ARTICLE

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The Advent of State and Local Lobby Regulations and the Legal and Ethical Considerations for Attorneys

Abstract. Advocacy is the primary goal and responsibility of two distinct and well-regulated professions: the lawyer and the lobbyist, each of whom is subject to his own set of rules and regulations. This Article is designed to analyze the intersection of the lawyer's Disciplinary Code with developing rules governing advocacy in the policy-making arenas throughout Texas. Increasingly, the line between legal and legislative advocacy has become blurred as more local Texas entities turn to state lobby regulations for inspiration. This Article will consider the state Lobby Law, including its history and structure, as a framework for subsequent efforts to regulate lobbying and will identify the common elements of lobby regulation systems, with a particular focus on their treatment of attorneys. It will also analyze how, at every level in Texas, the rules of engagement regarding communication and advocacy are being imposed with varying and significant consequences for attorneys, with a particular emphasis on how local governmental entities are literally rewriting those rules of engagement. Finally, this Article will analyze the potential consequences for all who advocate before governmental entities and attempt to influence public servants, including criminal and ethical issues, with a particular focus on attorneys engaged in lobbying. As local lobby regulations become more common, attorneys dealing with local governments will be forced to examine the fundamental aspects of the legal practice, including the structure of the representation, the nature of advocacy and communication, and the meaning of confidentiality.

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"Those who do not use local guides cannot take advantage of the ground."
Sun Tzu, The Art of War[1]

I. INTRODUCTION

The world is shaped primarily by decisions made by us or for us in almost every aspect of our lives. These decisions, made through the process of advocacy, influence both the mundane and routine parts of our daily lives and impart a critical and long-term impact on life itself.

The professional world of governmental advocacy is a major player in the realm of decision-making. Given the importance of such decisions, it is not surprising that citizens seek to influence them. This Article focuses on legal intricacies regarding lobbying, or communicating to influence decisions. Lobbying exists at every level of government and has influenced

1. SUN TZU, THE ART OF WAR 167 (Thomas Cleary, trans., Shambhala Publ'ns, Inc. 2000) (c. 2 B.C.E.).

the legislative branch throughout history.[2] Regulation differs significantly by venue, from the highly regulated and transparent to a complete lack of structured regulation. In Texas, the regulation of lobbyists at the state level evolved from an outright prohibition with criminal penalties to a well-regulated system of registration, reporting, administrative rules, and interpretive guidance (although some violations still carry criminal penalties).

Traditional legal work in which licensed professionals are paid to advise, strategize, interpret, and advocate is subject to specific rules and regulations. In a legislative setting, however, those same behaviors have historically been forbidden, and more recently regulated with an emphasis on disclosure. The behaviors that come naturally to the advocate trained in the law have transitioned from being strictly prohibited to being the subject of mandatory disclosure when the advocate is acting as a lobbyist.

Increasingly, more local governments—mostly municipalities—are adopting local ethics regulations to govern the conduct of officers, employees, and those seeking to do business with local governments. These regulations, which have historically focused on the conduct of elected and appointed officials, are expanding to include local lobbying regulations. The local rules include standards for determining who qualifies as a local lobbyist, registration requirements, mandatory periodic reporting, and limitations on behavior intended to influence decision makers. Throughout Texas, local governmental entities are literally rewriting the rules of engagement regarding communication and advocacy with varying and significant consequences for attorneys.

It is difficult to discern how, if at all, the evolution of state-level lobby regulations, and the advent of lobby rules at the local level, were influenced by the ethical standards imposed upon the legal profession. Lawyers have long been subject to rules designed to ensure the integrity of the legal profession. These standards, currently codified in the Texas Disciplinary Rules of Professional Conduct, address many of the same concepts as lobbying rules.

This Article is designed to analyze the intersection of the lawyer's Disciplinary Code with developing rules governing advocacy in the policy-making arenas throughout Texas. It will consider the state Lobby Law—including its history and structure—as a framework for subsequent efforts

2. *See* Peter Grier, *The Lobbyist Through History: Villainy and Virtue*, CHRISTIAN SCIENCE MONITOR (Sept. 28, 2009), http://www.csmonitor.com/USA/Politics/2009/0928/the-lobbyist-through-history-villainy-and-virtue ("Congress has always had, and always will have, lobbyists and lobbying." (quoting Senator Byrd (D) of West Virginia during a 1987 floor speech)).

to regulate lobbying. The common elements of lobby regulation systems will be identified, with a particular focus on the impact on lawyer–lobbyists. Finally, this Article will analyze the consequences, both criminal and ethical, affecting those who advocate before governmental entities and attempt to influence public servants, with an emphasis on attorneys engaged in lobbying. As a result of expanding local lobby regulations, attorneys involved with local governments reexamine fundamental aspects of the legal practice, such as the structure of representation, the nature of advocacy and communication, and the meaning of confidentiality.

II. THE REGULATION OF LOBBYISTS BY THE STATE OF TEXAS

Today in Texas, lobbying the legislature is a well-regulated profession. This was not always the case. In the early 1900s, lobbying was a crime:

> That if any paid or employed agent, representative or attorney of any person, association or corporation, shall, at any place in this state, after the election and during the term of office of any member of the Legislature of this state, privately solicit the vote, or privately endeavor to exercise any influence, or offer anything of value or any other inducements whatever, to any such member of the Legislature, to influence his action concerning any measure then pending or thereafter to be introduced, in either branch of the Legislature of this State, he shall be deemed guilty of lobbying.[3]

A person convicted of lobbying faced a "fine of not less than two hundred dollars nor more than two thousand dollars" and imprisonment between six months and two years.[4]

This lobbying prohibition was central to some noteworthy Texas contract cases of the early twentieth century. In *Graves & Houtchens v. Diamond Hill Independent School District*,[5] decided in 1922, a Texas appellate court cited this penal provision, among a litany of persuasive authorities from across the country, to nullify a contract for lobby services.[6] The Diamond Hill Independent School District retained Graves & Houtchens to advocate for the defeat of pending legislation, the passage of which would have hindered the district's taxing authority.[7] The firm

3. Act to Define and Punish Lobbying, 30th Leg., R.S., ch. 79, § 2, 1907 Tex. Gen. Laws 162, 163, *repealed by* Representation Before the Legislature Act, 55th Leg., 1st C.S., ch. 9, 1957 Tex. Gen. Laws 17.

4. *Id.* § 4.

5. Graves & Houtchens v. Diamond Hill Indep. Sch. Dist., 243 S.W. 638 (Tex. Civ. App.—Fort Worth 1922, no writ).

6. *Id.* at 639–40.

7. *Id.* at 638 (claiming the passage of a proposed bill would diminish the school district's taxing ability).

entreated lawmakers to kill the legislation on a contingent fee basis, taking credit for its ultimate demise.[8] However, when the district refused to pay the agreed sum of $890, the firm sued the district.[9] In reviewing the matter, the court held that a contract to influence privately the outcome of legislation was void as a matter of law and public policy.[10] Among the many authorities cited by the court was *Williston on Contracts*, opining, "[A]n agreement by a legislator to exercise his judgment in a particular way is not binding at law. His promise, if without consideration, is not binding for that reason, and if he bargains for consideration it is illegal."[11]

Davis v. Texas Farm Bureau Cotton Association[12] involved an attorney (and former legislator) who was retained by an association to represent its interests before the legislature.[13] Initially paid $500 for two days of work, the lawyer testified before committees regarding the bill his client was interested in and provided committee members with requested information.[14] However, his stay in Austin and the scope of his advocacy grew greater than originally envisioned, stretching to a twelve-day stay and resulting in a contractual fee dispute.[15] During the course of the representation, the attorney conversed with many of his former colleagues both socially and regarding the bill his client was interested in.[16] The attorney admitted that he dined with some of them, but adamantly denied that he sought private meetings with them for the purpose of influencing their votes; rather, he testified the exchanges were initiated by the legislators and that he merely answered their questions.[17] After the hired advocate brought suit for his fees, the association alleged in its defense that the attorney privately solicited the votes of legislators, which violated the

8. *Id.* (citing the firm's claim that "had it not been for their influence and efforts, . . . [lawmakers] would have voted favorably" for the bill).

9. *Id.*

10. *Id.* at 639.

11. 3 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 1727 (1920); *see* Davis v. Tex. Farm Bureau Cotton Ass'n, 62 S.W.2d 90, 96 (Tex. Comm'n App. 1933) ("Personal influence exerted over the individual members of a Legislature will vitiate a contract, the consideration of which is the procurement of legislative action. Such a contract should be held void though there is no actual corruption in the particular case. Although the contract may not expressly provide for personal solicitation it will be declared illegal if it appears that in carrying out the contract it is necessary to resort to 'lobbying' . . . .").

12. Davis v. Tex. Farm Bureau Cotton Ass'n, 62 S.W.2d 90 (Tex. Comm'n App. 1933).

13. *Id.* at 91.

14. *Id.* at 92–93.

15. *Id.*

16. *Id.* at 94.

17. *Id.*

criminal prohibition on lobbying.[18]

In its decision, the court found that even an appeal to a legislator's reason, if made privately by a paid agent, falls within the purview of the statute.[19] "Whenever any such paid or employed representative goes beyond the limitations of the statute and singles out individual legislators, privately, and either by argument or otherwise endeavors to influence their action, he transgresses the law, however fair in intent he may be."[20] The court ruled that personal influence exerted over individual legislators violated the lobby law, thereby vitiating a contract for otherwise lawful advocacy.[21] The court's holding clarified that mal-intent was not required on the part of the lobbyist; rather, it held the contract was unenforceable because of its "tendency to be injurious to the public."[22]

The penalty for violation of the lobbying prohibition was substantial—a monetary fine of $200 to $2,000 and possible jail time of six months to two years—but there is no record of it ever being enforced.[23] Indeed, the two reported cases both dealt with civil suits filed by the lobbyist to enforce payment of their fees.[24]

The first significant change in the regulatory scheme governing lobbying occurred in 1937 when the Texas House adopted rules requiring persons testifying before house committees to register and provide certain information before testifying.[25]

18. *Id.* at 93–95 (summarizing parts of the defendant's testimony containing allegations of lobbying on behalf of the association by Mr. Davis).

19. *Id.* at 95. The *Davis* court first considered Article 179 of the lobbying statute and concluded that while that particular provision permits persons with a direct interest in the pending measure to attempt to influence the members of the legislature; however, that influence was limited to appeals to reason. *Id.* It then considered Article 180, which applied to "paid agents, representatives, and attorneys" and prohibited any attempt to influence legislators, including by appeal to reason. *Id.*

20. *Id.* at 96.

21. *Id.* ("Although the contract may not expressly provide for personal solicitation it will be declared illegal if it appears that in carrying out the contract it is necessary to resort to 'lobbying' . . . .").

22. *Id.* at 97.

23. *Cf.* Act to Define and Punish Lobbying, 30th Leg., R.S., ch. 79, § 4, 1907 Tex. Gen. Laws 162, 163 (providing a monetary fine and jail time for violation of lobbying statute) (repealed 1957).

24. *See Davis*, 62 S.W.2d at 91 (initiating suit to collect fees for lobbying services); Graves & Houtchens v. Diamond Hill Indep. Sch. Dist., 243 S.W. 638, 638 (Tex. Civ. App.—Fort Worth 1922, no writ) (attempting to recover remaining balance on lobbying fees).

25. Tex. H.R. Rule 7 § 41, H.S.R. 9, 54th Leg., R.S., 1955 H.J. of Tex. 16, *reprinted in Rules of the House*, Texas Legislative Manual 175–76 (1955).

A. *History*

1. 1957

Although the adoption of the 1937 House Rules was significant, the real precursor to the present day law on lobbying was the 1957 passage of the Representation Before the Legislature Act (S.B. 2).[26] This legislation repealed all of the 1907 Penal Code provisions criminalizing the practice of lobbying and replaced them with a registration statute that required those who engage in "direct communications" to register with the Secretary of State and report their clients as well as expenditures on lobbying efforts.[27] However, the revision to the statutes did not completely broaden the permissible activities of persons engaged in lobbying.

The definition of direct communication in S.B. 2 allowed not only personal appearance before a legislative committee, but also the following:

> [P]ersonal contact or communication with any member of the Legislature for the purpose of explaining, discussing, or arguing for or against pending or proposed legislation or any action thereon by the Legislature, the Governor or the Lieutenant Governor during a session of the Legislature, to argue for or against pending legislation or any action thereon by the Legislature, the Governor, or the Lieutenant Governor.[28]

No longer were paid agents, representatives, or attorneys prohibited from privately soliciting the vote of legislators or privately attempting to exercise any influence over them.[29] Additionally, the new law required lobbyists to report expenditures and register with the state if those expenditures exceeded fifty dollars.[30]

Offsetting this seemingly broad provision was the retention of the

26. Representation Before the Legislature Act, 55th Leg., 1st C.S., ch. 9, 1957 Tex. Gen. Laws 17, *repealed by* Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 479, § 224, 1985 Tex. Gen. Laws 1652, 1719.

27. *Id.* § 3, 1957 Tex. Gen. Laws 17, 18.

28. *Id.* § 2(e), 1957 Tex. Gen. Laws 17, 17.

29. *Id.*

30. *Id.* § 3(c), 1957 Tex. Gen. Laws 17, 18 (providing that a person with expenditures of more than $50 must register and report such expenditures). While not reaching the level of regulation that legislative contact reporting required, the 1957 legislation also initiated, for the first time, a requirement that practitioners before state agencies sign a register at the state agency whenever they contacted any state employee or official. Act of Dec. 2, 1957, 55th Leg., 1st C.S., ch. 9, § 2, 1957 Tex. Gen. Laws 30, 30 (requiring registration of "every person appearing before a state agency or contacting in person any officer or employee thereof on behalf of any other person, firm, partnership, corporation[,] or association"). This provision can now be found in similar form in Chapter 2004 of the Texas Government Code, but without the central filing requirement. TEX. GOV'T CODE ANN. ch. 2004 (West 2008).

limitation initially found in Article 179 of the early Penal Code that prohibited influencing "the vote of any member of the Legislature or the Lieutenant Governor or the approval or veto of the Governor on any pending legislation *other than by an appeal to reason*."[31] Ostensibly, this provision would still prohibit attempts to influence by means viewed as less than direct.

2. 1973

Following the Sharpstown Scandal of 1971,[32] which led to the replacement of a majority of members of the legislature in the 1972 elections, the Legislature passed the Lobby Control Act (H.B. 2). Its passage repealed the 1957 Representation Before the Legislature Act and created the state's first full lobby registration law.[33] The Act required registration with the secretary of state by persons compensated for or making certain expenditures when communicating directly with the legislative or executive branch to influence legislation.[34] Considerably pared down from its initial introduced version,[35] the final bill retained much of the registration framework that served as the basis for the current law.[36] Significantly, the "appeal to reason" language was excluded, thereby eliminating the final barrier to private communications and expenditures for non-substantive lobby contacts.[37] In place of the excluded language was a mechanism and requirement for reporting expenditures and public disclosure of client information.[38]

31. Representation Before the Legislature Act, 55th Leg., 1st C.S., ch. 9, § 11, 1957 Tex. Gen. Laws 17, 19 (emphasis added) (repealed 1973).

32. *See* Sam Kinch, Jr., *Sharpstown Stock-Fraud Scandal*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/mqs01 (last visited May 9, 2013) (discussing the infamous scandal involving state officials who made "profitable quick-turnover bank-financed stock purchases in return for the passage of legislation desired by the financier").

33. Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096, *repealed by* Act of Sept. 1, 1985, 69th Leg., R.S., ch. 479, § 224, 1985 Tex. Gen. Laws 1652, 1719.

34. *Id.* § 3, 1973 Tex. Gen. Laws 1096, 1097.

35. *Compare* Comm. on State Affairs, Bill Analysis, Tex. H.B. 2, 63d Leg., R.S. (1973) (containing several classes for registration, such as employees of those who influence legislation), *with* Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096 (containing only two classes for registration) (repealed 1985).

36. *See generally* TEX. GOV'T CODE ANN. § 305.003 (West Supp. 2012) (resembling the registration provisions of the Lobby Control Act).

37. *Compare* Representation Before the Legislature Act, 55th Leg., 1st C.S., ch. 9, § 11, 1957 Tex. Gen. Laws 17, 20 (maintaining early Penal Code language on "appeal to reason") (repealed 1973), *with* Lobby Control Act, 63d Leg., R.S., ch. 422, 1973 Tex. Gen. Laws 1096 (lacking the language of "appeal to reason") (repealed 1985).

38. *See* Lobby Control Act, 63d Leg., R.S., ch. 422, §§ 5–6, 1973 Tex. Gen. Laws 1096, 1097–98 (describing registration and the information to be disclosed) (repealed 1985).

3. 1991

The progression of Texas statutes from prohibiting to regulating the conduct of lobbyists was muddled by difficult and sometimes conflicting statutory requirements and regulatory exceptions.

However, the Lobby Control Act of 1973 established a framework for local lobby ordinances that followed. These notable frames included the triggering mechanisms of communication, compensation, and expenditures, the addition of disclosure requirements, as well as the enumeration of certain exceptions.[39] Almost twenty years later, the current Texas Lobby Law was passed on the heels of a media uproar after poultry magnate Lonnie "Bo" Pilgrim handed out $10,000 campaign contributions on the senate floor during a debate on workers compensation legislation in which he had a strong interest.[40]

The 72nd Legislature passed two significant measures to set the stage for future ethics regulation in Texas. The first was the passage of Senate Joint Resolution 8, a constitutional amendment that established the Texas Ethics Commission, which was adopted by the voters on November 5, 1991.[41] The second was the passage of Senate Bill 1, the implementing legislation for the yet-to-be adopted constitutional amendment.[42] This legislation effected revisions to existing lobby law and regulated communications with all state-level officials and employees, including, for the first time, communications designed to influence the outcome of administrative actions.[43] The reforms, however, did not reach officials below the state level, nor did they reach federal activities or the state judiciary.[44] Unlike other states that have extended lobby laws to local

39. *See generally id.* § 3, 1973 Tex. Gen. Laws 1096, 1097 (regulating activities based on communication, compensation, and expenditures) (repealed 1985).

40. *See Texas Businessman Hands Out $10,000 Checks in State Senate*, N.Y. TIMES (July 9, 1989), http://www.nytimes.com/1989/07/09/us/texas-businessman-hands-out-10000-checks-in-state-senate.html (reporting on Lonnie Pilgrim's contributions). *See generally* Act of Jan. 1, 1992, 72d Leg., R.S., ch. 304, 1991 Tex. Gen. Laws 1290 (chronicling amendments and expansions on then-existing lobby laws), *amended by* Act of Sept. 1, 1995, 74th Leg., R.S., ch. 996, § 4.03, 1995 Tex. Gen. Laws 4999 (current version at GOV'T § 305.003 (West Supp. 2012)).

41. Tex. S.J. Res. 8, 72d Leg., R.S., 1991 Tex. Gen. Laws 3520, 3520–21 (amending the Constitution to create the Texas Ethics Commission); *see* TEX. CONST. art. III, § 24a (providing for the Texas Ethics Commission).

42. Act of Jan. 1, 1992, 72d Leg., R.S., ch. 304, § 2.06, 1991 Tex. Gen. Laws 1290, 1308, *amended by* Act of Sept. 1, 1995, 74th Leg., R.S., ch. 996, § 2, 1995 Tex. Gen. Laws 4999, 5000 (current version at GOV'T § 305.005 (West Supp. 2012)).

43. *Id.* § 2.03, 1991 Tex. Gen. Laws 1290, 1304–05, *amended by* Act of Sept. 1, 1995, 74th Leg., R.S., ch. 996, § 4.03.

44. *Id.*

public sector officials and servants,[45] Texas has not addressed lobbying at the local level; instead, it has relied on prohibitions in the Texas Penal Code and piecemeal restrictions at the local level.

4. 2003

In 2002, for the first time since its creation, the Texas Ethics Commission endured the scrutiny of the Texas Sunset Commission, leading to the generation of legislation that would subject the Commission to oversight.[46] The law regulating lobbyists was basically left intact, other than changes to expenditure reporting[47] and conflict of interest rules,[48] which clarified its application to both lawyers and non-lawyers.[49]

B. *Current Code*

1. Chapter 305 of the Government Code

Texas lobbying regulations are primarily located in Chapter 305 of the Government Code and in the rules adopted by the Texas Ethics Commission pursuant to Chapter 305.[50] This statute and the applicable rules will be referred to collectively as the "Lobby Law." Some provisions of Chapter 305 apply to all members of the public, as well as all state employees, and not merely to registrants under the Code.[51] Generally,

45. *See, e.g.*, N.Y. LEGIS. LAW art. 1-A, § 1-c (McKinney 2008) (applying to the passage of local laws).

46. *See* Act of Sept. 1, 2003, 78th Leg., R.S., ch. 249, § 1.02, 2003 Tex. Gen. Laws 1123, 1123 (making the Texas Ethics Commission subject to oversight), *amended by* Act of June 17, 2011, 82d Leg., R.S., ch. 1232, § 1.03, 2011 Tex. Gen. Laws 3278, 3278 (current version at GOV'T § 571.022 (West Supp. 2012)).

47. *See id.* § 4.06, 2003 Tex. Gen. Laws 1123, 1147 (changing disclosures), *amended by* Act Relating to Reporting of Expenditures by Persons Registered As Lobbyists, 79th Leg., R.S., ch. 206, § 2, 2005 Tex. Gen. Laws 366, 367 (current version at GOV'T § 305.0061 (West Supp. 2012)).

48. *See id.* § 4.08, 2003 Tex. Gen. Laws 1123, 1148–49 (altering the meaning of a conflict of interest), *amended by* Act Relating to Prohibited Conflicts of Interest of Registered Lobbyists, 79th Leg., R.S., ch. 218, §§ 1, 3, 2005 Tex. Gen. Laws 382, 382–83 (current version at GOV'T § 305.028 (West Supp. 2012)).

49. The provisions of the lobby law conflicts statute, while patterned after the conflicts language contained in 1.04 of the Texas Disciplinary Rules, is in some ways more encompassing than the provisions traditionally applied to lawyers. The lawyer–lobbyist is governed by and subject to both provisions.

50. *See* GOV'T ch. 305 (West 2005 & Supp. 2012) (putting forth lobby regulations); 1 TEX. ADMIN. CODE ch. 34 (2012) (Tex. Ethics Comm'n, Regulation of Lobbyists) (providing further regulation).

51. *Compare* GOV'T § 305.003 (West Supp. 2012) (referring to persons required to register, defined as "registrants" in section 305.002(9) of the Texas Government Code), *with id.* § 305.002(8) (referring generally to persons, defined as "an individual, corporation, association, firm, partnership,

however, the provisions apply to those individuals or entities required to register under Chapter 305 and Chapter 34 of the Commission rules.[52] It is important to note that the term "registrant" means anyone required to register as a lobbyist, including both those that have properly registered and those that should have registered, but have failed to do so.[53] While entities are considered persons under the Code and are required to register, they may avoid registration if an associated lobbyist reports the income or expenditures that the entity would otherwise have to report.[54]

There is no statutory or regulatory definition of "lobbyist," but the requisite analysis begins with a parsing of what it means to communicate. The key element that must exist before registration is required is that a person must "communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action."[55] To communicate means to "contact in person or by telephone, telegraph, letter, facsimile, electronic mail, or other electronic means of communication."[56] Through its advisory opinions, the Texas Ethics Commission has determined that "goodwill communications," which may not even reference a client's interest or request any active consideration, are considered direct communications that trigger a registration determination.[57] Goodwill is considered a communication "to generate or maintain goodwill for the purpose of influencing potential future legislation" or administrative action.[58]

Once a person is deemed to have communicated pursuant to Chapter 305, there are two statutory thresholds that determine whether registration is required. The operative terminology in the Lobby Law is that once a person directly communicates to influence legislation or administrative

committee, club, organization, or group of persons who are voluntarily acting in concert").

52. *See id.* § 305.0021 (governing a registrant and his agent); 1 ADMIN. § 34.81 (2012) (Tex. Ethics Comm'n, Election to File Annually) (addressing the activity report of a registrant).

53. *See* GOV'T § 305.002(9) (defining registrant as a person who must register under section 305.003).

54. *See id.* § 305.002 (defining registrant to include entities); 1 ADMIN. § 34.45 (2012) (Tex. Ethics Comm'n, Entity Registration) (authorizing this exception to entity registration).

55. GOV'T § 305.003; 1 ADMIN. § 34.41 (2012) (Tex. Ethics Comm'n, Expenditure Threshold).

56. GOV'T § 305.002; 1 ADMIN. § 34.1 (2012) (Tex. Ethics Comm'n, Definitions).

57. *See* Tex. Ethics Comm'n Op. No. 94, at 1 (1992) (paying travel expenses required registration); Tex. Ethics Comm'n Op. No. 90, at 2 (1992) (making a deer lease available for trips is communication); Tex. Ethics Comm'n Op. No. 89, at 3 (1992) (holding there could be direct communication during a hunting trip); Tex. Ethics Comm'n Op. No. 34, at 1 (1992) (hosting parties requires registration).

58. Tex. Ethics Comm'n Op. No. 467, at 1 (2006).

action, he, she, or it[59] triggers a need to determine if one of the thresholds requiring registration has been crossed.

The first type of threshold is based on expenditures made for the practice of lobbying. Once a person communicates directly, she must consider the current calendar quarter and determine if she has spent $500 or more in certain reportable lobby expenditures.[60] If she has, then she must register.[61]

The second type of threshold is tied to the amount of compensation received for lobby activities. A person paid or expected to be paid $1,000 or more in a calendar quarter is required to register when communicating directly to influence legislation or the outcome of any administrative action.[62] The term legislation is defined broadly in the Code[63] so it becomes difficult to envision any matter that would not fit into the definition. The definition of administrative action is equally broad: "'Administrative action' means rulemaking, licensing, or any other matter that may be the subject of action by a state agency or executive branch office . . . includ[ing] the proposal, consideration, or approval of the matter or negotiations concerning the matter."[64]

59. GOV'T § 305.002 (including entities in the Lobby Law definition of person).

60. *See id.* § 305.003 (deferring the amount of expenditure to commission rule); 1 ADMIN. § 34.41 (making $500 the minimum expenditure). The $500 requisite does not include personal expenses for travel, food or lodging. GOV'T § 305.003(a)(1). The Texas Government Code states that the minimum statutory amount will be $200, but defers to the Commission to set any amount above that. *Id.*

61. GOV'T § 305.003(a)(1) (authorizing the Ethics Commission to set the amount); 1 ADMIN. § 34.41(a) (2012) (Tex. Ethics Comm'n, Expenditure Threshold) (requiring registration if expenditures exceed $500). The Commission has set the compensation threshold at $1,000, but retains the power to change that amount by rule. GOV'T§ 305.003(a)(2); 1 ADMIN. § 34.43(a) (2012) (Tex. Ethics Comm'n, Compensation and Reimbursement Threshold).

62. GOV'T § 305.003(a)(2); 1 ADMIN. § 34.43(a).

63. GOV'T § 305.002(6).

64. *Id.* § 305.002(1) (defining administrative action). The potential of requiring lobby registration for everyone in the state who was paid a minimal sum over a calendar quarter to communicate with any state level official or employee was so broad that the original working group convened to assist with the implementation of the new law recommended a rulemaking to address the issue. *See* 21 Tex. Reg. 11820 (1996) (codified at 1 ADMIN. § 34.43) (adopting the 5% provision). Thus was born the "5% rule." 1 ADMIN. § 34.43. Once communication occurs, triggering possible registration, individuals must then determine if they have been compensated more than $1,000 in that quarter. *Id.* If so, they must register if they have spent 5% or more of their compensated time communicating or preparing to communicate during the same quarter. *See id.* (accounting for communication and the preparation to communicate). The Ethics Commission adopted a rule defining the elements of preparation time to consider in the calculation of 5%. *Id.* § 34.3 (Tex. Ethics Comm'n, Compensation for Preparation Time). In short, anything done to bring a person up to speed, educate, refresh, strategize, or other background preparation for communication counts toward the 5% threshold. *See id.* (describing preparations to communicate).

2. Exceptions

Despite the broad definition of actions that trigger the registration requirements, the legislature has statutorily provided numerous exceptions.[65] The most prevalent statutory exceptions to the registration requirements include exceptions for: (1) those individuals whose influential communication with the legislature or executive branch involves "an appearance before or testimony . . . in a hearing conducted by or on behalf of either the legislative or the executive branch and who does not receive special or extra compensation for the appearance other than actual expenses incurred in attending the hearing;"[66] and (2) written communications by an attorney of record in a docketed case before a state agency.[67] The statute also recognizes that certain individuals attempting to influence state purchasing decisions warrant exemption from the registration requirements.[68] Consequently, communications regarding certain agency purchasing decisions may be exempt depending on the monetary value of the procurement, whether the person attempting to influence the sale is an employee or a contractor, and whether the compensation to be paid is on a contingency basis.[69]

In addition to the statutory exceptions, the Texas Ethics Commission, by rule, has established exceptions to the compensation threshold.[70] Certain exceptions are particularly relevant for practicing lawyers. For example, communicating with state personnel or providing testimony in connection with an adjudicative proceeding or litigation does not trigger registration, nor do communications relating to an agency's rulemaking process.[71]

These triggers, thresholds, and exceptions are important to understand because they serve as the basis for most of the local lobby ordinances subsequently discussed in this Article.

Unanswered—and to date unasked—questions remain in the discussion of the implications of registration provisions on non-typical state entities.

The 5% threshold also includes time spent engaging in goodwill communications. *See id.* (counting time used to influence legislation).

65. *See, e.g.*, GOV'T § 305.004 (West 2005) (enumerating exceptions from the registration requirements of Chapter 305).

66. *Id.* § 305.004(2).

67. *Id.* § 305.003(c) (West Supp. 2012).

68. *Id.* § 305.0041(a).

69. *Id.* § 304.0041(a).

70. TEX. ETHICS COMM'N RULES § 34.5 (Dec. 2012), *available at* http://www.ethics.state.tx.us/rules/rules12.pdf.

71. *Id.* (outlining activities not invoking the registration requirements of Chapter 305).

For example, the question of the need to register when communicating with state university employees to influence their decisions regarding research projects or grants is but one of literally scores of "communications triggering registration" hypothetical dilemmas that might present problems if presented as a complaint to the Commission or proper prosecutorial authority.

3. Criminal Enforcement Provisions

Chapter 305 contains language creating a Class A misdemeanor offense if that person "intentionally or knowingly violates a provision of this chapter."[72] However, it is a third degree felony for a person to retain a lobbyist, or for a person to lobby, "for compensation that is totally or partially contingent on the passage or defeat of any legislation . . . veto of legislation . . . or administrative action."[73] The prohibition on contingent-fee lobbying has made its way into several local lobby ordinances, albeit in different forms, with some localities prohibiting the practice[74] while others simply require its disclosure.[75]

Title 8 of the Texas Penal Code, entitled "Offenses Against Public Administration," contains eight offenses under the heading "Bribery and Corrupt Influence."[76] Any attorney interacting with public servants at the state or local level should be aware of Title 8, or risk inadvertently violating its provisions. Practitioners who provide any type of benefit to public officials or employees should be cognizant of the gift restrictions, and relevant exceptions, found in Chapter 36.[77] To avail oneself of the exceptions to the gift statute, an advocate must be familiar with the definitions, prohibitions, and exceptions in the Code, and be able to reconcile those with any applicable local regulations.[78]

The Texas Penal Code creates two separate offenses related to gifts, or "benefits" in statutory language. First, it is a crime to solicit or receive a gift, and second, it is a separate offense to offer or give a gift.[79]

72. GOV'T § 305.031(a) (West Supp. 2012).

73. *Id.* §§ 305.022(a), 305.031(b) (West 2005 & West Supp. 2012).

74. *See, e.g.*, AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-8(C) (2012) (prohibiting persons engaged in lobbying from receiving compensation on a contingent fee basis).

75. *See, e.g.*, DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.5(c)(4) (2012) (allowing lobbyists to receive compensation on a contingent fee basis but requiring its disclosure).

76. TEX. PENAL CODE ANN. tit. 8, ch. 36 (West 2011 & Supp. 2012).

77. *See id.* §§ 36.08–.10 (outlining the restrictions and exceptions to providing gifts to public servants).

78. *See id.* tit. 8, ch. 36 (defining terms applicable to gift statute, promulgating prohibitions on providing gifts to public servants, and listing exceptions to prohibited conduct).

79. *See id.* §§ 36.08–.09 (West 2011) (bifurcating offenses relating to gifts to public servants

Significantly, gift prohibitions do not prescribe a culpable mental state.[80] Therefore, the required mental state must be ascertained from Penal Code section 6.02, which deems proof of recklessness sufficient for sustaining a conviction.[81]

Section 36.10 of the Penal Code sets out exceptions to the gift laws.[82] The statute further states that sections 36.08 and 38.09 "[do] not apply to food, lodging, transportation, or entertainment accepted as a guest and, if the donee [and donor] is required by law to report those items, reported by the donee [and donor] in accordance with that law."[83] To take advantage of this exception, both the donor and donee must meet relevant reporting requirements.[84]

There are numerous state statutes requiring (1) the reporting of gifts;[85] (2) that certain public officials file personal financial statements;[86] and (3) adherence to the conflict of interest provisions for public officials and vendors.[87] However, the adoption of each municipal ethics ordinance brings a new legal reporting requirement. Therefore, in the event an attorney provides food, lodging, transportation, or entertainment to a public official, before that lawyer can rely on the defense provided by section 36.10(c), those expenses must be reported in accordance with the reporting requirements established by the municipal's lobby ordinance. Otherwise, both the lawyer and the local official face Class A misdemeanor charges.

Title 8 of the Penal Code creates another offense that is equally punitive but disturbingly vague. The crime of improper influence harkens back to the original prohibition on lobbying, by making it an offense for a person to *privately address* a "public servant who exercises or will exercise official

into one that penalizes receiving a gift and another that penalizes giving a gift).

80. Hubbard v. State, 668 S.W.2d 419, 421 (Tex. App.—Dallas 1984), *rev'd on other grounds*, 739 S.W.2d 341 (Tex. Crim. App. 1987) (en banc); *see* PENAL §§ 36.08–.09 (failing to establish a requisite mental state for the offenses).

81. PENAL § 6.02 (West 2011); *Hubbard*, 668 S.W.2d at 421.

82. PENAL § 36.10 (West Supp. 2012).

83. *Id.* § 36.10(b), (c).

84. *See id.* § 36.10(b) (controlling donee reporting); *id.* § 36.10(c) (governing donor reporting).

85. *E.g.*, TEX. GOV'T CODE ANN. § 305.006(b) (West Supp. 2012) (itemizing what categories of gifts must be reported)

86. *See id.* § 572.021 (West 2012) (requiring certain state officials to file a personal financial statement); TEX. LOC. GOV'T CODE ANN. §§ 145.001, 145.003 (West 2008) (obligating municipal officials for cities with a population over 100,000 to file personal financial statements); *id.* §§ 159.001, 159.003 (West 2008 & West Supp. 2012) (mandating county officials for cities with a population over 100,000 must file personal financial statements).

87. *See generally* LOC. GOV'T ch. 171 & 176 (West 2008 & Supp. 2012).

discretion in an adjudicatory proceeding with [the] intent to influence the outcome of the proceeding *on the basis of considerations other than those authorized by law*."[88] Neither the statute nor case law provides much guidance as to what is meant by "considerations other than those authorized by law."[89]

In *City of Stephenville v. Texas Parks & Wildlife Department*,[90] the court found evidence of influence that was both blatant and effective.[91] While both were embroiled in a contested case pending before a state commission, a lawyer met privately with a state commissioner and offered to help get the commissioner re-appointed by the governor.[92] Judging from the facts recounted in the court's opinion, the influence was quite effective: the commissioner changed his vote, reversing the commission's prior action.[93] Should an attorney interacting with local officials be concerned about the offense of improper influence or the manner in which it may intersect with a local lobby ordinance? Would communication with a local official in violation of a local lobby ordinance constitute an attempt to "influence the outcome of the proceeding on the basis of considerations other than those authorized by law"?[94] Would compliance with a local lobby ordinance validate an otherwise questionable private entreaty? These are all issues for the cautious lawyer to take into consideration.

Both the bribery statute[95] and the gift statutes[96] recognize the role of lobby activities, expressly exempting transactions made in accordance with the Lobby Law.[97] The bribery statute provides that a benefit offered, conferred, solicited, or accepted is permissible if made and reported in accordance with Chapter 305 of the Government Code.[98] It remains an offense if the benefit is offered, conferred, solicited, or accepted "pursuant

88. PENAL § 36.04(a) (West 2011) (emphasis added). An "adjudicatory proceeding" includes "any proceeding before a court or any other agency of government in which the legal rights, powers, duties, or privileges of specified parties are determined." *Id.* § 36.04(b).

89. *Id.* § 36.04(a).

90. City of Stephenville v. Tex. Parks & Wildlife Dep't, 940 S.W.2d 667 (Tex. App.—Austin 1996, writ denied).

91. *Id.* at 671.

92. *Id.* at 672.

93. *Id.* at 673.

94. PENAL § 36.04(a).

95. *Id.* § 36.02 (West 2011).

96. *Id.* §§ 36.08–.09.

97. *See id.* § 36.02(d) (excepting "expenditure[s] made and reported in accordance with Chapter 305, Government Code" from the bribery penalty); *id.* § 36.10(a)(5) (West Supp. 2012) (exempting "a gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305, Government Code").

98. *Id.* § 36.02(d) (West 2011).

to an express agreement to take or withhold [an act] of official discretion"; however, prosecution of such an offense requires direct evidence of an express agreement.[99] The exceptions to the general prohibition on the giving and receiving of gifts also incorporate the Lobby Law by exempting any "gift, award, or memento to a member of the legislative or executive branch that is required to be reported under Chapter 305."[100]

During the previous century, the state law relating to lobbying has moved from outright prohibition to a well-regulated system with an emphasis on disclosure. Even the Penal Code has been modified to account for the Lobby Law.[101] This incremental movement toward disclosure continues in Texas through the present day; municipalities have implemented the tenets of a regulated and transparent system at the local level in an attempt to address issues of influence peddling.[102] As discussed immediately below, the evolution of state-level lobby restrictions is readily apparent in local jurisdictions' attempts to monitor and regulate the practice of lobbying.

4. The Advent of Lobby Ordinances in Major Texas Cities

There are inherent legal limitations that account for lobby regulations among municipalities as opposed to other local political subdivisions. Cities, especially home rule municipalities, have broad ordinance-making authority.[103] Such municipalities have the implied authority to regulate

99. *Id.* § 36.02(a)(4) ("[N]ot withstanding any rule of evidence or jury instruction allowing factual inferences in the absence of certain evidence, direct evidence of the express agreement shall be required in any prosecution under this subdivision.").

100. *Id.* § 36.10(a)(5) (West Supp. 2012).

101. *Compare* Act to Define and Punish Lobbying, 30th Leg., R.S., ch. 79, 1907 Tex. Gen. Laws 162, 162–63 (prohibiting any form of lobbying regardless of value gift or level of inducement and providing no exceptions to the prohibition) (repealed 1957), *with* PENAL ch. 36 (West 2011 & Supp. 2012) (condemning the exercise of undue influence and requiring the disclosure of gifts, but providing exceptions to lobbying offenses).

102. *See* AUSTIN, TEX., CITY CODE ch. 4-8 (2012) (requiring the registration of all lobbyists and the disclosure of all municipal issues on which the person has lobbied); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.5 (2012) (necessitating the registration of all lobbyists and mandating the disclosure of all issues for which the person has lobbied); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, §§ 2.94.040, 2.94.060 (2012) (governing the registration of lobbyists and disclosure of all municipal questions for which the person has lobbied); HOUS., TEX., CITY CODE ch. 18, art. V, §§ 18-72, 18-74 (2012) (mandating the registration of lobbyists and the disclosure of subjects on which influence was expended); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. 2, § 2-45 (2012) (prohibiting the acceptance or solicitation of gifts or benefits to influence official conduct).

103. *See* TEX. CONST. art. XI, § 5(a) (outlining the ability of cities to amend their charters and levy taxes); TEX. LOC. GOV'T CODE ANN. §§ 51.071, 51.072(a) (West. 2008) (declaring that home-rule municipalities have full local self-government powers).

professions and interactions with city officials.[104] Just as importantly as the right to regulate, cities have the ability to criminally enforce violations of their ordinances.[105] Pursuant to state statute, ordinance violations are fine-only offenses, with punishment generally capped at $500 per offense.[106] However, cities may also impose other noncriminal sanctions against violators, such as prohibiting culpable parties from contracting with the city.[107] On the other hand, counties rely on express authority delegated by the legislature.[108] Consequently, counties have taken varying approaches to the regulation of lobbying at the county level. As a result of developing local rules, people who have become accustomed to interacting with local officials—people like lawyers, engineers, surveyors, contractors, salesmen, and vendors—may find themselves held to new regulatory standards when engaging in their normal course of business. They may also find themselves lawfully limited in their ability to interact with any public servant because of the application of various Penal Code provisions. Therefore, it is increasingly important to be aware of local rules and the limitations placed on officers, employees, contractors, vendors, and the like.

Of course, as with all local rules, standards and processes vary from entity to entity. Each entity that has adopted a regulatory mechanism for local lobbyists has devised its own threshold for lobby registration, its own reporting requirements, and its own limitations on lobby activities. It is not enough, however, to know the regulations affecting the local lobbyist; those seeking to influence local government must also know the local regulations governing the conduct of the public officials and employees whose favor is sought, as well as the criminal laws that impact all public servants.

To date, municipal lobby ordinances have been adopted primarily by major metropolitan municipalities in Texas. This Article will focus on the lobby policies adopted by the cities of Austin, Dallas, El Paso, Houston,

104. *See* LOC. GOV'T § 51.072(a) (granting immense power to home-rule cities to govern all matters "incident to local self-government"); City of Beaumont v. Bond, 546 S.W.2d 407, 411 (Tex. Civ. App.—Beaumont 1977, writ ref'd n.r.e.) ("The legislative power granted to [home-rule] cities . . . is analogous to such power granted to the legislature.").

105. LOC. GOV'T § 54.001(a) (West 2008) (providing the power to enforce rules and provide punishment for violations).

106. *Id.* § 54.001(b) (mandating a $500 cap for fines or penalties, but allowing fines up to $2,000 for certain offenses, such as dumping of refuse).

107. *Cf. id.* § 54.004 (granting municipalities the broad power for the preservation of the municipality and those living there).

108. City of Laredo v. Webb Cnty., 220 S.W.3d 571, 576 (Tex. App.—Austin 2007, no pet.) (citing City of San Antonio v. City of Boerne, 111 S.W.3d 22, 28 (Tex. 2003)).

and San Antonio. Most adopt the primary structure found in the state Lobby Law. Obvious similarities will become apparent among certain cities; for instance, the ordinances of San Antonio and Dallas are virtual duplicates of one another,[109] while Austin and El Paso reflect each other in detailed specificity.[110] The common elements of lobby regulations are to be expected; however, it is the superficially minor differences among jurisdictions that pose potential issues for legal practitioners. This Article identifies the common elements as well as the small meaningful distinctions, and aims to explain the significance of each.

The development of local lobby policies has not been uniform, and each municipality covered in this Article has its own unique history that has informed the development of its regulatory framework. Dallas, for instance, overhauled its existing Code of Conduct for city officers and former officers in 2001.[111] However, a bribery scandal involving builders of low-income housing that funneled bribes to a councilman presaged the adoption of a lobby registration ordinance in late 2009.[112]

Houston city officials also faced charges and convictions for official misconduct, including federal bribery charges. In 2005, the mayor's chief of staff accepted cash in exchange for offering a vendor inside information on airport and parking meter contracts; the city's building services director also accepted bribes, including a trip to the Super Bowl, from a vendor competing for an energy contract.[113] In 2011, facing criticism that attorneys received an unfair advantage under the lobby ordinance, Houston's City Council adopted changes specifically targeted at lawyers

109. *Compare* SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-65 (2012) (outlining the registration requirements for lobbyists in San Antonio, with very similar language as the Dallas code), *with* DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.5 (2012) (identifying the requirements and procedures for lobbyist registration under the Dallas City Code, using language similar to the San Antonio code).

110. *Compare* AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-4 (2012) , *with* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.040 (2012) (requiring lobbyists in El Paso to register under conditions very similar to the Austin code).

111. *See Preface*, CITY OF DALLAS CODE OF ETHICS (2000), *available at* http://www.dallascityhall.com/pdf/Ethics/CodeOfEthics.pdf (declaring the old code of conduct repealed and the new code of ethics to be in place effective January 1, 2001).

112. Dana Enfinger, *Housing Scandal Rocks Dallas*, HOUSINGFINANCE.COM (Mar. 1, 2008), http://www.housingfinance.com/affordable-housing/housing-scandal-rocks-dallas.aspx (explaining the details of the scandal); *see* DALL., TEX., ORDINANCE 27748 (Nov. 9, 2009) (indicating the addition of a lobby registration section to the Dallas Code of Ethics in November of 2009).

113. David Feldstein, *Man Who Bribed 2 Officials in Houston Gets 15 Years*, HOUS. CHRON. (Nov. 17, 2005), http://www.chron.com/news/houston-texas/article/Man-who-bribed-2-officials-in-Houston-gets-15-1574923.php.

advocating on municipal issues.[114] The changes generally tracked the state Lobby Law and now require all persons lobbying, including attorneys, to register.[115] In 2012, there were approximately sixty-seven registered lobbyists representing close to ninety clients.[116]

The City of San Antonio has one of the oldest and most comprehensive lobby ordinances, originally adopted in November of 1998.[117] The ordinance was revised in 2004 as the result of a thorough review by the mayor's integrity unit and a city ethics panel the previous year.[118] Due in part to its age, and in part to the comprehensive nature of its restrictions, the San Antonio Ethics Panel has developed a significant library of ethics advisory opinions designed to provide interpretive guidance for ordinance compliance.[119] About thirty individuals or entities currently register as lobbyists with the City of San Antonio.[120]

The City of Austin has also adopted a comprehensive lobby ordinance,[121] and the city currently lists over fifty registrants.[122] The City of El Paso, which adopted a lobby ordinance in 2006,[123] incorporates many components of Austin's policy and currently reflects

114. *See* Bradley Olsen, *Houston City Leaders Look to Tighten Ethics, Lobbying Rules*, HOUS. CHRON. (Jan. 5, 2011), http://www.chron.com/news/houston-texas/article/Houston-city-leaders-look-to-tighten-ethics-1609644.php (discussing the proposal before the City Council to close the loophole allowing lawyers to advocate for municipal issues without registering as lobbyists).

115. *See* HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-72 (2012) (declaring who must register as a lobbyist under the municipal code); *see also id.* § 18-71 (codifying a broadly inclusive definition of person).

116. *See List of Lobbyists*, OFFICE OF THE CITY SECRETARY (Jan. 10, 2013), http://www.houstontx.gov/citysec/lobbyists/Jan2013.xls (listing the sixty-seven registered lobbyists in Houston representing eighty-five different clients).

117. *See* CITY OF SAN ANTONIO, LOBBYIST HANDBOOK 1 (2010), *available at* http://www.sanantonio.gov/clerk/ethics/LobbyistHandbook2010.pdf (declaring the City of San Antonio established its lobbyist regulations in 1998).

118. *See* SAN ANTONIO, TEX., ORDINANCE 98709 (Jan. 15, 2004), *available at* https://webapps1.sanantonio.gov/archivedagendas/CC02011/4v$v01!.pdf (amending the San Antonio Ethics Code to include new provisions regarding lobbyist fees).

119. *See Ethics Review Board Opinions*, CITY OF SAN ANTONIO, http://www.sanantonio.gov/atty/ethics/formal.htm (last visited May 9, 2013) (demonstrating the volume of opinions generated since the inception of the Ethics Review Board).

120. *See City of San Antonio Lobbyists' Clients*, CITY OF SAN ANTONIO (Nov. 26, 2012, 11:19 AM), http://sanantonio.gov/clerk/ethics/lobbyists.pdf (listing all the registered lobbyists and their clients in San Antonio, with twenty-four lobbyists registered).

121. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8 (2012).

122. *View Lobbyist*, CITY OF AUSTIN, http://www.ci.austin.tx.us/cityclerk/lobbyist/list_lobbyists.cfm (last visited May 9, 2013).

123. *See* EL PASO, TEX., ORDINANCE 16300 (Mar. 7, 2006) (approving the addition of a section of municipal code regulating the activities of lobbyists).

twenty-six registered lobbyists.[124]

III. COMMON ELEMENTS OF LOBBY REGULATION SYSTEMS

In crafting local lobby ordinances, large Texas municipalities have relied on state law for guidance. The more sophisticated regulations include common elements such as: definitions of communication, compensation and expenditure thresholds, parameters for the matter being advocated for or against, and disclosure requirements.[125] However, each of these elements may differ in slight, but significant, ways from locality to locality. Moreover, each lobby ordinance treats attorneys differently and imposes different limitations and obligations on local lobbying by lawyers. Rather than present a detailed analysis of the various local lobby ordinances (which are frequently changed or updated), this Article highlights common elements, recognizes some meaningful distinctions, and illuminates the impact on legal advocacy at the local level.

A. *Compensation and Expenditures*

Local lobbyist limitations were clearly inspired by the state Lobby Law definition of compensation as "money, service, facility, or other thing of value or financial benefit that is received or is to be received in return for or in connection with services rendered or to be rendered."[126] The major cities with lobbyist regulations—Austin, Dallas, El Paso, Houston, and San Antonio—each define compensation in generally similar language.[127] Even small distinctions among local definitions are worth noting, however, as they could have a meaningful impact on determining whether a person is required to register as a lobbyist.

The City of Austin's basic definition of compensation[128] tracks Chapter 305 of the Government Code word for word, and that same

124. *Registered Lobbyists*, CITY OF EL PASO, http://www.elpasotexas.gov/muni_clerk/registered_lobbyist.asp (last visited May 9, 2012).

125. *Cf.* TEX. GOV'T CODE ANN. ch. 305 (West 2005 & Supp. 2012) (providing specific parameters for the regulation and registration of lobbyists under state law, upon which many municipalities built their local regulations).

126. *Id.* § 305.002(3) (West Supp. 2012).

127. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(2) (2012) ("money, service, facility[,] or other thing of value or financial benefit"); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(3)(A) (2012) ("money, service, facility, or other thing of value"); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012) ("money or other tangible thing of value"); HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012) ("money, service, facility, or other thing of value or benefit"); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-62(c) (2012) ("money or any other thing of value").

128. AUSTIN, TEX., CITY CODE tit 4, ch. 4-8, § 4-8-2(2) (2012).

definition originated in the 1957 Representation Before the Legislature Act.[129] The City of Houston's definition of compensation[130] also tracks the definition in Chapter 305, but with a potentially significant one-word distinction: whereas state law refers to a "thing of value or financial benefit," Houston's ordinance removes the word "financial," thereby broadening the type of benefit that may qualify as compensation and trigger registration.[131] The City of El Paso offers a shorter—if not simpler—definition of compensation as "money or other tangible thing of value" that is received in return for lobby services.[132]

The ordinances of both Dallas and San Antonio delve into the intent and structure behind compensation arrangements by adding a level of scrutiny to the relationship between advocate and client. In defining compensation, the Dallas ordinance stipulates that lobbyists engaging in lobbying and similar advocacy must include all amounts received "if, for the purpose of evading the lobby obligations imposed under this article, the lobbyist has structured the receipt of compensation in a way that unreasonably minimizes the value of the lobbying activities."[133] The City of San Antonio lobby ordinance includes almost identical language.[134]

Each of these ordinances, with the exception of Houston's, excludes certain types of payments from the definition of compensation. These exceptions include payments made to a person regardless of whether the person was engaged in lobbying activities if those payments are ordinarily made.[135] They also except any gain from the determination of a

129. *See* Representation Before the Legislature Act, 55th Leg., 1st C.S., ch. 9, 1957 Tex. Gen. Laws 17, 17 (establishing the definition of compensation to be used in future lobbyist statutes) (repealed 1973).

130. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012).

131. *Compare* GOV'T § 305.002(3) ("'Compensation' means money, service, facility, or other thing of value of financial benefit that is received."), *with* HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012) ("*Compensation* means money, service, facility, or other thing of value or benefit that is received . . . .").

132. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012).

133. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(3)(C) (2012).

134. *See* SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(c) (2012) ("If a lobbyist engages in both lobbying activities and other activities on behalf of a person, compensation for lobbying includes all amounts received from that person, if, for the purpose of evading the obligations imposed under division 5, the lobbyist has structured the receipt of compensation in a way that unreasonably minimizes the value of the lobbying activities.").

135. *See* AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2 (2012) (stating compensation does not include incidental expenses); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(B) (2012) (excluding incidental expense from compensation); EL PASO, TEX., MUN. CODE tit 2, ch 2.94, § 2.94.020 (2012) (stating compensation excludes incidental expenses); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(d) (2012) (limiting expenditures by not including incidental expenses).

municipal question, unless the value is in the form of a contingent fee.[136] Austin, Dallas, El Paso, and Houston each establish a compensation threshold of $200 in a calendar quarter; less than this will not trigger the registration requirements.[137] In addition to the quarterly threshold, the City of Houston requires registration for anyone who has been paid $800 in a calendar year for lobbying services.[138] The City of San Antonio, however, has no minimum threshold; compensation or an expenditure of *any* amount will trigger registration requirements for not only persons paid for the lobbying services, but also for those paying for lobbying services.[139]

As with state law, compensation is one of two financial thresholds that trigger registration.[140] A person is also required to register if he crosses the relevant expenditure threshold.[141] The local definitions of expenditure are relatively uniform and generally reflect the state law definition. Generally, the definitions of expenditure include "a payment, distribution, loan, advance, reimbursement, deposit, or gift of money or any thing of value, including a contract, promise, or agreement, whether or not legally enforceable."[142]

B. *City Officials*

Each locality with an established lobby regulation process has adopted its own unique class of decision makers with whom communication triggers registration. Again, while there is general consistency, minor

136. *See* AUSTIN, TEX., CITY CODE ch 4-8, § 4-8-2 (2012) ("Compensation shall not include the financial gain that [a] person may realize as a result of the determination of a municipal question, unless that gain is in the form of a contingent fee."); EL PASO, TEX., MUN. CODE tit 2, ch. 2.94 § 2.94.020 (2012) ("Compensation shall not include the financial gain that a person may realize as a result of the determination of a municipal question, unless that gain is in the form of a contingent fee."); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V § 2-62(c) (2012) ("Compensation does not include the financial gain that a person may realize as a result of the determination of a municipal question, unless that gain is in the form of a contingent fee.").

137. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-4(1) (2012); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.3(a)(1) (2012); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.040(A)(1) (2012); HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-72(a)(1) (2012).

138. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-72(a)(2) (2012).

139. *See* SAN ANTONIO, TEX., CODE OF ORDINANCES ch.2, art. III, div. V, § 2-63 (2012) (requiring registration of any person who "engages in lobbying activities for compensation" as well as any person who "expends monies for lobbying activities").

140. *See* 1 TEX. ADMIN. CODE § 34.43(a) (2012) (Tex. Ethics Comm'n, Compensation and Reimbursement Threshold).

141. *See, e.g.*, AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-4(3) (2012) (mandating registration of a person who "expends $200 or more in a calendar quarter for lobbying").

142. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012).

differences between municipalities are important to note.

The City of El Paso offers the simplest and most straightforward class of decision makers, defining a city official to include the mayor, any council member, the city manager, or members of certain boards, commissions, and committees.[143]

The City of Austin's lobby ordinance broadens the definition to include staff, expressly naming "the mayor, a councilmember, or a member of the City staff" or a designated board, commission, or committee.[144] The "applicability" section of the ordinance applies to a person who lobbies any of the following: "the mayor, a council member, their aides . . . a member of a board, [or] task force . . . the city manager, an assistant city manager, their aides, the city attorney, an assistant city attorney, [and] a department or assistant department director."[145]

The City of Dallas offers a similar definition of city official, including the mayor and members of city council, the city manager as well as assistant city managers, the city attorney and first assistant city attorney, the city secretary and first assistant city secretary, the city auditor and first assistant city auditor, municipal judges, all department directors, and a litany of board and commission members.[146]

The City of San Antonio establishes the broadest definition. As with the other ordinances discussed, it applies to the mayor and members of city council and covers "municipal court judges and magistrates, the city manager, deputy city manager, city clerk, assistant city clerk, assistant city managers, . . . all department heads . . . [and] internal auditor and assistant internal auditors."[147] In addition to including a specific list of boards and commission members who qualify as city officials, the ordinance includes "any other board or commission that is more than advisory in nature."[148] When compared to other ordinances, however, San Antonio's definition appears to reach down further into the bureaucratic structure, specifically

143. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.050 (2012); *see also id.* § 2.94.030 (enumerating eight specific boards and commissions whose members are included in the definition of city official).

144. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(1) (2012).

145. *Id.* § 4-8-3.

146. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 15.2(1)(h)(i) to (xvi) (2012) (including members of the board of adjustment, the building inspection board, the plan and zoning commission, the civil service board, the community development commission, the rapid transit board, the airport board, the ethics advisory commission, the housing finance corporation board, the landmark commission, local government corporation boards, municipal management district boards, park and recreation board, and all reinvestment zone boards).

147. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-62(a) (2012).

148. *Id.*

including assistant department heads, assistants to city council, and assistants to the mayor (including contract personnel), the secretary to the city manager, executive secretaries, the community action manager, the public utilities supervisor, and members of bid committees.[149] Further, the definition of city official includes board members of the city's electric and water providers.[150]

Rather than define city official, the City of Houston's lobby ordinance actually divides the municipal infrastructure into executive and legislative departments.[151] The Houston ordinance defines a "member of the legislative branch" as "a council-member, council-member elect, or candidate for the office of council member."[152] It offers a much broader definition of "member of the executive branch," which reflects the internal operation of the city's municipal government.[153] That definition includes the mayor (as well as candidates for mayor), the city controller (and candidates for that office), an employee of the city, and any member of specified boards.[154]

C. *Communication*

Whereas the state Lobby Law applies only in situations where a person has direct communication with a member of the executive or legislative branch, local lobby restrictions have expanded definitions in an effort to regulate "indirect" communication with local officials.[155] Only the City of Houston tracks the state Lobby Law, regulating only direct

149. *Id.*

150. *Id.*

151. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012).

152. *Id.* The decision to treat candidates for office the same as actual officeholders is analogous to the definition of "public servant" found in the Penal Code, which include candidates for public office. TEX. PENAL CODE ANN. § 1.07(a)(41) (West Supp. 2012).

153. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012).

154. *Id.* The specified boards include:

> The Archaeological and Historical Commission, Airport Land Use Regulations Board of Adjustment, Automotive Board, Board of Public Trusts, Boiler Code Review and Licensing Board, Building and Standards Commission, Civil Service Commission, Electrical Board, Fire Board of Appeals, General Appeals Board, Helicopter Facilities Licensing and Appeals Board, Mechanical Code Review Board, Municipal Board on Sign Control, Planning Commission, Plumbing Code Review Board, Tower Permit Commission, or Wastewater Capacity Reservation Review Board.

Id.

155. *See, e.g.*, AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-1 (2008) (including indirect communication within the definition of lobbying).

communication.[156] Unlike the state statute, most of the local ordinances attempt to define lobbying by incorporating the meaning of communication within the various definitions.[157]

It should be noted that each local definition incorporates some generally accepted exceptions to the definition of lobbying. Common exceptions include communications made by a member of a media organization,[158] by a public official acting within his or her official capacity,[159] "a mere request for information,"[160] a statement made at a meeting conducted in accordance with the Texas Open Meetings Act,[161] official testimony at a hearing or in a formal proceeding,[162] or communication made in a publicly available speech, article, or publication.[163]

The cities of Dallas and San Antonio have adopted nearly identical definitions of the conduct that constitutes lobbying, including:

> [A]ny oral or written communication (including an electronic communication) to a city official, made directly or indirectly by any person in an effort to influence or persuade an official to favor or oppose, recommend or not recommend, vote for or against, or take or refrain from taking action on any municipal question.[164]

The cities of Austin and El Paso share nearly identical definitions of lobbying: the direct or indirect "solicitation of a City official, by private interview, postal or telephonic communications, or any other means other than public expression at a meeting of City officials."[165]

When considering who constitutes a local lobbyist, it is also important to note that most of the ordinances—like the state Lobby Law—treat as a "registrant" anyone who is required to register as a lobbyist but has not done so.[166]

156. TEX GOV'T CODE ANN. § 305.002(2) (West 2009); HOUS., TEX., CODE OF ORDINANCES ch. 18, art V, § 18-71 (2012).

157. *E.g.*, AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-1 (2012).

158. *E.g.*, *id.* § 4-8-5(1).

159. *E.g.*, EL PASO, TEX., MUN. CODE tit. 2, ch. 2, § 2.94.050(A) (2012).

160. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(6) (2008); *accord* DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(10)(B)(i) (2012) (including a similar exception).

161. *E.g.*, HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-73(2) (2012).

162. *E.g.*, *id.* § 18-73(2).

163. *E.g.*, DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(10)(b)(i) (2012).

164. *Id.* § 12A-15.2(10); *see* SAN ANTONIO, TEX., CODE OF ORDINANCES ch.2, art III, div. V, § 2-62(i) (2012).

165. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(6) (2012); *accord* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012).

166. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(11) (2012); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(14) (2012); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020

D. *Municipal Question*

The registration requirements will not be triggered if a lobbyist communicates with a covered city official on a topic other than a municipal question.[167] The Texas Ethics Commission's inclusion of a "goodwill communication" has not yet been incorporated into the municipal definitions of communication; thus, communications intended to "generate or maintain goodwill for the purpose of influencing potential future legislation" remain unhindered at the local level.[168]

The cities of Dallas, El Paso, and San Antonio have adopted very similar yet far-reaching definitions of a municipal question. Essentially, a municipal question is any "public policy issue of a discretionary nature that is pending before, or that may be the subject of action by, the city council or any city board or commission."[169] The term includes, but is not limited to, proposed actions or proposals for action in the form of ordinances, resolutions, motions, recommendations, reports, regulations, policies, nominations, appointments, sanctions, and bids.[170] It includes the adoption of "specifications, awards, grants, or contracts"; however, it excludes such routine matters as "permitting, platting[,] and design approval."[171]

The City of Austin takes a slightly different approach, defining a municipal question as a "proposed or proposal for an ordinance, resolution, motion, recommendation, report, regulation, policy,

(2012); HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(m) (2012).

167. *See, e.g.*, EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, §§ 2.94.020 (2012) (defining municipal question as "a public policy issue of a discretionary nature pending or impending before the city council, a legislative review committee of the council, or any board, commission or committee set forth in Section 2.94.030 of this chapter, including but not limited to a proposed or proposal for an ordinance, resolution, motion, recommendation, report, regulation, policy, appointment, sanction, bid, a request for proposal, including the development of specifications, an award, grant, or contract, and all matters before the boards, commissions or committees listed in Section 2.94.030 (B), C, D, K and L of this chapter").

168. *Cf.* Tex. Ethics Comm'n Op. No. 467, at 1 (2006) (declaring political contributions intended to generate goodwill are prohibited); Tex. Ethics Comm'n Op. No. 46, at 1 (1992) ("[C]ommunications to generate goodwill may be communications to influence[.]").

169. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(12) (2012); *see* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(k) (2012).

170. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(12) (2012); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(k) (2012).

171. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(12) (2012); *see* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(k) (2012).

appointment, sanction, and bid, including the development of specifications, an award grant or contact for more than $2,000."[172] Although seemingly similar, the slight variations may have a substantive effect. First, unlike the ordinances of El Paso and San Antonio, it does not expressly include an "impending" matter,[173] or in the case of Dallas, a matter that "may be the subject of action by" the city.[174] Arguably, then, the Austin ordinance may be limited to those proposals that are actually before the relevant city officials. Additionally, Austin places a minimum threshold of $2,000 on contracts that would raise a municipal question.[175]

Again, the City of Houston takes the approach most similar to the state Lobby Law, which defines two types of matters—municipal legislation and administrative action.[176] Administrative action is defined as "rulemaking, licensing, or any other matter that may be the subject of action by a city official, city department[,] or other city agency, including the proposal, consideration, or approval of the matter."[177] The term excludes day-to-day matters relating to the application or administration of existing city programs or policies.[178] Municipal legislation, by comparison, is defined as "an ordinance, resolution, motion, amendment[,] or other matter pending before the city council" or "[a]ny matter that is or may be the subject of action by the city council or a council committee, including drafting, placing on the agenda, consideration, passage, defeat, approval, or countersignature of the matter."[179]

These highly technical distinctions are important because they determine whether a lawyer advocating at the local level must register as a lobbyist, and therefore subject himself—and his client—to significantly more public scrutiny. Determining whether the subject of representation constitutes a municipal question will dictate whether the attorney must disclose his client's identity, the client's specific goals, the structure of his professional engagement, the nature of his interactions with local officials, the fundamental basis of his advocacy strategy, and in some instances, his

172. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(9) (2012).

173. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-62(k) (2012); EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012).

174. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(12) (2012).

175. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-2(9) (2012).

176. *Compare* HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012) (providing definitions for both municipal legislation and administrative action), *with* TEX. GOV'T CODE ANN. § 305.002(1) (West Supp. 2012) (defining administrative action), *and id.* § 305.002(6) (defining legislation in the context of lobbying).

177. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-71 (2012).

178. *Id.*

179. *Id.*

compensation.[180]

E. *Reporting*

Each ethics ordinance under discussion has specific disclosure requirements for a local lobbyist's initial registration as well as for ongoing activity reports. For attorneys who find themselves subject to a municipal lobby regulation, these disclosures will likely require more detailed information than most attorneys are accustomed to providing.

The ordinances of Austin, San Antonio, and Dallas each require new registrants to identify their client and specify the municipal questions they seek to influence.[181] The ordinances also mandate quarterly disclosure of any initial contact with city officials and whether the representation is contingent upon the outcome of the municipal question.[182] The subsequent quarterly activity reports must include the client, the specific issues subject to the lobby efforts, a list of city officials contacted, all expenditures made in connection with lobby activities, and a list of all the registrant's employees who engaged in lobby activities.[183] Additionally, each activity report must be sworn to.[184] It is worth noting that the Dallas and San Antonio ordinances also require lobbyists who communicate in writing to include the identity of their client in the written communication; if having a conversation with a city official, the lobbyist must orally identify her client to the municipal official.[185]

The City of Houston requires a lobbyist's initial registration to include the client's identity, the subject of the lobby activity, and whether the lobbyist's compensation is partially or totally contingent on the outcome of the matter.[186] Interestingly, Houston does not require the same detail mandated by other cities in subsequent activity reports—a lobbyist is not

180. *See, e.g.,* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.020 (2012) (defining lobbying as action taken on a municipal question, which triggers the registration requirement under section 2.94.040).

181. *E.g.*, DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.5(c) (2012).

182. *E.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-65(e) (2012).

183. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-7 (2012); DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.6 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-66 (2012).

184. *See* DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.6 (2012) ("Activity Reports"); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-66 (2012) ("Quarterly Activity Report").

185. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.9 (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-68 (2012).

186. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-74 (2012).

required to list the specific contacts with city officials that relate to her advocacy, but only needs to list expenditures made in the course of lobbying.[187]

Only the City of El Paso takes into account the professional restrictions imposed upon licensed attorneys:

> A registrant who is an attorney shall not be required to report under [the initial registration section or the activity reports section], specific facts or information that would cause the attorney to violate the Texas Disciplinary Rules of Professional Conduct; provided however, that the ability to exclude certain privileged or confidential information under the his subsection shall not constitute nor be interpreted to constitute a complete exception to the registration or activity reporting requirement for an attorney who is required to register under this chapter.[188]

Like the other ordinances analyzed, the El Paso ordinance requires the initial registration to identify the client and the specific municipal questions at issue.[189] Subsequent activity reports must also name the client, identify the specific municipal question that was the subject of the lobby activities, itemize lobby expenditures and gifts made to public officers, and list the city officials that were contacted on behalf of each client.[190] The question, then, is what information a lawyer–lobbyist may withhold from his report. Furthermore, what reported information can be omitted from disclosure under one of the exceptions in the Code? This issue is discussed further below, but it should be noted that there is precedent for treating the client's identity as confidential.[191] Further, any communication between attorney and client is confidential, and that protection extends to both privileged and unprivileged information.[192] Therefore, can the municipal questions of concern to the client be withheld from public disclosure?

187. *Id.* § 18-75.

188. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.060(B) (2012).

189. *Id.* § 2.94.060(A)(3).

190. *Id.* § 2.94.070.

191. *See* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(a), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2005) (Tex. State Bar R. art. X, § 9); *cf.* ALA. CODE § 36-25-1(20) (LexisNexis Supp. 2012) (attorneys involved in drafting legislation or rendering opinions regarding the effects of registration are not considered lobbyists); COLO. REV. STAT. ANN. § 24-6-101 (2012) (lobbying does not include attorney–client communications that involve the practice the law); D.C. CODE § 1-1161.01(32)(B) (2012) (representation by an attorney of a client before an executive agency hearing is not lobbying); N.Y. LEGIS. LAW § 1-c (Consol. Supp. 2012) (participation of an attorney on behalf of a client in a public proceeding is not deemed lobbying).

192. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.05(a).

F. *Contingent Fees and Procurement Issues*

At the state level, the issue of advocating on a contingent fee basis is deceptively straightforward. The Texas Government Code generally prohibits lobbying on a contingent fee basis[193] and provides that a violation of the prohibition constitutes a third degree felony.[194] In fact, the law creates two offenses: first, it is unlawful for the *client* to "retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action";[195] and second, it is unlawful for a person (regardless of status as a registered lobbyist) to accept such employment.[196]

However, the statute establishes exceptions to the general prohibition, which are largely intended to address the sale of goods to state agencies. For example, the statute excludes a sales commission payable to "an employee of a vendor of a product or service" so long as the state agency purchasing decision does not exceed $10 million.[197] Similarly, a quarterly or annual compensation performance bonus payable to a vendor's employee is not considered an impermissible contingent fee.[198] Note, these two exceptions apply specifically to an *employee*[199] of a vendor; however, an independent contractor who sells a product or service may avoid the contingency fee prohibition only if the purchasing decision does not exceed $10 million *and* the contractor registers as a lobbyist (noting the vendor as the lobby client).[200] The prohibition does not apply to contingency fees "expressly authorized by other law" or for legal representation before state administrative agencies in contested hearings or in other similarly adversarial proceedings.[201] The prohibition and its exceptions appear designed to prevent contingent-fee lobbying, while simultaneously recognizing traditional compensation for the sale of goods and thereby discouraging attempts by consultants to avoid registration by masquerading as a salesperson.

193. TEX. GOV'T CODE ANN. § 305.022 (West Supp. 2012).

194. *Id.* § 305.031(b) (West 2005).

195. *Id.* § 305.022(a) (West Supp. 2012).

196. *Id.* § 305.022(b).

197. *Id.* § 305.022(c)(1).

198. *Id.* § 305.022(c)(2).

199. *See id.* § 305.022(e) (defining employee as a full-time employee, as opposed to a consultant or independent contractor).

200. *Id.* § 305.022(c)(1).

201. *Id.* § 305.022(d).

The issue of contingent-fee lobbying and its connection to the procurement process is approached differently by the various Texas cities discussed in this Article. Some cities prohibit contingent-fee lobbying,[202] while others simply mandate that such an arrangement must be disclosed.[203] Similarly, the cities take varying approaches to the role of the lobbyist in procurement matters, though most try to limit advocacy while a proposal is out for bid.[204] Consequently, a local lobbyist may be hired to help secure a municipal contract, but subsequently be barred from advocating during the period when the recommendations and decisions are made.

The City of Dallas authorizes the practice of lobbying on a contingent fee basis, but requires the arrangement to be reported on registration and activity reports.[205] The Dallas lobby ordinance also includes, under the section entitled "Restricted Activities," a prohibition against "[l]obbying by bidders and proposers on city contracts."[206] The ordinance states:

> A person responding to a request for bids or request for proposals on a city contract shall not (either personally or through a representative, employee, or agent) lobby a city council member from the time the advertisement or public notification of the request for bids or request for proposals is made until the time the contract is awarded by the city council.[207]

Like Dallas, the City of San Antonio permits lobbying on a contingent fee basis, but requires the disclosure of such an arrangement.[208] San Antonio has an additional provision that requires anyone seeking a discretionary contract from the city to disclose certain information, including the "identity of any lobbyist, attorney[,] or consultant employed for purposes relating to the discretionary contract being sought by any individual or entity who would be a party to the discretionary contract."[209] After a bid for a contract with the city is released, a person acting on a bidder's behalf is prohibited from contacting city officials or

202. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-8(C) (2012).

203. *See* DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.2(12) (2012) (mandating the declaration of a contingent fee agreement); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art III, div. V, § 2-66(e) (2012) (requiring disclosure of a contingent fee arrangement).

204. *E.g.*, EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.090(E) (2012) ("During the period in which the city has issued a solicitation, including a competitive bid, . . . no person or registrant shall engage in any lobbying with city officials or employees.").

205. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.5(c)(4) & 15.6(a)(3) (2012).

206. *Id.* § 12A-15.8(g).

207. *Id.*

208. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-66(e) (2012).

209. *Id.* § 2-59(a)(3).

employees (with the exception of the city employees specified in the solicitation document) regarding that contract until the item has been posted on the city council's agenda for consideration.[210] A violation may disqualify the offer from consideration.[211]

The City of Houston does not prohibit lobbying on a contingent fee basis, but requires a registrant to disclose "[w]hether the registrant's compensation, if any, is totally or partially contingent on the passage or defeat of any municipal legislation or the outcome of any administrative action."[212]

The City of Austin's ordinance contains an outright prohibition on contingent fees.[213] Like the state law, the prohibition applies to both the client and the advocate, providing, "No person shall *retain or accept* employment to lobby on a contingent fee basis."[214] However, the ordinance does contain an exception for situations where "a contingent fee is a standard and customary method of payment for the employment of the person."[215] Though not part of its lobby ordinance, the City of Austin also establishes an "anti-lobbying" policy relating to the city's procurement procedures.[216] The ordinance provides that from the time a solicitation is issued until a contract for that project is executed, a bidder or the bidder's agent—including a local lobbyist—may not contact any city official, other than the official designated in the solicitation documents, about the matter.[217] Although the ordinance expressly waives any criminal penalty for a violation, there are still potentially serious consequences for the bidder or vendor, including disqualification from the solicitation and any similar subsequent solicitations. A vendor who is found to have violated the no-contact provision twice during a five-year period will, after notice and a hearing, be barred from all city solicitations for a period of up to three years.[218] If it is determined that the contractor violated the no-contact provision after the execution of a contract, the contract is voidable at the discretion of the city. So, not only must a local lobbyist report all contacts with city officials during the course of her lobby activity, but that person must also be scrupulous enough to know when

210. *Id.* § 2-61.
211. *Id.*
212. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-74(a)(5) (2012).
213. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-8(c) (2012).
214. *Id.* (emphasis added).
215. *Id.*
216. *See id.* tit. 2, ch. 2-7, §§ 2-7-101 to 110.
217. *Id.*
218. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.130 (2012).

those contacts are prohibited by the procurement process, lest the *client* be disqualified and barred from business with the city.

The City of El Paso does not prohibit lobbying on a contingent fee basis, and expressly includes such an arrangement as a trigger for registration.[219] El Paso's lobby ordinance also addresses the issue of contact during a procurement period. During the period between the issuance of a solicitation and the official notice of the contract award, "no person or registrant shall engage in any lobbying activities with city officials and employees."[220] Any person or entity found to violate this provision may be disqualified by the city council from entering into any contract with the city for up to three years.[221]

G. *Treatment of Attorneys*

The cities discussed herein take differing approaches to attorneys acting as lobbyists; the recurring theme, however, is to treat lawyers as any other paid advocate and to carve as narrow an exception as possible.[222] Most ordinances attempt to establish a distinction between lobby work and legal work.[223] That is, any distinctions between lawyers and nonlawyers are based on conduct rather than professional status. As discussed later, however, making a theoretical distinction practicably workable will likely prove difficult.

The cities of Dallas and San Antonio built in limited exceptions to the definition of lobbyist that expressly mention licensed lawyers.[224] Dallas lists among its exceptions to registration: "An attorney or other person whose contact with a city official is made solely as part of resolving a dispute with the city, provided that the contact is solely with city officials who do not vote on or have final authority over any municipal question involved."[225] The City of San Antonio takes a similar approach, but it references the relevant ethics rule governing attorney communications and exempts:

219. *Id.* § 2.94.040(A)(6).

220. *Id.* § 2.94.090(E).

221. *Id.* § 2.94.130.

222. *Compare* DALL., TEX., CITY CODE ch. 12A, art III-A, § 12A-15.4(5) (2012) (mentioning an attorney exception), *with* AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-5(7) (2012) (neglecting to specifically mention attorneys in the exception).

223. *See, e.g.*, EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.050(F) (2012) (recognizing exception for attorneys doing legal work).

224. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.4(5) (2012); SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-64(5) (2012).

225. DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-15.4(5) (2012).

> An attorney or other person whose contact with a city official is made solely as part of resolving a dispute with the city, provided that the contact is solely with city officials who do not vote on or have final authority over any municipal question involved and *so long as such an attorney complies with Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, as amended*.[226]

As will be discussed later, compliance with Rule 4.02 is a significant issue for a lawyer–lobbyist to overcome, and one that potentially puts a lawyer at a strategic disadvantage.

The City of Austin, though making no mention of attorneys, also incorporates a dispute resolution exception, providing that "a person" whose sole contact is made for the purpose of resolving a dispute with the city need not register as a lobbyist.[227]

The City of El Paso incorporates a slightly modified exception aimed specifically at attorneys that relieves the registration requirement:

> A person who is performing an act that may be performed only by a licensed attorney or a person whose contact with a city official is made solely as part of the process of resolution of a dispute or other matter that is primarily legal in nature between a person and the city if the person is an attorney, so long as he complies with Rule 4.02 of the Texas Disciplinary Rules of Professional Conduct, as amended.[228]

The Houston City Council's relatively recent changes to its lobby ordinance provide an interesting look at how the treatment of attorneys can be central to the policymaking process. Changes adopted by the Houston City Council in 2011 were designed specifically to make sure attorneys were clearly within the scope of the lobby ordinance and its disclosure requirements.[229] Consider this question posed by the Houston Chronicle's editorial board: "When is a lobbyist not a lobbyist at Houston City Hall? Answer: When he or she is a lawyer influencing elected officials under the guise of performing legal work."[230] At the time, Houston Mayor Annise Parker stated, "For whatever reason, lawyers did not want to register as lobbyists even though they were doing exactly the same work. I

226. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-64(5) (2012) (emphasis added).

227. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-5(7) (2012).

228. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.050(F) (2012) (emphasis added).

229. *See* Editorial, *Lobby Law: City Ordinance Aims to Unmask Attorneys Working to Influence Councilmembers*, HOUS. CHRON. (Jan. 8, 2011), http://www.chron.com/opinion/editorials/article/Lobby-law-City-ordinance-aims-to-unmask-1692660.php (citing Houston council members stating an intention to include attorneys within scope of lobby ordinance).

230. *Id.*

see no distinction, and if you're lobbying, you're lobbying."[231] Attorneys representing companies or individuals discussed matters with council members, though the attorneys rarely registered as lobbyists, defended themselves by explaining they were acting "on behalf of a legal client."[232]

Consequently, the lobby ordinance was amended and now provides limited exceptions similar to other cities' municipal lobby ordinances. The ordinance provides that a person who is otherwise required to register who communicates directly with a member of the executive branch is not required to register if "performing an act that may be performed only by a licensed attorney."[233]

H. *Counties*

It is worth noting that two large Texas counties, Harris County and El Paso County, have ventured into the area of lobby regulations. The likely explanation for the dearth of counties considering such rules is the lack of statutory authority. It is well settled that Texas counties are limited to the power expressly conferred on them by the Texas Legislature.[234] To date, the legislature has not granted counties blanket authority to regulate the practice of lobbying at the local level.

The two counties, at opposite ends of the state, have taken drastically different approaches to the regulation of local lobbying. In 2009, Harris County adopted a policy for the *voluntary* registration of local lobbyists seeking to influence county business:

> Although the State of Texas, the City of Houston, and other Texas jurisdictions require registration and disclosure of lobbying activities, Harris County [cannot] do so without enabling legislation. The county can, however, seek *voluntary* annual registration and financial disclosure showing clients represented and specific lobbying topics from any person or entity that expends or receives compensation of $200 or more for lobbying activities.[235]

Currently, only eight individuals representing seven clients have

231. *Id.*

232. Bradley Olson, *Houston City Leaders Look to Tighten Ethics, Lobbying Rules*, HOUS. CHRON. (Jan. 5, 2011), http://www.chron.com/news/houston-texas/article/Houston-city-leaders-look-to-tighten-ethics-1609644.php.

233. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18–72(b)(1) (2012).

234. *See, e.g.*, OFFICE OF THE ATT'Y GEN. OF TEX., 2009 COUNTIES AND DUTIES HANDBOOK (2009), *available at* https://www.oag.state.tx.us/AG_Publications/pdfs/copowers duties.pdf (recognizing the legislature has the power to modify the powers of Texas counties).

235. HARRIS CNTY. ETHICS POLICY 3 (2009), *available at* http://www.harriscountytx.gov/CmpDocuments/63/Doc/Ethics%20Policy.pdf.

voluntarily registered as Harris County lobbyists.[236]

El Paso County, recognizing the lack of statutory authority, sought and received its own enabling legislation for a code of ethics,[237] including its own ethics commission and lobby regulations. The resulting regulatory framework is generally comparable to the municipal ordinances covered herein. El Paso County has adopted an expansive definition of "county public servant" that includes all elected county officials, candidates for county office, the county auditor, the county purchasing agent, all county employees, all assistant district attorneys, and appointed members of county and multi-jurisdictional boards.[238] The Code of Ethics adopts a standard definition of lobbyist that excludes "[a]n attorney who communicates directly with a county public servant to the extent that such communication relates to the attorney's representation of a party in a civil or criminal proceeding."[239] The enabling statute provides the definition of lobbyist, but authorizes the county ethics commission to adopt the appropriate compensation threshold, directing the commission to look to the rules of the Texas Ethics Commission, adopted pursuant to the state Lobby Law, for guidance.[240]

Interestingly, the only criminal offenses created by El Paso County's enabling legislation relate to the breach of the commission's sworn complaint process.[241] Unauthorized destruction or removal of confidential information may result in a fine between $25 and $4,000, as

236. *See* Stan Stanart, *Summary of Registered Lobbyists in Harris County*, HARRIS COUNTY CLERK'S OFFICE: ETHICS SYSTEM, http://www.ethics.cclerk.hctx.net/LobbyistRegistartion/LobbyBrowse.aspx (last visited Mar. 25, 2013) (providing a current list of all voluntarily registered lobbyists in Harris County).

237. TEX. LOC. GOV'T CODE ANN. § 161.101 (West Supp. 2012) ("The commission shall enforce the provisions of the ethics code by issuing appropriate orders or recommendations or by imposing appropriate penalties."). *See generally* EL PASO CNTY., TEX., CODE OF ETHICS § 4 (2012), *available at* http://www.epcounty.com/ethicscom/documents/Code_of_Ethics.pdf (creating a detailed code of ethics regarding the procedures and regulations for lobbyists).

238. *See* EL PASO CNTY., TEX., CODE OF ETHICS § 2.2 (2012), *available at* http://www.epcounty.com/ethicscom/documents/Code_of_Ethics.pdf (listing explicit definitions for county public servant, county officer, and county employee).

239. *See id.* § 2.8 ("Lobbyist means a person who, receives, or is entitled to receive under an agreement under which the person is retained or employed . . . .").

240. *See* LOC. GOV'T § 161.101 (citing the general powers of the county ethics commission).

241. *See id.* § 161.173(d)–(h) (West Supp. 2012) ("A person who obtains access to confidential information under this chapter commits an offense if that person knowingly: (1) uses the confidential information for the purpose other than the purpose for which the information was received or for a purpose unrelated to this chapter, including solicitation of political contributions or solicitation of clients; (2) permits inspection of the confidential information by a person who is not authorized to inspect the information; or (3) discloses the confidential information to a person who is not authorized to receive the information.").

well as confinement anywhere from three days to three months.[242] Unauthorized disclosure, distribution, or use of confidential information subject to the sworn complaint process is punishable by a fine up to $1,000 and confinement in the county jail for up to six months.[243] Such a breach constitutes official misconduct, subjects an employee to discipline or termination, and justifies referral to the district attorney for behavior constituting a violation of the Penal Code.[244]

In considering an actual violation of the Code of Ethics, the El Paso Ethics Commission may issue "a cease and desist order," which is "an affirmative order to require compliance with the law[]," and "an order of public censure with or without a civil penalty."[245] The civil penalty may be up to $4,000 for violating the Code of Ethics, or up to $500 for delayed compliance with a commission order.[246]

In contrast to municipal lobby ordinances, which create a Class C misdemeanor for violating their terms, the legislation enabling El Paso County's regulatory process does not create a crime for violating its standards; it criminalizes the release of information relating to an investigation of those violations.[247] In other words, a private attorney who fails to properly register or report as a lobbyist may face a reprimand or civil penalty, but the public attorney conducting the investigation of such behavior faces imprisonment for improperly disclosing information about the investigation.

242. *See id.* § 161.173(e) (explicating the confidentiality requirements associated with the commission and the commission staff); EL PASO CNTY., TEX., CODE OF ETHICS § 17.3 (2012), *available at* http://www.epcounty.com/ethicscom/documents/Code_of_Ethics.pdf ("A person commits an offense if the person intentionally: destroys, mutilates, or alters information obtained under this chapter; or removes information obtained under this chapter without permission as provided by this chapter.").

243. LOC. GOV'T § 161.173(h) (West Supp. 2012).

244. *See* EL PASO CNTY., TEX., CODE OF ETHICS §§ 17.3.2, 17.3.3 (2012), *available at* http://www.epcounty.com/ethicscom/documents/Code_of_Ethics.pdf ("Violation of this [a]rticle is a misdemeanor and is punishable by fine and/or confinement in the [county jail]pursuant to Section 161.173 of the Local Government Code.").

245. *See* LOC. GOV'T § 161.201 (West Supp. 2012) (explaining the enforcement capabilities of the commission).

246. *See id.* § 161.202 (describing the civil penalties for delay or violation of a commission order).

247. *See* EL PASO CNTY., TEX., CODE OF ETHICS § 17.2.1 (2012), *available at* http://www.epcounty.com/ethicscom/documents/Code_of_Ethics.pdf ("A person who obtains access to confidential information under this chapter commits an offense if that person knowingly: uses the confidential information for a purpose other than the purpose for which the information was received or for a purpose unrelated to this chapter . . . .").

IV. PRACTICAL ISSUES FACING ATTORNEYS

The attorney interacting with government should be mindful of the various ways by which the lobby ordinances, rules, and statutes referenced above can create practical issues influencing advocacy at the local or state level.

A. *Engagement Structure*

Even the formation of the attorney–client relationship, including the responsibilities of the lawyer and the structure of the fee arrangement, can have implications depending on the jurisdiction. As mentioned above, some local lobby ordinances—notably, those in San Antonio and Dallas—look to the division of both duties and fees, as well as to the intent of the parties crafting the terms of engagement.[248] If an attorney's engagement includes both legal and local lobby services, the attorney should be mindful of the relevant distinctions when crafting the scope of the lawyer's responsibilities. If the representation involves legislative advocacy, the attorney may want to specify that disclosure of the client's identity is likely to occur, regardless of the constraints envisioned by Texas Disciplinary Rules of Professional Conduct Rule 1.05.[249] Similarly, the subject matter of the representation will likely have to be disclosed, as well as many of the efforts undertaken on the client's behalf.[250] Likewise, the nature of the fee arrangement may have to be disclosed depending on the jurisdiction.[251] A client seeking a contingent fee arrangement should be advised as to whether such an agreement is permissible, and if so, whether it must be publicly disclosed.[252]

The exceptions previously noted in Chapter 305 of the Texas Government Code allow an attorney to avoid registration only in limited situations, primarily those that already require the disclosure of the client

248. *E.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, §§ 2-62 to 2-71 (2012) (explicating the San Antonio Code of Ordinance's requirements for lobbyists, including attorneys).

249. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05(a)–(c) ("A lawyer may reveal confidential information: (1) When the lawyer has been expressly authorized to do so in order to carry out the representation. (2) When the client consents after consultation.").

250. *See id.* R. 1.05 cmt. 1 (urging the importance of full disclosure to the client prior to representation).

251. *Cf. id.* R. 1.05 cmt. 15 ("A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it, and this necessity is recognized by sub-paragraphs (c)(5) and (d)(2)(iv). This aspect of the rule, in regard to privileged information, expresses the principle that the beneficiary of a fiduciary relationship may not exploit the relationship to the detriment of the fiduciary.").

252. *See id.* R. 1.04 (d) (detailing the requirements of attorney contingency fees).

relationship, such as administrative or legislative hearings and contested case hearings.[253] In general, there is no broad exception for an attorney to utilize to maintain the confidentiality of the relationship or the details it encompasses.

B. *What Can Only Be Done by an Attorney?*

The local ordinances discussed above all recognize that there are certain functions that only licensed attorneys may perform and should not fall within the standard definition of lobbying. However, none of the ordinances discussed above even attempts to provide any guidance as to the conduct that falls within this exception. To discern what conduct can only rightly be engaged in by a licensed lawyer, practitioners must turn elsewhere.

Somewhat surprisingly, neither the Texas Disciplinary Rules of Professional Conduct nor the Texas Rules of Disciplinary Procedure attempt to define the practice of law. However, the state law governing the regulation of the legal profession (and the unauthorized practice of law) does offer some guidance.[254] That statute defines the practice of law as:

> [T]he preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined.[255]

So, in the context of advocating on a client's behalf at city hall, what constitutes legal work? Is the drafting of an ordinance something that only a licensed lawyer should do? What about opining on the legal implications of a proposed city policy? In case the definition set forth in section 81.101(a) of the Texas Government Code does not provide enough

253. *See* TEX. GOV'T CODE ANN. § 305.003(b-1) (West 2012) ("Subsection (a)(2) does not require a member of the judicial, legislative, or executive branch of state government or an officer or employee of a political subdivision of the state to register.").

254. *See id.* § 81.101 (West 2005) (providing governance for the practice of law and unauthorized practice of law).

255. *See id.* § 81.101(a)–(c) ("In this chapter, the 'practice of law' does not include the design, creation, publication, distribution, display, or sale, including publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.").

certainty, beware of section 81.101(b): "The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law."[256]

Thus, according to the Government Code, a person must be a lawyer to prepare a pleading or other document on behalf of a client in court, to render legal advice out of court, to prepare instruments requiring legal consideration, or to engage in any other quasi-legal conduct that some court may find to be overreaching at some later date.[257] Compare that ambiguous guidance with the Texas Penal Code provision covering the unauthorized practice of law,[258] which makes it a Class A misdemeanor for a person, "with intent to obtain an economic benefit for himself or herself," to do any of the following:

> (1) contract[] with any person to represent that person with regard to personal causes of action for property damages or personal injury;
> (2) advise[] any person as to the person's rights and the advisability of making claims for personal injuries or property damages;
> (3) advise[] any person as to whether or not to accept an offered sum of money in settlement of claims for personal injuries or property damages;
> (4) enter[] into a contract with another person to represent that person . . . on a contingent fee basis [;] or
> (5) enter[] into any contract with a third person which purports to grant the exclusive right to select and retain legal counsel . . . in any legal proceeding.[259]

The prohibitions above do not apply to a person currently licensed to practice law in Texas or another jurisdiction.[260]

While the Texas Government Code establishes the practice of law as the rendering of specialized legal services, the Texas Penal Code establishes the unauthorized practice of law as an attempt to enrich oneself in the realm of

256. *Id.* § 81.101(b).

257. *See id.* (granting the judiciary the ability to ascertain what does and does not constitute the practice of law).

258. *See* TEX. PENAL CODE ANN. § 38.123 (West 2011) (including a graduated punishment system for repeat offenders, such as "under Subsection (a) of this section is a felony of the third degree if it is shown on the trial of the offense that the defendant has previously been convicted under Subsection (a) of this section").

259. *See id.* § 38.123(a) (describing the elements that constitute the "Unauthorized Practice of Law" in Texas).

260. *See id.* § 38.123(b) (stating that such provision in the Texas Penal Code does not apply to any attorney in good standing with the State Bar of Texas or other valid jurisdiction).

personal injury and property claims.[261] Unfortunately, neither provision provides any meaningful guidance when attempting to determine whether an individual is "performing an act that may be performed only by a licensed attorney."[262]

V. ETHICAL AND LEGAL ISSUES FACING ATTORNEYS

A. *State Bar Consequences*

In terms of reconciling state and local lobby regulations with an attorney's ethical obligations, even the disclosure of a client's identity is potentially problematic.

Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct sets forth the guidelines for confidential and privileged information.[263] Confidential information not only includes privileged information[264] but also unprivileged client information.[265]

In 1991, the Professional Ethics Committee for the State Bar of Texas considered whether the Disciplinary Rules of Professional Conduct prevented an attorney from disclosing a client's name and the fees owed by that client.[266] The Committee looked at the then recently enacted expansion of the confidentiality rule, which clarified that both privileged and unprivileged client information were deemed confidential.[267] The Committee also looked at the restrictions imposed by the law of agency on

261. *See id.* § 38.123(a) (establishing the circumstances under which a person will be guilty of engaging in the unauthorized practice of law and focusing on personal injury and property disputes).

262. *E.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-64(9) (2012) (asserting the attorney exception included in the list of persons who are not required to register as lobbyists).

263. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (dictating Texas guidelines and limitations on a client's confidential information).

264. *Id.* R. 1.05(a) (identifying two types of confidential information and providing that "'[p]rivileged information' refers to the information of a client protected by the lawyer–client privilege of Rule 503 of the Texas Rules of Criminal Evidence or . . . Rule 501 of the Federal Rules of Evidence").

265. *Id.* R. 1.05(a) (including information acquired by a lawyer relating to or "furnished by the client *other than* privileged information" (emphasis added)).

266. *See* Tex. Comm. on Prof'l Ethics, Op. No. 479 (1991) (addressing "whether the Texas Disciplinary Rules of Professional Conduct prohibit the disclosure of" client names or "the amounts owed by each client" where the information is requested from the firm to secure a loan); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 cmt. 15 ("A lawyer entitled to a fee necessarily must be permitted to prove the services rendered in an action to collect it.").

267. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (providing privileged and unprivileged information are appropriately categorized as confidential information); *See also* Tex. Comm. on Prof'l Ethics, Op. No. 479 (1991) ("In contrast to the former rule . . . [Disciplinary Rule 1.05] provides increased protection by expanding the scope of confidentiality.").

an attorney acting "in his or her capacity as fiduciary."[268] In its analysis, the Committee found that the names of a client and the amounts they owed constituted confidential information.[269] In conclusion, "[a]bsent a client's informed consent, [a] law firm may not reveal either the names of its client or the amounts which those clients owe."[270]

In light of this cautionary guidance, an attorney should approach governmental advocacy with care. When it becomes clear to attorneys that they will be subject to a local lobby ordinance or the state Lobby Law, should the first order of business be to gain consent to disclose the client's identity? Similarly, if the professional ethics committee has deemed it improper to disclose amounts owed by a client to an attorney, does that same logic apply to the disclosure of a contingent fee arrangement? A careful practitioner should not only get consent to reveal the client's identity, but also seek permission to reveal any relevant details of the fee structure.[271] Otherwise, the advocate's first act of compliance—registering as a lobbyist—could simultaneously constitute an ethical breach.[272]

B. *Rule 4.02: Communications with One Represented by Counsel*

One of the more complicated and uncharted ethical consequences stemming from local lobby ordinances is the issue of reconciling how communication with city officials is treated by local ordinance and how it is viewed by the Texas Disciplinary Rules of Professional Conduct.[273] There appears to be an inherent conflict between a regulatory structure that regulates such communication through disclosure and a system that essentially prohibits such communication.

268. Tex. Comm. on Prof'l Ethics, Op. No. 479 (1991) ("[A] lawyer's obligation of confidentiality springs not so much from the attorney–client evidentiary privilege as it does from the Law of Agency.").

269. *See id.* ("Application of the rule prohibits the law firm from disclosing the requested information.").

270. *Id.*

271. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.05 (prohibiting the disclosure of confidential information and providing for limited exceptions to the rule); Tex. Comm. on Prof'l Ethics, Op. No. 479 (1991) ("Absent a client's informed consent, the law firm may not reveal either the names of its clients or the amounts which those clients owe.").

272. *See generally* TEX. GOV'T CODE ANN. § 305.003 (West 2005) (outlining who is required to register as a lobbyist).

273. *Compare* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02 (stating a lawyer must not communicate with an entity of government that the lawyer knows is represented by counsel about his client's representation), *with* Tex. Comm. on Prof'l Ethics, Op. No. 474 (1991) (concluding Rule 4.02 prohibited plaintiff's counsel from communicating with city council members).

Rule 4.02 is "meant 'to prevent lawyers from taking advantage of uncounselled lay persons and to preserve the integrity of the lawyer–client relationship.'"[274] Rule 4.02 states in relevant part:

> (a) In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
> (b) In representing a client a lawyer shall not communicate or cause another to communicate about the subject of representation with a person or organization a lawyer knows to be employed or retained for the purpose of conferring with or advising another lawyer about the subject of the representation, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.
> (c) For the purpose of this rule, "organization or entity of government" includes: (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation, or (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.[275]

In 1991, the Professional Ethics Committee of the State Bar of Texas found Rule 4.02 prohibits a lawyer representing a party in litigation against a city from communicating with an individual city council member about the proposed settlement of the litigation.[276]

Most Texas case law interpreting Rule 4.02 deals with communications made while litigation was pending and does little to illuminate the propriety of communications between private attorneys and city officials regarding matters of public policy.[277] The language of the rule and the

274. Graham v. United States, 96 F.3d 446, 449 (9th Cir. 1996) (quoting MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (1992)); *see also* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02 cmt. 1 ("Paragraph (a) of this Rule is directed at efforts to circumvent the lawyer–client relationship existing between other persons, organizations[,] or entities of government and their respective counsel."); Tex. Comm. on Prof'l Ethics, Op. No. 474 (1991) (establishing Rule 4.02 "prohibit[s] communication by a lawyer for one party concerning the subject of the representation with persons having a managerial responsibility on behalf of the organization that relates to the subject matter of the representation").

275. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02.

276. Tex. Comm. on Prof'l Ethics, Op. No. 474 (1991).

277. *See, e.g.*, *In re* News Am. Pub., Inc., 974 S.W.2d 97, 97 (Tex. App.—San Antonio 1998, no pet.) (finding sanctions were appropriate under Rule 4.02 for actions in a suit for breach of contract where plaintiff's counsel met with a party who unilaterally terminated his attorney–client relationship).

commentary that follows makes it clear that an attorney may communicate with one represented by counsel about the subject of the representation only in limited situations: when opposing counsel consents to the communication or when authorized to do so by law.[278]

With the exception of San Antonio, which expressly incorporates Rule 4.02 into its lobby regulations,[279] the other local lobby ordinances do not require the consent of the city attorney and clearly anticipate a lawyer–lobbyist communicating with city officials.[280] Thus, does a local lobby ordinance constitute an authorization by law for the purposes of Rule 4.02? While no formal answer exists, we may be able to glean guidance from other sources.

The Texas Attorney General considered Rule 4.02 in light of an administrative rule requiring written communications be delivered to an opposing party, as well as the party's counsel.[281] The attorney general was asked about the interplay of Rule 4.02 and a rule adopted by the Texas Workers' Compensation Commission, which requires all written communications relating to a claim be delivered to the claimant's legal counsel, as well as the claimant.[282] The attorney general sought to determine whether the commission rule, found in the Texas Administrative Code, was a "law" that would authorize such communication.[283] The opinion concluded an administrative rule is a law, provided it is authorized by statute, is within the authority of the agency, and was adopted in a procedurally correct manner.[284]

278. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 4.02(a) (restricting contact between an attorney and opposing counsel's client to instances where consent is secured from opposing counsel or the contact is otherwise authorized).

279. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-64(5) (2012) (stating "[a]n attorney . . . whose contact with a city official is made solely as part of resolving a dispute with the city, provided that the contact is solely with city officials who do not vote on or have final authority . . . and so long as such an attorney complies with Rule 4.02," does not have to register).

280. *See, e.g.*, HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-72(b) (2012) (establishing an individual that is required to register and "communicates directly with a member of the executive branch to influence administrative action is not required to register" if the individual performs acts as a licensed attorney).

281. *See* Tex. Att'y Gen. Op. No. JC-0572 (2002) (addressing "whether a Workers' Compensation Commission . . . rule requiring that written communications be sent to both a claimant and the claimant's attorney creates an exception to Rule 4.02(a)").

282. *See id.* (comparing Rule 4.02(a) with Workers' Compensation Commission Rule 102.4(b), which requires certain information be mailed to the claimant and her representative).

283. *See id.* ("Rule 4.02(a) bars communication with clients 'unless the lawyer . . . is authorized by law to do so.'").

284. *Id.* ("[A]dministrative regulations only have the full force and effect of law when: (1) a statute exists which authorized the issuance of rules and regulations by the agency; (2) the rule or

Additionally, the attorney general opined "that the Commission rule is [a] 'law' authorizing an attorney to send a written communication to a person who is represented by counsel and that it provides an exception to Rule 4.02(a)."[285]

In reaching this opinion, the attorney general relied on the reasoning set forth in *Lee v. Fenwick,*[286] which dealt with the proper calculation of prejudgment interest.[287] The issue before the court was whether the defendant received written notice of the claim, as required by statute, when plaintiff's counsel had merely notified defendant's attorney, but not the defendant himself.[288] The court dispensed with the argument that Rule 4.02 prohibits direct communication with a defendant represented by counsel.[289] The court focused on the exception created by the language in Rule 4.02, noting that the general prohibition applies "*unless the lawyer . . . is authorized by law to do so*," and concluded, "Since [the statute] requires written notice to the defendant, an attorney would not violate Disciplinary Rule 4.02 by sending the statutory notice."[290]

However, these authorities deal with situations where an attorney is procedurally *required* to communicate *in writing* with another party, not with the sort of strategic oral communication most often associated with lobbying. The local lobby ordinances do not *require* communication, but merely *permit* communication and mandate that it be disclosed.[291] Clearly, an ordinance regulating lobbyists is within the lawful jurisdiction of a home rule municipality and should be considered a law complete with criminal penalties.[292] The question that remains unanswered is whether a

regulation adopted is within the authority of the agency; and (3) the rule or regulation is adopted according to the procedure prescribed by statute.").

285. *Id.*

286. Lee v. Fenwick, 907 S.W.2d 88 (Tex. App.—Eastland 1995, writ denied).

287. *Compare id.* at 88 (discussing whether the defendant received communications from the plaintiff about the claim before suit was filed and awarding "prejudgment interest from the date the lawsuit was filed," because the defendant did not receive notice), *with* Tex. Att'y Gen. Op. No. JC-0572 (2002) (relying on the decision in *Lee v. Fenwick* to conclude that a statutory exception exists to Rule 4.02).

288. *Lee*, 907 S.W.2d at 89–90 (examining the argument that receipt of notice by a party's counsel is conclusive of the fact that the party received notice).

289. *See id.* at 90 (dismissing the plaintiff's argument by noting that an exemption to Rule 4.02 exists where there is a statutory notice requirement).

290. *Id.*

291. *See, e.g.*, HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-72 (2012) (discussing registration when a party makes certain communications, but not mandating the party make communications).

292. *See, e.g.*, *id.* (establishing reporting requirements for lobbyists conducting communications in the City of Houston).

local lobby ordinance that grants restricted permission to communicate with city officials outside the presence of their attorneys is legal authorization, which brings those discussions outside the scope of Rule 4.02.

C. *Regulating Conflicts of Interest*

As noted, state Lobby Law contains statutory provisions for lobbyists whose clients develop conflicting interests.[293] These restrictions are in addition to—not in lieu of—the conflict of interest rules governing attorneys.[294] This means a lawyer who is lobbying at the state level is equally subject to both standards for conflicts of interests, each with its own method of addressing the conflict. Although the lobby conflicts provisions of the Government Code have not yet made their way into local lobby ordinances, practitioners should be aware of the two systems and their distinctions. The two procedures differ in the notice required,[295] the disclosure of a conflict,[296] and the ability of the clients to consent to a conflict of interest.[297]

Rule 1.06 of the Texas Disciplinary Rules governs conflicts of interests between clients.[298] Generally, a lawyer may not represent a client if it reasonably appears the client's interests are materially and directly adverse to the interests of another client or to the lawyer himself.[299] A lawyer may engage in the dual representation if the lawyer reasonably believes the dual representation will not materially affect either client and after full disclosure of the conflict—and its potential consequences—each client consents to the dual representation.[300] If the conflict is incurable, the lawyer should withdraw from one or more representations as necessary to

293. TEX. GOV'T CODE ANN. § 305.028 (West 2005) (identifying prohibited conflicts of interest under the state Lobby Law).

294. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (providing the general rule for conflicts of interest).

295. *Compare* GOV'T § 305.028(c)(2) (describing the requirement to file conflicts with the Commission), *with* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06 (omitting notice to anyone other than each affected client).

296. *Compare* GOV'T § 305.028(c)(2) (requiring client disclosure within two business days of discovering the conflict), *with* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(c)(2) (detailing the required disclosure of the conflict to the client).

297. *Compare* GOV'T § 305.028(c-1)(2) (allowing an attorney to represent a client despite a conflict of interest if the attorney does not "reasonably believe[] the representation of each client will be materially affected" and if the client consents), *with* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(c) (requiring the consent of "each affected or potentially affected client").

298. TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06.

299. *Id.* R. 1.06(b).

300. *Id.* R. 1.06(c).

avoid a violation of the rules.

The Lobby Law borrows liberally from Rule 1.06, but specifies written notice to affected clients and requires disclosure of the conflict to a third party. Section 305.028 of the Government Code sets out the conflict of interest provisions applicable to lobbyists.[301] It provides that a lobbyist may not represent two clients with interests that are "materially and directly adverse," nor may he represent a client when the representation "reasonably appears to be adversely limited" by the lobbyist's own interests or obligation to another client.[302] To properly address a conflict, the lobbyist must reasonably believe "the representation of each client will not be materially affected," must notify each client in writing within two business days of becoming aware of the conflict, and must provide written notice to the Texas Ethics Commission of the existence of the conflict within ten days.[303] Once this notice is accomplished, there is no permission necessary from the clients to continue the representation.[304]

However, if the lobbyist determines that the dual representation reasonably appears to materially affect the representation, both clients must consent to the continuing lobby representation, thereby waiving the lobbyist's conflict.[305] When a conflict arises that the procedures in the statute do not satisfactorily address, the lobbyist must withdraw from representation as necessary to cure the conflict.[306] Violations are subject to civil penalty and revocation of lobby credentials by the Ethics Commission, and lobbyists are under an ongoing obligation to swear they have complied with Section 305.028.[307]

D. *Penal Code Consequences*

As noted earlier, one of the statutory exceptions to the Texas Penal Code's gift prohibition is for food, lodging, transportation, and entertainment that is both (1) accepted as a guest, and (2) reported as required by law.[308] In order to take advantage of this exception, both the donor and donee must meet relevant reporting requirements, which may vary depending on the jurisdiction. An attorney must not only know the

301. GOV'T § 305.028.
302. *Id.* § 305.028(b).
303. *Id.* § 305.028(c)(1)–(3).
304. *Id.* § 305.028(c-1).
305. *Id.* § 305.028(c-1)(2).
306. *Id.* § 305.028(d).
307. *Id.* § 305.028(f)–(h).
308. *See* TEX. PENAL CODE ANN. § 36.10(b) (West Supp. 2012) (noting the inapplicability of offense statutes for gifts to public servants where reporting requirements are met).

local reporting requirements, but also the reporting requirements of the local official who is the recipient of the goodwill.

It is evident the activity reports required by each municipality discussed herein mandate the report of any expenditures made in the course of lobbying, including expenditures for food, lodging, transportation, and entertainment.[309] However, to avoid implicating the state law's gift prohibitions for such expenditures, the local official must also report those benefits as required by any local ordinance.[310]

This means, to enjoy the protection conferred by section 36.10 of the Penal Code, an advocate must first ensure he is meeting the local reporting requirements. For example, in Dallas and San Antonio, the definition of "gift" is broad enough to include food, lodging, transportation, and entertainment.[311] A local lobbyist in Dallas must report gifts, benefits, or expenditures with a cumulative value of over $25 and must specify the date, cost, and circumstances of the transaction.[312] In San Antonio, quarterly activity reports must include "[e]ach gift, benefit, or expenditure greater than [$50]."[313] In Houston, a lobbyist must report any gift, expenditure, or honorarium over $250.[314] The City of Austin requires its lobbyists to report expenditures, gifts, or honoraria of $100 or more made to benefit a city official, along with the "date, beneficiary, amount[,] and circumstances of the transaction."[315] In El Paso, lobbyists must include gifts, including meals and entertainment costs, in quarterly reports.[316]

While it is imperative that attorneys be familiar with the local lobby

309. *See, e.g.*, SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-66 (2012) (requiring quarterly activity reports for lobbying activities, which shall include gifts, benefits, or expenditures).

310. *See, e.g.*, DALL., TEX., CITY CODE ch. 12A, art. I, § 12A-15.6 (2012) (providing guidelines for required disclosures by lobbyists in form, manner, and substance).

311. *See* SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-42 (2012) (defining gift as "a voluntary transfer of property (including the payment of money) or the conferral of a benefit having pecuniary value (such as the rendition of services or the forbearance of collection on a debt), unless consideration of equal or greater value is received by the donor"); *see also* DALL., TEX., CITY CODE ch. 12A, art. I, § 12A-2(21) (2012) (specifying a gift is "a voluntary transfer of property (including the payment of money) or the conferral of a benefit having pecuniary value").

312. *See* DALL., TEX., CITY CODE ch. 12A, art. III, § 12A-15.6(a) (2012) (mandating "each registrant [lobbyist] shall file with the city secretary a report concerning the registrant's lobbying activities for each client from whom, or with respect to whom, the registrant received compensation of, or expended, monies for").

313. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. V, § 2-66(a)(6) (2012).

314. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-75(a)(3) (2012).

315. AUSTIN, TEX., CITY CODE tit. 4, ch. 4-8, § 4-8-7(3) (2012).

316. *See* EL PASO, TEX., MUN. CODE tit. 2, ch. 2.94, § 2.94.070(A)(7) (2012) (stating all gifts "must be reported pursuant to Section 2.92.070(B)," which delineates in greater detail what gifts are reportable).

disclosure requirements, it is not sufficient to know only the local disclosure requirements; an attorney must be well versed in the city's corresponding code of ethics applicable to its various public officers. The City of Dallas Code of Ethics has specific reporting requirements related to travel.[317] A Dallas city official must file a disclosure statement after accepting any trip or excursion in connection with that person's official duties, and the disclosure must include "the gratuitous provision of transportation, accommodations, entertainment, meals, or refreshments."[318] The disclosure must also include the sponsor name, the person funding the trip, the place to be visited, the date of the trip, and the purpose of the travel.[319] If time permits, such disclosure must be made prior to the excursion; otherwise, it must be reported within seven days after the travel is concluded.[320]

In San Antonio, city officials may not accept any gift from a registered lobbyist, except for meals of less than $50 per occurrence, so long as the city official does not accept more than $500 in a calendar year from a single source.[321] San Antonio also requires a city official's financial disclosure report include the name of each person giving the city official or the official's spouse a gift with a fair market value of $100 or more.[322] In Houston, the financial disclosures required of city officials include the identification of any person or business that donates a gift worth more than $250, but it specifically excludes food and beverages from the reporting requirement.[323]

In the City of Austin, the mayor and council members are required to make multiple disclosures when they accept any trip or excursion from a person or entity other than the city.[324] Before embarking on a trip or excursion, the elected official must notify the city clerk of the sponsor's name and the place visited, as well as the date, purpose, and duration of the trip.[325] Upon returning, the official must report the approximate

317. *See* DALL., TEX., CITY CODE ch. 12A, art. III-A, § 12A-21 (2012) (detailing a number of travel reporting requirements that must be followed by certain persons).

318. *Id.* § 12A-21(a).

319. *Id.* § 12A-21(a)(1)–(4).

320. *Id.*§ 12A-21(a).

321. SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 2, art. III, div. II, § 2-45(a)(2) (2012).

322. *Id.* div. VII, § 2-74(14).

323. HOUS., TEX., CODE OF ORDINANCES ch. 18, art. V, § 18-21(g)(6) (2012). Interestingly, this places the burden upon city officials to determine the value of a benefit for which they did not pay. There is no guidance for city officials as to whether they must verify the value of such a benefit, or which valuation method (fair market, face value, etc.) should be utilized.

324. AUSTIN, TEX., CITY CODE tit. 2, ch. 2-7, § 2-7-72(F) (2012).

325. *Id.*

value of the trip.[326] Thus, to avail oneself of the "food, lodging, transportation" defense, Austin advocates and officials must ensure the trip has been reported on the lobbyist's quarterly activity report and *twice* by the elected official.[327]

El Paso has the most specific reporting provision, requiring city officials to report "[a]ny hosting, such as travel and expenses, entertainment, meals or refreshments, that has a value of more than [$50], other than hosting provided on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient."[328] The El Paso city ordinance goes on to require reporting of "[a]ny tickets or other admission passes to any event with an actual or face value of more than [$10] . . . except for tickets or admission passes provided by the City for an event that is sponsored or conducted by the City."[329]

What remains unclear is how each of the aforementioned local limits on gifts will be reconciled with section 36.10(6) of the Texas Penal Code.[330] The Penal Code exception to the gift prohibitions authorizes gifts with a value of less than $50.[331] It is not difficult to envision a scenario where a public official reports the acceptance of a gift prohibited by the Penal Code in an attempt to comply with a local disclosure requirement.

E. *Negative Consequences to Be Considered by the Local Governmental Practitioner*

The attempt to reconcile both state and local lobbying regulations with an attorney's ethical obligations is further complicated by provisions found in the Texas Government Code and the Texas Penal Code. The Penal Code offers limited deference to transactions reported in accordance with the state Lobby Law. Nevertheless, the advent of local lobby regulations serves to complicate rather than simplify the standards imposed by the Penal Code.

Perhaps the area of greatest risk to the local government lobby practitioner is the uncertainty surrounding the bribery statute found in

326. *Id.*

327. *See id.* § 2-7-72(G) (stating any city official must promptly report to the city manager any gift or loan accepted); TEX. PENAL CODE ANN. § 36.10(b) (West Supp. 2012) (outlining the inapplicability of section 36.08, which may subject a public servant to a penal offense, to "food, lodging, [and] transportation" that is reported by the done and accepted as a guest).

328. EL PASO, TEX., MUN. CODE tit. 2, ch. 2.92, § 2.92.070(B)(4)(b) (2012).

329. *Id.* § 2.92.070(B)(4)(d).

330. PENAL § 36.10(a)(6) (West Supp. 2012).

331. *Id.* (disallowing application of section 36.08 to "an item with a value of less than $50, excluding cash or a negotiable instrument").

section 36.02 of the Texas Penal Code.[332] While the exceptions found in section 36.10[333] specifically reference sections 36.08 and 36.09, there is no application of the language found in section 36.10 to the bribery provisions in section 36.02.

For discussion purposes, the most relevant portion of section 36.02 reads as follows:

> (a) A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:
>
> (1) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;
>
> . . . .
>
> (d) It is an exception to the application of Subdivisions (1), (2), and (3) of Subsection (a) that the benefit is a political contribution as defined by Title 15, Election Code, or an expenditure made and reported in accordance with Chapter 305, Government Code.
>
> (e) An offense under this section is a felony of the second degree.[334]

The only exceptions to prosecution for the felony offense of improper offering of a benefit to a public servant include when the benefit was a political contribution or was an expenditure made under the Lobby Law, Chapter 305 of the Government Code.[335] Because the Lobby Law does not apply to local government public servants, there is no exception for such benefits.[336] The offense is complete with the singular act of offering or soliciting any benefit as consideration; thus, there is no acceptance or quid pro quo required.[337] The practical outcome is that at the state level, a registrant may make expenditures without being subject to the provision as long as the registrant reports the expenditure. At the local level, however, there is no safe harbor, and the local district attorney may prosecute the violation. The cautious practitioner would be well advised to counsel clients to be very careful when determining whether to make any

332. PENAL § 36.02 (West 2011).

333. *Id.* § 36.10 (West Supp. 2012).

334. *Id.* § 36.02 (West 2011).

335. *Id.* § 36.02(d).

336. *See* Tex. Ethics Comm'n Op. No. 427, at 2 (2000) (stating Lobby Law restrictions and exceptions only apply to officers or employees "of the legislative or executive branch of state government").

337. *See, e.g.*, Hubbard v. State, 668 S.W.2d 419, 420–21 (Tex. App.—Dallas 1984) ("The offense focuses on the mental state of the actor, and is complete if a private citizen, by offering, conferring, or agreeing to confer, or a public servant or party official, by soliciting, accepting, or agreeing to accept, intends an agreement." (citing Minter v. State, 159 S.W. 286 (Tex. Crim. App. 1913))), *pet. granted, remanded on other grounds*, 739 S.W.2d 341 (Tex. Crim. App. 1987).

expenditure involving a local public official or government employee.

There are other areas of incongruity found in state law impacting advocacy practitioners at the local level. This is primarily seen in statutes adopted to provide exceptions to state officials and employees, but which were not extended to local officials.

For example, section 572.060 of the Texas Government Code provides that a state officer or employee may solicit a contribution to a charity or government entity without running the risk of that becoming a benefit under the Penal Code honorarium or gift provisions, Lobby Law, or the Title 15 campaign law.[338] The same protection could have been codified for local officials and employees but it was not; as a result, these persons were left subject to the interpretation of the commission that the contribution as solicited could become an impermissible benefit under the Penal Code.[339]

VI. IN CONCLUSION

In a world of increasing transparency and scrutiny on the public policymaking process, there is likely to be an increasing number of jurisdictions that will adopt local lobby regulations. Currently, there is no model ordinance; as a result, the local practitioner will not only have to monitor any changes at the state level that might influence local governmental lobby practices, but also all municipalities as well. Furthermore, in 2013, the Texas Legislature will consider statutory changes to the jurisdiction of the Texas Ethics Commission, including Chapter 305 of the Government Code.[340] Due to the rules of professional conduct and the increasing efforts for greater transparency and disclosure, the lawyer–lobbyist will face significant challenges in ethically and proficiently representing clients. The attorney who chooses to serve as both a legal advocate and a policymaking advocate will be subjected to competing layers of regulatory oversight, including the Texas Disciplinary Rules of Professional Conduct, state or local lobby restrictions, and the provisions of the Texas Penal Code. Each of these standards has its own restrictions, exceptions, interpretive guidance, and potential consequences. Recognizing and reconciling these normative and legal standards will be paramount for the ethical attorney.

338. TEX. GOV'T CODE ANN., tit. 5, subtit. B, § 572.060 (West 2012).

339. Tex. Ethics Comm'n Op. No. 427, at 1 (2000).

340. Report of the Texas Sunset Advisory Comm. on the Texas Ethics Comm'n, at 1, 26 (2012).