the restricted period, no person or organization required to file a statement or report pursuant to this article shall engage in lobbying activities concerning a governmental procurement by contacting any person in a state agency other than the state agency conducting the governmental procurement about that governmental procurement. The prohibitions set forth in this subdivision shall not apply to any contacts described in subdivision two or three of this section.

2. A complaint by an officer regarding the failure of the person or persons designated by the procuring entity pursuant to section one hundred thirty-nine-j of the state finance law to respond in a timely manner to authorized officer contacts shall not be deemed to be "lobbying" or "lobbying activities" and shall be exempt from the provisions of subdivision one of this section and shall be made in writing to the office of general counsel of the state agency, either house of the state legislature or the unified court system that is conducting the procurement. Further, the following contacts shall not be deemed to be "lobbying" or "lobbying activities" and shall be exempt from the provisions of subdivision one of this section:

(a) contacts by officers in protests, appeals or other review proceedings (including the apparent successful bidder or proposer and his or her representatives) before the governmental entity conducting the procurement seeking a final administrative determination, or in a subsequent judicial proceeding; or
(b) complaints of alleged improper conduct in a governmental procurement to the attorney general, inspector general, district attorney, or court of competent jurisdiction; or

(c) written protests, appeals or complaints to the state comptroller's office during the process of contract approval, where the state comptroller's approval is required by law, and where such communications and any responses thereto are made in writing and shall be entered in the procurement record pursuant to section one hundred sixty-three of the state finance law; or

(d) complaints of alleged improper conduct in a governmental procurement conducted by a municipal agency or local legislative body to the state comptroller's office;

provided, however, that nothing in this subdivision shall be construed as recognizing or creating any new rights, duties or responsibilities or abrogating any existing rights, duties or responsibilities of any governmental entity as it pertains to implementation and enforcement of article eleven of the state finance law or any other provision of law dealing with the governmental procurement process.

3. Nothing in this section shall be deemed to prohibit a person or organization required to file a statement or report pursuant to this article from contacting a member of the state legislature concerning a governmental procurement in a state agency, the unified court system, or a municipal agency, as that term is defined by paragraph (ii) of subdivision (e) of section one-c of this article.

§ 1-a. Penalties.

(a) (i) Any lobbyist, public corporation, or client who knowingly and wilfully fails to file timely a report or statement required by this section or knowingly and wilfully files false information or knowingly and wilfully violates section one-m of this article shall be guilty of a class A misdemeanor; and

(ii) any lobbyist, public corporation or client who knowingly and wilfully fails to file timely a report or statement required by this section or knowingly and wilfully files false information or knowingly and wilfully violates section one-m of this article, after having previously been convicted in the preceding five years of the crime described in paragraph (f) of this subdivision, shall be guilty of a class E felony. Any lobbyist convicted of or pleading guilty to a felony under the provisions of this section may be barred from acting as a lobbyist for a period of one year from the date of the conviction. For the purposes of this subdivision, the chief administrative officer of any organization required to file a statement or report shall be the person responsible for making and filing such statement or report unless some other person prior to the due date thereof has been duly designated to make and file such statement or report.

(b) (i) A lobbyist, public corporation, or client who knowingly and wilfully fails to file a statement or report within the time required for the filing of such report or knowingly and wilfully violates section one-m of this article shall be subject to a civil penalty for each such failure or violation, in an amount not to exceed the greater of twenty-five thousand dollars or three times the amount the person failed to report properly or unlawfully contributed, expended, gave or received, to be assessed by the commission.

(ii) A lobbyist, public corporation, or client who knowingly and wilfully files a false statement or report shall be subject to a civil penalty in an amount not to exceed the greater of fifty thousand dollars or five times the amount the person failed to report properly, to be assessed by the commission.

(iii) (A) A lobbyist or client who knowingly and wilfully violates the provisions of subdivision one of section one-n of this article shall be subject to a civil penalty not to exceed ten thousand dollars for an initial violation.

(B) If, after a lobbyist or client has been found to have violated subdivision one of section one-n of this article, a lobbyist or client knowingly and wilfully violates the provisions of subdivision one of section one-n of this article within four years of such finding, the lobbyist or client shall be subject to a civil penalty not to exceed twenty-five thousand dollars.

(iv) Any lobbyist or client that knowingly and wilfully fails to file a statement or report within the time required for the filing of such report, knowingly and wilfully files a false statement or report, or knowingly and wilfully violates section one-m of this article after having been found by the commission to have knowingly and wilfully committed such conduct or violation in the preceding five years, may be subject to a determination that the lobbyist or client is prohibited from engaging in lobbying activities, as that term is defined in paragraph (v) of subdivision (c) of section one-c of this article, for a period of one year.

(v) Any lobbyist or client that knowingly and wilfully engages in lobbying activities, as that term is defined in paragraph (v) of subdivision (c) of section one-c of this article, during the period in which they are prohibited from engaging in lobbying activities, as that term is defined in paragraph (v) of subdivision (c) of section one-c of this article pursuant to this subdivision, may be subject to a determination that the lobbyist or client is prohibited from engaging in lobbying activities, as that term is defined in paragraph (v) of subdivision (c) of section one-c of this article, for a period of up to four years, and shall be subject to a civil penalty not to exceed fifty thousand dollars, plus a civil penalty in an amount equal to five times the value of any gift, compensation or benefit received as a result of the violation.

(vi) A lobbyist, public corporation, or client who knowingly and wilfully fails to retain their records pursuant to paragraph three of subdivision (c) of section one-c of this article, subparagraph (v) of paragraph five of subdivision (b) of section one-h of this article, or paragraph five of subdivision (b) of section one-i of this article shall be subject to a civil penalty in an amount of two thousand dollars per violation to be assessed by the commission.

(c) (i) Any assessment or order to debar shall be determined only after a hearing at which the party shall be entitled to appear, present evidence and be heard. Any assessment or order to debar pursuant to this section may only be imposed after the commission sends by certified and first-class mail, written notice of intent to assess a penalty or order to debar and the basis for the penalty or order to debar. Any assessment may be recovered in an action brought by the attorney general.

(ii) In assessing any fine or penalty pursuant to this section, the commission shall consider: (A) as a mitigating factor that the lobbyist, public corporation or client has not previously been required to register, and (B) as an aggravating factor that the lobbyist, public corporation or client has had fines or penalties assessed against it in the past. The amount of compensation expended, incurred or received shall be a factor to consider in determining a proportionate penalty.

(iii) Any lobbyist, public corporation or client who receives a notice of intent to assess a penalty for knowingly and wilfully failing to file a report or statement pursuant to subdivision (b) of this section and who has never previously received a notice of intent to assess a penalty for failing to file a report
or statement required under this section shall be granted fifteen days within which to file the statement of registration or report without being subject to the fine or penalty set forth in subdivision (b) of this section. Upon the failure of such lobbyist, public corporation or client to file within such fifteen day period, such lobbyist, public corporation or client shall be subject to a fine or penalty pursuant to subdivision (b) of this section.

(d) All monies recovered by the attorney general or received by the commission from the assessment of civil penalties authorized by this section shall be deposited in the general fund.

§ 1-p. Enforcement.

(a) All statements and reports required under this article shall be subject to a declaration by the person making and filing such statement and report that the information is true, correct and complete to the best knowledge and belief of the signer under the penalties of perjury.

(b) The commission shall be charged with the duty of reviewing all statements and reports required under this article for violations, and it shall be their duty, if they deem such to be willful, to report such determination to the attorney general or other appropriate authority.

(c) Upon receipt of notice of such failure from the commission, the attorney general or other appropriate authority shall take such action as he deems appropriate to secure compliance with the provisions of this article.

§ 1-q. Record of appearances. The commission shall promulgate all rules or regulations and any procedures, forms, or instructions necessary to implement the provisions of section one hundred sixty-six of the executive law relating to the quarterly filing of the record of appearances before regulatory agencies.

§ 1-r. Publication of statement on lobbying regulations. The Commission shall publish a statement on lobbying regulations setting forth the requirements of this article in a clear and brief manner. Such statement shall contain an explanation of the registration and filing requirements and the penalties for violation thereof, together with such other information as the commission shall determine, and copies thereof shall be made available to the public at convenient locations throughout the state.

§ 1-s. Public access to records; format of records and reports. The commission shall make information furnished by lobbyists and clients available to the public for inspection and copying in electronic and paper formats. Access to such information shall also be made available for remote computer users through the internet network.

§ 1-t. Advisory council on procurement lobbying.

(a) There is hereby established an advisory council on procurement lobbying. The council shall be composed of eleven members as follows:

(1) the commissioner of the office of general services, or his or her designee, who shall be chair;

(2) the commissioner of the state department of transportation, or his or her designee;

(3) the director of the division of the budget, or his or her designee;

(4) three members appointed by the governor as follows:

(i) one member shall be representative of public authorities or public benefit corporations,

(ii) one member shall be a representative of local governments, and

(iii) one member shall be a representative of the contracting community;

(5) one member appointed by the temporary president of the senate;

(6) one member appointed by the speaker of the assembly;

(7) one member appointed by the chief judge of the court of appeals;

(8) the state comptroller, or his or her designee;

(9) one member appointed by the mayor of the city of New York.

(b) The members of the council shall receive no compensation for their services, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

(c) The council shall provide advice to the commission with respect to the implementation of the provisions of this article as such provisions pertain to procurement lobbying.

(d) The council shall annually report to the legislature any problems in the implementation of the provisions of this article as such provisions pertain to procurement lobbying. The council shall include in the report any recommended changes to increase the effectiveness of that implementation.

(e) The council may, pursuant to section one hundred thirty-nine-j of the state finance law, establish model guidelines for:

(1) contacts during the restricted period between designated staff of a state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined in paragraph (ii) of subdivision (a) of section one-c of this article, involved in governmental procurements and officers or employees of offers, or officers or employees of subcontractors of offerers, who are charged with the performance of functions relating to contracts and who are qualified by education, training or experience to provide technical services to explain, clarify or demonstrate the qualities, characteristics or advantages of an article of procurement. Such authorized contacts shall:
(i) be limited to providing information to staff of a state agency, either house of the state legislature, the unified court system, or a municipal agency, as that term is defined in paragraph (ii) of subdivision (e) of section one-c of this article, to assist them in understanding and assessing the qualities, characteristics or anticipated performance of an article of procurement,

(ii) not include any recommendations or advocate any contract provisions, and

(iii) occur only at such times and in such manner as authorized under the procuring entity's solicitation or guidelines and procedures. For the purposes of this paragraph, the term "technical services" shall be limited to analysis directly applying any accounting, engineering, scientific, or other similar technical disciplines;

(2) contacts between offerers and public officials and officers or employees of the unified court system during the preparation of specifications, bid documents or request for proposals, invitation for bids, or any other method for soliciting a response from offerers for a procurement contract prior to the restricted period.

(f) The council shall:

(1) by December thirty-first, two thousand five submit a preliminary report to the governor and legislature on potential implementation issues arising out of the procurement lobbying provisions as set forth in this article that were added by a chapter of the laws of two thousand five that added this section that are to take effect on January first, two thousand six, and

(2) by October thirtieth, two thousand seven, submit a report to the governor and legislature on the effects of the procurement lobbying provisions as set forth in this article including but not limited to any changes in the number and nature of offerers after January first, two thousand six.

§ 1-u. Applicability of certain laws. The provisions of this article including, but not limited to, any proceeding or hearing conducted pursuant hereto, shall be subject to the applicable provisions of the state administrative procedure act and section seventy-three of the civil rights law.

§ 1-v. Separability clause. If any part or provision of this article or the application thereof to any person or organization is adjudged by a court of competent jurisdiction to be unconstitutional, such judgment shall not affect or impair any other part or provision or the application thereof to any other person or organization, but shall be confined in its operation to the part, provision, person or organization directly involved in the controversy in which such judgment shall have been rendered.
Advisory Opinion No. 16-01: Reporting obligations under the Lobbying Act for a party who is compensated for consulting services in connection with lobbying activity

Introduction

Consultants offer a number of services that abut lobbying, but may not necessarily cross the line into lobbying. For example, consultants may offer services that may include communications and media relations, community organizing, coalition building, strategic planning, social media relations, grassroots advocacy, advertising, and electoral campaigns. However, despite the terms used to describe the services, some of this activity could constitute reportable lobbying under Legislative Law Article 1-A (the “Lobbying Act”).

Principally, this analysis will address actions taken and roles played by consultants in two typical lobbying scenarios – as “facilitators” for direct lobbying to or before a public official, and as architects of grassroots lobbying campaigns to the public.

The State Temporary Commission on Lobbying (the “Lobbying Commission”), a predecessor agency of the New York State Joint Commission on Public Ethics (“JCOPE”), previously defined the activities under the Lobbying Act that may constitute grassroots lobbying through a series of Advisory Opinions discussed below. Since that time, however, the Lobbying Act has been amended more than once and the Lobbying Commission has been disbanded and ultimately replaced by JCOPE.

The Commission issues this Advisory Opinion in order to articulate when the Lobbying Act covers the services of consultants, and to clarify the test used to determine when grassroots advocacy constitutes reportable lobbying activity.

Issues

I. When a consultant (or other paid representative) contacts a public official on behalf of a client, for the purpose of enabling or otherwise facilitating lobbying activity, is that initial contact, i.e., the “door opening”, reportable under the Lobbying Act?

II. When a consultant attends a meeting between a client (with or without a lobbyist) and a public official, is the consultant engaging in lobbying?

III. Must consultants who create and implement grassroots lobbying campaigns on behalf of clients themselves register as lobbyists?
Conclusions

Pursuant to its authority under Lobbying Act § 1-d(f), the Commission renders its opinion that:

I. Reportable lobbying\(^1\) includes preliminary contact made with public officials to enable or facilitate the ultimate advocacy.

II. Any direct interaction with a public official in connection with an advocacy campaign, including preliminary communications to facilitate or enable the eventual substantive advocacy, constitutes lobbying.

*Direct interaction* includes, but is not limited to: (i) verbal or written communications, including communications made for the purpose of facilitating access to a public official; (ii) attendance at a meeting with a public official; and (iii) presence on a phone call with a public official.

III. A grassroots communication constitutes lobbying if it:

1. References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c).
2. Takes a clear position on the issue in question; and
3. Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s);

A consultant’s activity on a grassroots campaign can be considered reportable lobbying if the consultant controlled the delivery and had input into the content of the message.

Control of the *delivery* of a grassroots communication involves participation in the actual delivery of the message.

Input on the *content* of a grassroots message means participation in the formation of the message.

Discussion

*History and Precedent*

Lobbying was first regulated in New York state in 1977 with the enactment of the “Regulation of Lobbying Act” (L. 1977, Ch. 937). The statute defined “lobbying” or “lobbying activity” as:

\[\text{Attempts to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the}\]

\(^1\) See Lobbying Act § 1-c(c)(i)-(x)
outcome of any rate making proceeding by a state agency. Section 3(b) of Ch. 937, L. 1977.

This legislation also created the first iteration of the State’s lobbying regulatory body, with the creation of the Temporary Commission on the Regulation of Lobbying. This Commission was subsequently reconstituted in 1981 as the similarly-named Temporary Commission on Lobbying, which would remain in place until 2007.2

These commissions are charged in their respective enabling statutes with the interpretation of the laws governing lobbying, through the issuance of advisory opinions.3

The definition of lobbying provides what kind of activity can be lobbying (“attempts to influence”), as well as the contexts in which it can occur (i.e., legislation, rulemakings, and rate makings).

However, it was not until the Lobbying Commission’s Opinion No. 21 (79-1) in 1979 that a New York state regulator addressed what specific conduct constituted an “attempt to influence” under the Act. In that opinion, a committee of the state bar association both: (1) challenged the “attempts to influence” language of the statute as vague and unqualified; and (2) asked whether this language included interactions other than “direct contact with legislators, the Governor, or regulatory agency decision makers”.

On both questions the Lobbying Commission turned to the U.S. Supreme Court’s seminal 1953 lobbying-related decision, United States v. Harriss (347 U.S. 612). Harriss upheld a constitutional challenge to the Federal Lobbying Act, the Court held that the definition of lobbying captured “direct pressures exerted by lobbyists themselves...or through an artificially stimulated letter campaign.” Harriss at 620. Justifying the potential infringement of protected speech, the Court noted that “[Congress] has ... merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much...”. TCOL Op. No. 21 (79-1), quoting U.S. v. Harriss.

The Lobbying Commission stated that it was acting to “conform with Federal case law”, i.e., Harriss and, as a result, “lobbying activity” under the New York state statute is through direct verbal, written, or printed communications with legislators, including “contacts with those staff members of the decision maker to whom authority to decide had been delegated and to those staff members upon whom the decision maker relies for informed recommendations on matters under consideration.” Lobbying Commission Op. No. 21 (1979).

In the months immediately following the publication of this opinion, the Lobbying Commission notified the Commission on Independent Colleges and Universities (“CICU”) of potential reporting obligations under the law, should [CICU] exceed the $1,000 lobbying spending

1 The Lobbying Commission was merged with the State Ethics Commission in 2007, into the Commission of Public Integrity (“COPI”), as part of the Public Employee Ethics Reform Act, Ch. 14, L. 2007. COPI was subsequently replaced by the Joint Commission on Public Ethics in 2011’s Public Integrity Reform Act, Ch. 399, L. 2011. All prior opinions referenced in this document were issued by the Lobbying Commission, unless otherwise noted.

2 See § 4(c)(6), Ch. 937, L. 1977; § 4(c)(6), Ch. 1040, L. 1981; Legislative Law Article 1-A, § 1-d(f).
threshold then in effect. CICU subsequently registered as a lobbying organization and sought a declaratory judgment in the District Court that the lobbying statute was “in its entirety, null and void, unconstitutional and of no force and effect”. The constitutional challenge argued that the law was an overbroad constraint on the rights to speech, petition the government, and association, because it attempted to regulate “any action which could conceivably impact upon government action, no matter how remote”. The Court dismissed the plaintiffs’ arguments, noting that the Supreme Court had limited the definition of lobbying in Harriss and pointed to the Lobbying Commission’s decision to apply Harriss to its own activities.

In applying Harriss to the New York lobbying laws, the CICU court ratified the boundaries that the Lobbying Commission had imposed on itself (in Op. No. 21). Further, an ensuing progeny of decisions by the Lobbying Commission created a series of general rules about what constituted lobbying activity under Harriss and state law, and applied the rules in the context of “grassroots” lobbying.

After CICU, the Commission issued the first opinion applying criteria to grassroots lobbying. The Commission found in Op. No. 36 (82-2) that lobbying included not only the direct contacts with a public official, but also exhortations to the public to contact the public official, i.e., a call to action, with regard to specific pending legislation.

The Commission was later presented with the question whether a consultant that carries out the mailing function of a grassroots campaign (assuming the requisite “call to action” is present) is required to register as a lobbyist. The Commission found that lobbying occurs when a consultant controls message delivery, and that control results in direct contact with a public official (“A lobbyist cannot be allowed to avoid registering with the Commission simply by changing how contact with legislators is made. Any attempt by a lobbyist to influence the passage or defeat of any legislation...is lobbying irrespective of how contact is made.”)

However, the Commission clarified that the consultant’s activity must include participation in both the content and delivery of a grassroots lobbying campaign to trigger the disclosure requirements. In that case, the delivery of pamphlets – without input, editing, reviewing, or other connection to the content of the message – was not lobbying activity.

The Lobbying Commission further clarified that an advertisement that includes a public “call to action” need not necessarily identify a bill number for the advertisement to constitute lobbying. In evaluating radio advertisements encouraging the public to contact the Governor regarding proposed Indian casino gaming issues, the Commission wrote, “[t]he company’s reliance on the omission of a bill number to avoid the requirement of disclosure is misplaced; it is the clear attempt to stimulate a grassroots lobbying effort in regard to pending legislation that controls the question.” (Opinion No. 44 (00-3)). The Commission also articulates a three-part test for all lobbying – direct or grassroots: “Lobbying, under New York law, occurs when the activity in

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5 Id. at 496.
6 Id. at 497, citing Lobbying Commission Op. No. 39 (97-1).
question relates to pending legislation, a position is stated, and the activity is an attempt to
influence decision makers...Direct contact is not required.\(^8\) (emphasis added)

Finally, and as discussed below, the definition of "lobbying" or "lobbying activities" has
expanded from the initial 1977 version\(^9\): in 1999, the legislature added certain actions by
municipalities to the contexts in which lobbying can occur; in 2005, the definition was expanded
to cover attempts to influence governmental procurements and tribal-state compacts (or Class III
gaming actions);\(^10\) and most recently, in 2011, PIRA further amended the definition (to its
current state) to specify that an attempt to influence passage or defeat of legislation included the
introduction or intended introduction of such legislation.\(^11\)

Issue Analysis

I. When a consultant (or other paid representative) contacts a public official on behalf of a
client, for the purpose of enabling or otherwise facilitating lobbying activity, is that
initial contact, i.e., the "door opening", reportable under the Lobbying Act?

JCOPE is cognizant and respectful of the fact that the scope of the Lobbying Act is limited to
those circumstances enunciated in Section 1-c(c) of the Lobbying Act. However, advocacy has
evolved, requiring JCOPE to address activities that are clearly within the ambit of the Lobbying
Act, but not been previously considered.

JCOPE finds that reportable lobbying\(^12\) includes preliminary contact made with public
officials to enable or facilitate the ultimate advocacy. This initial contact does not have to
involve the substantive concerns of the client, but can simply be to schedule a future meeting for
the client with the public official. It can also include a consultant introducing his client to a
public official prior to a meeting.

While one may call himself a consultant, when that individual communicates with a public
official (or her staff) on behalf of a client – for the purpose of enabling the client to explicitly
advocate before the public official – the lobbying has begun. But for the access to the public
official, the ensuing advocacy could not take place.

\(^{8}\text{Id.}\)

\(^{9}\text{The original definition of lobbying covered "attempts to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency".}\)

\(^{10}\text{Ch. 15, L. 2005.}\)

\(^{11}\text{Part D, Ch. 399, L. 2011.}\)

\(^{12}\text{As discussed above, the Lobbying Act defines "lobbying" or "lobbying activities" as any attempt to influence the enumerated activities in Section 1-c(c)(i)-(x). However, lobbying requires reporting only if the potential lobbyist or client expends, incurs, or receives more than $5,000 in annual compensation and expenses for lobbying (hereinafter, "reportable lobbying"). For purposes of this opinion, all references to and discussions of the applicability of the Lobbying Act presume that the $5,000 monetary threshold has been met.}\)
JCOPE is not attempting to regulate personal social conversation among those who happen to also work in and around government — but rather to ensure that those who are compensated for their political connections are exposed to the requisite sunlight.

To hold otherwise allows a class of individuals to operate in the same sphere as lobbyists, yet be exempted from specific statutes designed to promote transparency about attempts to influence public officials. For example, JCOPE holds that just as it is presumptively impermissible for a lobbyist to give a gift to a public official, 13 a consultant who “opens doors” should be subject to the same restrictions. Similarly, the prohibition on a lobbyist receiving a fee contingent on the success of the lobbying 14 should apply to a consultant as well. 15

For these reasons, JCOPE finds that anyone who makes contact with a public official, including preliminary communications to facilitate or enable the eventual substantive advocacy, is engaging in lobbying.

A consultant must report these activities if he knows or has reason to know that lobbying will occur before the public official. The consultant cannot employ a “willful blindness” strategy in order to create plausible deniability as to any lobbying that follows.

II. When a consultant attends a meeting between a client (with or without a registered lobbyist) and a public official, is the consultant engaging in lobbying?

As noted above, reportable lobbying begins on first contact with the public official, even if that contact is only an introduction or securing a future meeting for a client. However, the question remains whether a consultant’s attendance at a lobbying meeting (or participation on a call), even if only to make initial introductions or observe, constitutes reportable lobbying activity. Based on the new rules above, it follows that an individual who subsequently has direct interaction with a public official in connection with reportable lobbying may also be required to register as a lobbyist. 16

For purposes of this opinion, direct interaction includes, but is not limited to (i) verbal or written communications, including communications made for the purpose of facilitating access to a public official; (ii) attendance at a meeting with a public official; and (iii) presence on a phone call with a public official.

Just as JCOPE determined, supra, that using a consultant’s access to facilitate advocacy is part of lobbying, it is also the case that a consultant’s presence can be part of lobbying. These situations are all part and parcel of trading on relationships and influence. To be clear,

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13 Lobbying Act Section 1-m
14 Lobbying Act Section 1-k
15 Regardless of whether the registration requirements — and thus these prohibitions — apply, consulting services procured as part of a lobbying campaign will be disclosed as reportable expenses in the filings submitted by another lobbyist or client.
16 This should not be interpreted to require clerical or administrative staff who make scheduling calls for consultants to be listed as additional lobbyists. The activity is attributed to the consultant — the actions of clerical staff are a reportable non-lobbying salary expense (which can be reported in the aggregate).
consultants should not be barred from these practices – the Legislature clearly found lobbying to be part of a fundamental exercise of rights under the Constitution; but, at the same time, these transactions should merit that "modicum of information from those who for hire attempt to influence legislation" that the Supreme Court called for in Harriss. To that end, a consultant who has direct interaction (as defined above) with a public official at any point in the reportable lobbying effort is subject to the Lobbying Act.

There may be individuals who attend meetings with public officials, e.g., architects, scientists, or engineers, to address technical questions. They have no role in the strategy, planning, messaging, or other substantive aspect of a meeting. Since these attendees are not trading on access, influence, or relationships, they are not subject to the attendant lobbying reporting rules.

III. Must consultants who create and implement grassroots lobbying campaigns on behalf of clients themselves register as lobbyists?

Grassroots Lobbying

As noted above, the Lobbying Commission's adoption of Harriss (via Lobbying Commission Opinion No. 21) first determined that lobbying activity can occur via direct contact with public officials, or through what the Harriss court called "artificially stimulated letter campaigns".

However, the Lobbying Commission continued to refine its position on these indirect methods of lobbying. For example, the Lobbying Commission stated that a communication that addresses specific pending legislation, takes a position on the issue, and solicits the public to contact a public official, i.e., includes a call to action, constitutes lobbying activity.

Further, it stated that a communication that included the following attributes would constitute lobbying activity, specifically that the communication:

(1) related to pending legislation;

(2) took a position; and

(3) was an attempt to influence decision makers.

Finally, the Lobbying Commission found that an individual or organization that participates in the formation of the content and delivery of such a communication may be lobbying ("Lobbying activity requires some participation in both message content and delivery. A company that has complete control over mailing in furtherance of a grassroots lobbying effort would be a lobbyist

17 Section 1 of Ch. 937, Laws of 1977 ("...the operation of responsible democratic government requires that the fullest opportunity be afforded to the people to petition their government for the redress of grievances and to express freely to appropriate officials their opinions on legislation and government operations").
only if that company participated in the formation of the message itself or was given some control over reviewing or editing the client’s message.”\textsuperscript{20}

Since these opinions were published, however, the statutory reach of the Lobbying Act has increased. In PIRA, the Lobbying Act was expanded to cover not only attempts to influence the passage, defeat, enactment, or veto of legislation, but also the “introduction or intended introduction of legislation”.

This opinion attempts to account for this expanded scope by forming a new grassroots lobbying test, as well as a determination of the applicability of the Lobbying Act to consultants who participate in these grassroots lobbying campaigns.

The existing requirements for a communication to: (1) include call to action; (2) take a position on an issue; and (3) attempt to influence decision makers are still applicable regardless of the breadth of covered activities under Section 1-c(c). However, given the expansions to the statutory definition of “lobbying”, the “current pending legislation” element must be redefined.

JCOPE finds that the communication need only relate to a Section 1-c(c) activity. It need not reference a bill number, but a bill (or its defeat) must be the intended byproduct of the lobbying. Similarly, it need not identify an executive order or regulation, but it must be clear that an executive order or regulation is the subject of the lobbying. In sum, a grassroots communication constitutes lobbying if it:

1. References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c).
2. Takes a clear position on the issue in question; and
3. Is an attempt to influence a public official through a call to action, i.e., solicits or exhorts the public, or a segment of the public, to contact (a) public official(s);

Application to Consultants

With the above grassroots criteria in mind, JCOPE affirms while clarifying the position of its predecessor from Op. No. 39, and finds that a consultant’s activity on a grassroots campaign can be considered reportable lobbying if the consultant controlled the delivery of the message and had input into its content.

Control of the delivery of a grassroots communication requires participation in the actual delivery of the message to the audience, whether verbally or in writing. The delivery can be either to a targeted audience, or to the public in general, e.g., as a spokesperson.

The speaker/author should be identifiable as a person/entity distinct from their client, who is speaking for the client’s benefit. A public relations consultant who speaks to a group to advance the client’s lobbying message would be participating in actual delivery of a message. Further, a public relations consultant who contacts a media outlet in an attempt to get it to advance the client’s message in an editorial would also be delivering a message. That said, this is in no way

\textsuperscript{20} Lobbying Commission Op. No. 39 (97-1).
intended to restrict a reporter’s ability to gather information or to seek comment from representatives of advocacy groups as part of reporting the news. Rather, this is intended to generate transparency in the activities of paid media consultants who are hired to proactively advance their client’s interests through the media. 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.

**Input into the content** of a grassroots communication means participation in forming the message. The determining factor is shaping the content of the communication. It involves more than mere proofreading, but at the same time does not require full decision-making authority, *i.e.*, a client having the “final say” in a work product does not exempt the role played by the consultant in creating the message.

If a consultant’s participation in a grassroots campaign constitutes control over delivery and input into content, the activity becomes reportable lobbying for the consultant and may require registration and reporting.

**Exceptions**

In reiterating that the conduct must involve participation in both the content and delivery, JCOPE notes that each of the following activities or roles would not alone be lobbying under this test:

1. Billboard or sign owners;
2. Copy editing;
3. Advertisement writers;
4. Storyboard artists;
5. Film crews;
6. Photographers;
7. Video editors;
8. Website managers, hosts, or internet service providers;
9. Media outlets or broadcasters; 21
10. Media buyers or placement agents;
11. Secretaries, clerical, and ministerial staff.

Additionally, existing exceptions and limitations in the Lobbying Act would also apply, ensuring that attorneys who draft opinions, research, or memos 22; non-lobbying staff; or others are not unnecessarily captured by the law.

**Conclusion**

JCOPE has identified a class of participants in lobbying efforts who, while potentially engaging in lobbying activities, have called themselves something other than lobbyists. Through this opinion, JCOPE has means to clarify the criteria when those activities require registration and

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21 See also Lobbying Act Section 1-c(c)(B).
22 Lobbying Act Section 1-c(c)(A).
reporting under the Lobbying Act, and when those activities need only be disclosed as expenses incurred by another lobbyist.