Chapter 23

Exemptions from Definitions of "Executive Agent" and "Legislative Agent"

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§ 23.1 WHY IS IT IMPORTANT TO DETERMINE WHETHER AN INDIVIDUAL IS AN "EXECUTIVE AGENT" OR "LEGISLATIVE AGENT"?

As discussed more fully in Chapter 21, conduct within the definition of "executive agent" or "legislative agent" triggers the application of various notification, registration, and reporting requirements under the Lobbying Law, G.L. c. 3, § 39 et seq. In addition, whether an individual's conduct falls within the statutory definitions or is exempted will determine whether various restrictions imposed by statutes other than the Lobbying Law apply to the individual.

§ 23.2 NEW STATUTORY TERMINOLOGY

The 2009 amendments to the Lobbying Law not only substantially redefined the terms "executive agent" and "legislative agent," but introduced two new terms: "executive lobbying" and "legislative lobbying." St. 2009, c. 28, § 2. The addition of these new terms may be the most radical of the changes to the Lobbying Law contained in the 2009 amendments (St. 2009, c. 28, §§1-16). No longer is "lobbying" limited to engaging in *direct communication* with a covered public official or employee. It has now been expanded to include a variety of other so-called "behind the scenes" or "back office" activities – if they are done in connection with an act to communicate with a government employee. G.L. c. 3, § 39.

Practice Note

In combination with a narrowing of the so-called "safe harbor" for individuals whose lobbying is presumed to be merely "incidental" to their regular and usual business or professional activities (*see discussion in* § 23.5.1), these amendments greatly expanded the class of individuals who may potentially be required to register as an executive or legislative agent with the secretary.

§ 23.3 WHEN DOES ONE BECOME AN "EXECUTIVE AGENT" OR "LEGISLATIVE AGENT"?

There are two contending views of when an individual becomes an executive or legislative agent. The first looks to the time of actual performance of lobbying activity; the second looks to the time of engagement to perform such activity. Each view can claim some statutory legitimacy and neither has been considered by a Massachusetts court of record. The first view is more closely tied to the declared purpose of the Lobbying Law (see "Statement of Intent," St. 1973, c. 981, § 1) and has the virtue of being the narrower interpretation of a statute that regulates protected First Amendment activity. The second view is favored by the supervisor of public records (the official charged with the administration of the Lobbying Law, hereafter, "the supervisor") and therefore carries institutional weight and much less risk of an investigation or enforcement proceeding under G.L. c. 3, §§ 45, 48, or 49.

The first view relies on the statutory definitions of "executive agent" and "legislative agent," which are framed in terms of certain kinds of conduct undertaken to persuade governmental decision-makers. The former is a "person who for compensation or reward engages in executive lobbying, which includes at least 1 lobbying communication with a government employee made by said person" and the latter is a "person who for compensation or reward engages in legislative lobbying, which includes at least 1 lobbying communication with a government employee made by said person."

"Executive lobbying" is defined as:

> any act to promote, oppose, influence, or attempt to influence the decision of any officer or employee of the executive branch or an authority, including but not limited to, statewide constitutional officers and employees thereof, where such decision concerns legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation promulgated pursuant to any general or special law, or any act to communicate directly with a covered executive official to influence a decision concerning policy or procurement; provided further, that executive lobbying shall include acts to influence or attempt to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with executive lobbying at the state level; and provided further, that executive lobbying shall include strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee; and provided, further, that "executive lobbying" shall not include providing information in writing in response to a written request from an officer or employee of the executive branch or an authority for technical advice or factual information regarding a standard, rate, rule or regulation, policy or procurement for the purposes of this chapter.

"Legislative lobbying is defined as:

> any act to promote, oppose, influence or attempt to influence legislation, or to promote, oppose or influence the governor's approval or veto thereof including, without limitation, any action to influence the introduction, sponsorship, consideration, action or non-action with respect to any legislation; provided further, that legislative lobbying shall include acts to influence or attempt to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with legislative lobbying at the state level; and provided further, that legislative lobbying shall include strategizing, planning and research if performed in connection with or for use in an actual communication with a government employee; provided, however, that "legislative lobbying" shall not include providing information in writing in response to a written request from an officer or employee of the legislative branch for technical advice or factual information regarding any legislation for the purposes of this chapter.

Practice Note

Note that the terms "executive lobbying" and "legislative lobbying" expand the concept of lobbying to include for the first time acts to influence or attempt to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with lobbying at the state level, as well as strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee. St. 2009, c. 28, § 3.

Under these definitions, one may reasonably take the position that one does not become an executive or legislative agent until one actually engages in some act to influence covered executive or legislative branch decisions. This view finds some support in a 1991 opinion of the supervisor that concludes, based on the definitional language and the above-cited "Statement of Intent," that "the only plausible construction of the phrase 'any act to [affect the decision making process]' is that the act be one which involves direct contact with a decision maker." *Letter to Carl Valvo* (June 24, 1991).

Based on this reading, the supervisor went on to advise that "any individual who has no personal contacts with state governmental decision makers need not register as a legislative agent with this office." Because much of what lobbyists and lobbying firms do—monitor bills, draft legislation, devise strategies, assemble coalitions, develop position papers, etc.—does not involve personal contacts with governmental decision makers, engaging in such activity alone is insufficient to require registration as an executive or legislative agent (although the expenditures for such activity would be reportable under § 47 if part of a lobbying initiative undertaken by an employer of an executive or legislative agent). This view is buttressed by the revised definition of "executive agent" and "legislative agent" that requires the sending of "at least 1 lobbying communication to a government employee" to be considered a lobbyist. G.L. c. 3, § 3.

The second view is that one becomes an executive or legislative agent when one is hired to perform services that include or contemplate acts to influence the specified kinds of governmental decisions. Under this view, it is the intent of the parties that controls: if the employer agrees to pay for services that *may include, where necessary*, efforts to influence covered governmental decisions and a person agrees to provide such services, then the person has become an executive or legislative agent. It is possible, therefore, to become an executive or legislative agent and not, in fact, engage in the acts described in the statutory definitions of the terms. This view is implicit in G.L. c. 3, § 41.

Section 41 requires that a client who hires an executive or legislative agent must file a registration statement by the December 15 immediately preceding the beginning of the registration year or, if the hiring occurs after January 1, within ten days of the engagement. Executive and legislative agents must also file an annual registration statement not later than December 15 of the year preceding the registration year. Although the statute is silent with respect to the timing of the client's registration statement if the hiring occurs after December 15, but on or before January 1, or of the executive or legislative agent's registration statement if the hiring occurs at any time after December 15, most observers attribute these gaps to poor draftsmanship and not to a legislative intention that registration be excused in such circumstances.

In any event, it is clear that Section 41 links the registration obligations of the client to the date of hire (or, in the case of executive or legislative agents' registration, the mere fact of having been retained) and not to the actual performance of covered lobbying activity.

As noted above, these contending views have yet to be conclusively resolved. Most professional lobbyists (particularly legislative agents) complete their registration obligations when their engagements with established clients or employers are entered (or renewed) for a given year. The question of when (or whether) to register arises more often in the case of executive agents (who are engaged more episodically and not on a schedule linked to the legislative year) or non-typical lobbyists (i.e., persons, such as

lawyers, who may be called upon to engage in lobbying activity for particular clients, but not as part of their regular business activities). Until the issue is resolved, the conservative course is to register promptly (i.e., within ten days) after an engagement that contemplates the possibility of covered activity or after it appears that covered activity will be required as part of a pre-existing engagement.

§ 23.4 STATUTORY IMPLICATIONS OF BEING AN EXECUTIVE OR LEGISLATIVE AGENT

In addition to the registration and reporting obligations that attach to executive or legislative agents and their employers, there are various other statutory restrictions on the activities of executive or legislative agents that do not necessarily apply to individuals who are neither executive nor legislative agents. These restrictions apply to such agents' gifts, hospitality, and campaign contributions.

§ 23.4.1 Gifts

Few subjects have generated more questions, concerns, passions, proposals, and honest agreements than the problem of gifts to public officials. The difficulties stem from the fact that the term comprehends items ranging from the clearly de minimus and innocent (e.g., a cup of coffee) to the clearly inappropriate (e.g., a new sports car) and the fact that giving gifts (including meals and entertainment) to generate goodwill and foster good relationships is an accepted practice in the private sector. Acceptable standards in this area change over time, but the changes are not necessarily accompanied by clear notice to those whose conduct is affected.

The practice of providing meals, beverages or entertainment to legislators attracted much attention in the mid-1990s, leading to a series of enforcement actions by the State Ethics Commission, federal criminal prosecutions, and, in 1995, amendments to the Lobbying Law. Unfortunately, the legislative response in the past did not extend to conforming the provisions of other gift laws to the 1995 amendments. The 2009 amendments to the Lobbying Law (G.L. c. 3, § 43), the Financial Disclosure Law (G.L. c. 268B § 6) and the Conflict of Interest Law (G.L. c. 268A, § 3) did bring some degree of uniformity to the treatment of gifts to public officials and public employees. St. 2009, c. 28, §§ 9, 62, 95.

(a) *Under the Lobbying Law*

G.L. c. 3, § 43 strictly prohibits the giving of "gifts" by an executive or legislative agent to a "public official" or "public employee" or to members of such person's "immediate family." It is important to note that for purposes of the gift prohibition in Section 43, the terms "gifts," "public official," and "public employee" have the same meaning those terms are given by G.L. c. 268B, § 1, the Financial Disclosure Law. Section 43 does not appear, at least expressly, to incorporate the Financial Disclosure Law's definition of "immediate family," a term that is also defined, albeit differently, in G.L. c. 268A, § 1, the Conflict of Interest Law. Executive and legislative agents are also prohibited from "knowingly" paying for "any meal, beverage, or other item to be consumed by a public official or employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such agent's business or in connection with a personal or social event."

Section 43 does provide an exception to the ban on the giving of gifts, meals, beverages or other items to be consumed from an executive or legislative agent to a public official or public employee "who is a member of his immediate family or a relative within the third degree of consanguinity or of such agent's spouse or the spouse of any such relative. The 2009 amendments to the Lobbying Law (St. 2009, c. 28, § 9) made regulations to be promulgated by the State Ethics Commission establishing exclusions relative to the giving of applicable to executive and legislative agents. Those regulations may be found at 930 CMR 5.09 (Gifts From Lobbyists Not Related To Official Action or Position). (*See discussion in* **§ 24.4.1 (b)**)

Section 43 does not address the *receipt* of gifts by an executive or legislative agent from a public official or public employee.

(b) *Under the Financial Disclosure Law*

In an effort to avoid technical, but de minimus, violations of the ban on gifts or meals to a public official or a public employee, the Legislature amended the Financial Disclosure Law, G.L. c. 268B, § 6, to grant the State Ethics Commission the authority to promulgate regulations: (i) establishing exclusions for ceremonial gifts; (ii) establishing exclusions for gifts given solely because of family or friendship; and (iii) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest. St. 2009, c. 28, § 62, 95. Those regulations are set forth in 930 CMR 5.00 (Exemptions From G.L. C. 268A and G.L. C. 268B Related To Gifts) and can be found at http://www.mass.gov/ethics/laws-regulations-and-forms.

Practice Note

Note that prior to the 2009 amendments, G.L. c. 268B, § 6 contemplated the permissibility of annual gifts aggregating up to $100 from a "legislative agent" to a "public official" or "public employee" or to members of such person's "immediate family" (all as then defined in G.L. c. 268B, § 1). However, the $100 limitation in Section 6 was replaced with a ban on giving "any gift of any kind or nature" by an executive or legislative agent to a "public official" or "public employee," subject to the exceptions discussed above. St. 2009, c. 28, § 95.

(c) *Under the Conflict of Interest Law*

Complicating the matter of gifts to public officials or legislators is the so-called "gratuity" provision of the Conflict of Interest Law, G.L. c. 268A, § 3, which prohibits any person (including, of course, executive and legislative agents) from giving to a present or former state, county, or municipal employee anything of "substantial value" "for or because of any official act performed or to be performed by such an employee." (Although the principles are the same for county and municipal employees under the Conflict of Interest Law, we focus here on "state employees" who are the more common targets of lobbying activity). Similarly, any present or former "state employee" may not receive anything of substantial value "for himself" "for or because of any official act or act within his official responsibility performed or to be performed by him." Note that "state employee" is defined in G.L. c. 268A, § 1 far more broadly than the terms "public official" or "public employee" in the Financial Disclosure Law or the Lobbying Law.

The 2009 amendments to the Conflict of Interest Law required the State Ethics Commission to "adopt regulations: 1) defining "substantial value," ; provided, however, that "substantial value" shall not be less than $50; (ii) establishing exclusions for ceremonial gifts; (iii) establishing exclusions for gifts given solely because of family or friendship; and (iv) establishing additional exclusions for other situations that do not present a genuine risk of a conflict or the appearance of a conflict of interest." St. 2009, c. 28, § 62, 95.

The terms "official act" (which is an element of the prohibition against both giving and receiving under Section 3) and "official responsibility" (which appears only in the prohibition applied to receivers) are statutorily defined terms for purposes of the Conflict of Interest Law. Violation of Section 3 requires proof of a motivating link ("for or because of") between the giving of the gratuity and an official act. *Scaccia v. State Ethics Commission*, 431 Mass. 351, 355–56 (2000).

Also amended in 2009, was Section 23(b)(2) of the Conflict of Interest Law to prohibit any current officer or employee of a state, county or municipal agency knowingly, or with reason to know "solicit or receive anything of substantial value for such officer or employee, which is not otherwise authorized by statute or regulation, *for or because of the officer or employee's official position*." St. 2009, c. 28, § 81.

Finally, the State Ethics Commission has promulgated regulations to exempt certain kinds of gifts and benefits from the prohibitions established by the statute. 930 C.M.R. § 5.06-5.08. Giving or accepting some such gifts requires disclosure in some, but not all, cases. Among the gifts and benefits addressed in the regulations that would most likely be relevant to persons or entities engaged in lobbying are informational materials, awards, or display items given for meritorious public service, honoraria, and free admission to events calling for the public official to perform a ceremonial functions.

(d) *Under the House and Senate Rules*

Persons engaged in lobbying should also be aware of the gift rules that apply to legislators. The Rules of the House of Representatives provide that [n]o member, officer or employee shall knowingly accept any gifts from any legislative or executive agent." H.R. Rule 16A(12). The Senate has no gift rule as such, having repealed it after the enactment of G.L. c. 268B, § 6. *See* Senate Rule 10 for related matters.

> ***Practice Note***
> The State Ethics Commission has generated a body of interpretive "precedent" that it applies prospectively. This body of internal precedent sometimes yields counter-intuitive, and even controversial, results. Accordingly, one cannot be totally certain of the advice one renders to a client in the area of gifts and entertainment without first consulting the commission or those thoroughly familiar with its views.

§ 23.4.2 Hospitality

The 1995 amendments to the Lobbying Law repealed a long-standing administrative interpretation of G.L. c. 3, § 43, which excluded from the gift prohibition expenditures for shared hospitality in a social context (provided that no business was conducted). As a result, executive or legislative agents are expressly prohibited from "picking up the tab" for "any meal, beverage, or other item to be consumed by such public official or employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such agent's business or in connection with a personal or social event," except for gifts and meals to relatives. As suggested by Section 47's reporting requirements that expressly contemplate expenditures for meals, entertainment, etc., the prohibition in Section 43 applies to the executive or legislative agent personally, not to his or her employer.

§ 23.4.3 Campaign Contributions

There are certain restrictions on the political activity and contributions of "executive agents" and "legislative agents," as defined in G.L. c. 3, § 39.

Under G.L. c. 55, § 7(b), executive or legislative agents may not make political contributions for the benefit of any one candidate and such candidate's committee in excess of $200 and the aggregate of all contributions by a legislative or executive agent to any other political committee, other than a ballot question committee, may not exceed $200 in any one calendar year. The limit for persons who are not executive or legislative agents is $500.

The annual aggregate limit of $12,500 for executive or legislative agents is the same for any other individual. G.L. c. 55, § 7A(a)(5).

Under G.L. c. 55, § 10A(b)(2), executive and legislative agents are subject to the rules regarding "bundling." See Chapter 14.

§ 23.4.4 Former State Employees

The Conflict of Interest Law, G.L. c. 268A, § 5(e), prohibits "a former state employee or elected official, including a former member of the general court, who acts as legislative or executive agent, as defined in section thirty-nine of chapter three, for anyone other than the commonwealth or a state agency before the governmental body, as determined by the state ethics commission with which he has been associated, within one year after he leaves that body."

Practice Note

The 2009 amendments to the Conflict of Interest Law extended the prior law's one-year ban on legislative lobbying by a former state employee or elected official to executive lobbying also. St. 2009, c. 28, § 64.

In 1984, the State Ethics Commission decided that § 5(e)'s prohibition extends to "behind the scenes" or "back office" advising and strategizing by a former state representative. *In the Matter of Neil Foley*, 1984 S.E.C. 172. The commission stated that, "[t]he need to insulate the legislative process from the former employee's inevitable special knowledge and access during this initial period is the same whether the former employee is doing the lobbying directly or instead is advising and directing the lobbying activities of someone else."

Subsequently, in 1991, the supervisor of public records opined that such "behind the scenes" activity, which does not entail direct communication with governmental decision makers, does not constitute activity as a "legislative agent" for purposes of the Lobbying Law. Relying on the statement of intent in the act that created the modern framework of the Lobbying Law, St. 1973, c. 981, § 1, and the need to narrowly construe statutes that regulate First Amendment activity, the opinion rejected a reading of G.L. c. 3, § 39, that would make a "legislative agent" of anyone who participates in a lobbying campaign, but who does not personally engage in any effort to communicate directly or through another with decision makers. *Letter to Carl Valvo* (June 24, 1991).

The 2009 amendments to the Lobbying Law resolved this conflict between the Ethics Commission and the supervisor, through the introduction of the terms "executive lobbying" and "legislative lobbying." Those definitions, as discussed previously, include such "behind the scenes" or "backroom" activities as "strategizing, planning, and research if performed in connection with, or for use in, an actual communication with a government employee." G.L. c. 3, § 39.

In inserting the terms "executive lobbying" and "legislative lobbying," the Legislature presumably was guided by the Ethics Commission's view as stated in EC-COI-05-03 that the legislative process must be shielded from the former employee's special knowledge, even though the former employee makes no personal appearance in the legislative process. Accordingly, a former state employee is prohibited for one year under § 5(e) from communicating information on legislation to and from his or her employer or its principal legislative agent and from assisting the lobbying activities of others by behind-the-scenes participation in drafting letters to legislators, advising others on how they could be most helpful in supporting the employer's position on legislation, or other activities that do not involve appearing as a legislative agent before the former state employee's former agency. *See also Commission Advisory No. 90-02* ("Former State Employees Serving as Legislative Agents") ("Legislative agent activity . . . includes indirect lobbying such as communicating information to a legislative agent; helping to formulate and articulate positions, and soliciting and assisting the lobbying activities of others by drafting letters and by advising others how to support or oppose positions").

Practice Note

As is also discussed in Chapter 24, as a result of the 2009 amendments to the Lobbying Law, the State Ethics Commission issued

> a new opinion EC-COI-10-1. This opinion *overruled* EC-COI-05-03. EC-COI-10-1 states that a former state employee who engages in "strategizing, planning and research" as part of a lobbying effort, but does not personally engage in any "lobbying communication with a government employee" does not violate G.L. c. 268A, § 5 e).

§ 23.5 WHO IS EXEMPTED FROM REQUIREMENTS OTHERWISE APPLICABLE TO PERSONS ENGAGED IN LOBBYING ACTIVITY?

The terms "executive agent" and "legislative agent" are defined in § 39 of the Lobbying Law and the elements of the pertinent definitions are treated in Chapter 21. For present purposes they can be summarized as requiring that a person,

- for compensation or reward,
- perform an act involving communication with governmental decision makers
- to influence certain kinds of decisions.

All three elements are required to be satisfied to trigger statutory registration and other requirements. As a general proposition, anyone who does not meet all three criteria can be said to be exempt. In addition, there are various specific statutory exceptions to the definitions of "executive agent" or "legislative agent" as well as exemptions from the application of the lobbying law generally, which are discussed in the following sections.

§ 23.5.1 Incidental Lobbying

The definitions of "executive agent" and "legislative agent" are both written in terms of doing "any act to influence the decision" of executive branch or legislative branch decision makers with respect to decisions on certain kinds of matters. Both definitions seek to narrow the potentially limitless scope of "any act" by stating that both terms include "a person who, as part of his regular and usual business or professional activities *and not simply incidental thereto*, attempts to influence any such decision, whether or not any compensation in addition to the salary for such activities is received for such services."

The "not simply incidental thereto" language has been a part of the statutory scheme since the enactment of the modern framework in 1973. The phrase, of course, was amenable to wide variation in interpretation and application.

The 1995 amendments to the Lobbying Law retained the concept of excluding "incidental" lobbying from activity that would otherwise require registration, but the amendments inserted some objective criteria for determining what is presumed to be "incidental." For purposes of either definition,

> a person shall be presumed to engage in activity covered by [either] definition in a manner that is simply incidental to his regular and usual business or professional activities if he engages in any activity or activities covered by this definition for not more than fifty hours during any reporting period *or* receives less than five thousand dollars during any reporting period for any activity or activities covered by this definition.

This presumption (or "safe harbor") for what is considered "incidental lobbying" was deemed by the Legislature in 2009 to be excessively broad. The 2009 amendments to the Lobbying Law substantially narrowed that presumption as follow:

> a person shall be presumed to be engaged in [either executive or legislative] lobbying that is simply incidental to his regular and usual business or professional activities if he: (i) engages in [either executive or legislative] lobbying for not more than 25 hours during any reporting period; *and* (ii) receives less than $2,500 during any reporting period for [either executive or legislative] lobbying. St. 2009, c. 28, § 2.

It is important to understand that the statute does not draw a bright line between what is and what is not "incidental." It does state that lobbying activity below the statutory thresholds will be "presumed" to be incidental to the individual's "regular and usual business or professional activities," but it does not preclude a determination that lobbying activity outside the statutory "safe harbors" is nonetheless "incidental." It is therefore possible for a person to engage in lobbying activity that is incidental to his or her regular and usual business or professional activity even if, in a given reporting period, he or she may exceed the 25-hour/$2,500 thresholds. This will typically occur when, for example, a corporation engages in an extraordinary legislative initiative on a matter critical to its interests and a company officer who does not ordinarily involve herself in legislative matters, becomes very active in the legislative initiative, including spending much time visiting and communicating directly with legislators.

Practice Note

Note that to receive the protection of the "safe harbors" and to be deemed to have engaged in "incidental lobbying," a person must meet both statutory requirements (i.e., not engage in lobbying activity for not more than 25 hours *and* receive less than $25,00 during any reporting period.) St. 2009, c. 28, § 3. Remember, too, that the reporting periods are from January 1 to June 30 and July 1 to December 31. G.L. c. 3, § 43.

In computing the time and compensation received for purposes of the safe harbors, *Lobbying Advisory Opinion 98-4* advises that all of the time spent preparing a written communication (presumably including all drafts, meetings to discuss its contents, etc.) should be included in the computation. In *Lobbying Advisory Opinion 10-16*, it was held that "the $2,500 referenced in the incidental lobbying exception includes not only monetary compensation, but also any additional employee benefits in exchange for one lobbying efforts and apportionable thereto, such as an equity interest in an organization, health insurance, pension contributions, life insurance, commuter benefits, and the like." *See also, Lobbying Advisory Opinion 10-12* regarding the term "reward" and *Lobbying Advisory Opinion 10-5* holding that high school interns who receive a stipend of more than $2,500 in a reporting period and who have at least one lobbying communication, must register as a legislative agent.

It should be remembered that even where an individual is exempted from registration as an executive or legislative agent because the individual's lobbying activity qualifies as "incidental" to his or her usual professional activities, the value of the individual's services may be required to be reported as lobbying expenditures under either § 44 or § 47 if either of those provisions otherwise applies. *Lobbying Advisory Opinion 98-3*. See Chapter 22.

There are several unresolved interpretive issues arising from the exemption for incidental lobbying. The first is that the "safe harbors" may not be available to persons whose regular and usual business or professional activity *includes* lobbying, even if such persons may actually spend less than fifty hours in covered lobbying activity in a given reporting period. For example, an employee in an organization's governmental relations department whose regular job duties include lobbying on an as-needed basis is not exempt from registration despite spending less than fifty hours in lobbying activity in a reporting period *(a rebuttable presumption*). The rationale for this interpretation is that the safe harbors relate only to the determination of what level of lobbying activity will be deemed to be incidental. If lobbying is a part of an individual's regular business or professional activities, it is not "simply incidental" under any circumstances and therefore the safe harbors have no application. The contrary view is that the language of the statute supports an interpretation that presumes certain levels of lobbying activity to be incidental

regardless of the individual's usual job duties (*an absolute presumption*). An early advisory opinion appears to be consistent with this view, holding that a "public policy consultant" hired by an organization for a two-month period, whose responsibilities included lobbying but who was not likely to exceed the safe harbor thresholds, did not need to register. *Letter to William B. Coughlin* (March 1, 1996).

The second unresolved issue is whether the safe harbor thresholds apply to activity undertaken on behalf of an individual client or whether they apply to an individual's total aggregate professional activity for all clients in any given reporting period. If, as is likely, the latter is the case, many lawyers whose practices bring them into regular contact with state agencies should take care to keep track of their billings and time expended on activity within the definition of "executive agent." Such lawyers should familiarize themselves with the exemptions discussed below in § 23.5.5.

§ 23.5.2 Volunteer or Pro Bono Lobbying

Persons who engage in lobbying activity on behalf of a person or organization for no compensation or other financial reward, are not within the definitions of "executive agent" or "legislative agent" and therefore are not subject to the registration and reporting requirements of the Lobbying Law. This principle should apply equally to professional lobbyists who provide services under a bona fide pro bono arrangement. An organization that uses such volunteers as part of a lobbying effort must comply with the applicable expenditure reporting requirements of G.L. c. 3, § 44. See Chapter 22.

§ 23.5.3 Public Employees or Agents

Under G.L. c. 3, § 50, the provisions of the Lobbying Law (expenditure reporting as well as registration) do not apply to "employees or agents of the commonwealth or of a city, town, district or regional school district who are acting in their capacity as such employees or agents."

The secretary has interpreted the § 50 exemption to apply to employees or agents of governmental bodies (specifically, the various independent "authorities"), even though they may not be expressly listed in the statute. In *Lobbying Opinion 98-3*, the § 50 exemption was applied also to cover individuals serving on a governor-appointed advisory commission, presumably to exempt advocacy activities in support of the commission's recommendations.

Note that in 2010, the Legislature amended G.L. c. 29 by inserting a new Section 29J, prohibiting any state agency or state authority from using state funds to pay for an executive or legislative agent, unless the executive or legislative agent is a full time employee of the state agency or authority. *See St. 2010, c. 131, § 21.*

§ 23.5.4 Request by the Legislature to Appear

Section 50 also exempts from the provisions of the Lobbying Law

> any person requested to appear before any committee or commission of the general court by a majority of the members of such committee or commission; provided, that such person performs no other act to influence legislation; and provided further, that the name of such person be recorded in the official records of such committee or commission.

This provision has received little official interpretation, most likely because its terms are self-explanatory.

§ 23.5.5 Exemptions for Certain Communications with the Government

Executive agent activity consists of two general categories of paid advocacy.

The first category is "any act to influence the decisions of any officer or employee of the executive branch or an authority" on matters of "legislation or the adoption, defeat or postponement of a standard, rate, rule, or regulation."

The second category is "any act to communicate directly with a covered executive official" (certain specified high-ranking executive officials) to influence their decisions on matters of "policy or procurement." The substantive scope of this category is derived from four definitions added to G.L. c. 3, § 39 by the 1995 amendments to the Lobbying Law: "covered executive official," "policy," "procurement," and "act to communicate directly with a covered executive official to influence a decision concerning policy or procurement."

(a) *"Covered Executive Official"*

Whether or not one is engaged in executive agent activity with respect to policy or procurement depends in part on whom one is seeking to influence. There are four categories of "covered executive official":

- the five constitutional officers;
- persons designated by the constitutional officers as holding a "major policy-making position" under G.L. c. 268B (one may obtain a list of such individuals from the State Ethics Commission, the state secretary, or the individual constitutional officers);
- the secretary and deputy or assistant secretary of each of the various executive offices; and
- the executive or administrative head and the deputy or assistant head of the authorities (the term "authority" is defined in § 39 and includes various entities, such as the several home care corporations, that are not typically considered to be "authorities"), state agencies, and subdivisions of such authorities and agencies.

(b) *"Policy"*

The gist of the definition of "policy" is that it is a plan or course of action that is designed to guide future decisions or actions of a "covered executive official" with respect to general classes of persons, proceedings, or matters. Thus, regulations, generic proceedings, interpretive bulletins, enforcement guidelines, and similar agency pronouncements constitute "policy." Expressly excluded are adjudications or determinations of rights and duties of persons on a case-by-case basis, including the issuance or denial of a license, permit or certification, or a disciplinary action or investigation of a person.

Because "standards, rates, rules or regulations" are also vehicles of state policy but are included in the first category of executive agent activity, there is a substantial overlap of the two categories. The principal consequence of the overlap is that under the first category one acts as an executive agent when one seeks to influence the decision of "any officer or employee of the executive branch" while efforts to influence "policy," presumably including standards, rates, rules or regulations of general application, are regulated only when directed to "covered executive officials." The safer course, at least until reliable guidance is given by the supervisor, is to assume that the broader class of executive officials applies.

(c) *"Procurement"*

"Procurement" is defined broadly to include

> the buying, purchasing, renting, leasing or otherwise acquiring or disposing, by contract or otherwise, of supplies, services or construction or the acquisition or disposition of real property or any interest therein, including, but not limited to, the purchase, lease or rental of any such real property or the

> granting of easements or rights of way therein; but not including any item of expenditure the value of which is twenty-five thousand dollars or less.

The statute does not address the situation where the value of the expenditure item is to be determined in the procurement process, as in a sealed bid procedure.

The exception for procurement activity involving items of expenditure with a value under $25,000 is supplemented by exceptions to the definition of "act to communicate directly with a covered executive official to influence a decision concerning . . . procurement," which include responses to procurement solicitations or requests for information relevant to a contract and all communications made in connection with a review or appeal of a procurement decision.

Whether a private organization involved in a cooperative effort or joint venture with the state to provide a service is involved in lobbying relative to procurement depends on whether the private entity sought to influence the agency to undertake the program. "If the private organization attempted to influence the decision makers of the agency in order to secure the contract for the cooperative venture, then there is a lobbying effort which may be subject to reporting requirements. However, if the state agency has a service to offer and initiates the proposal for a joint effort, without influence from the private entity, then it is not a lobbying matter and no reporting is required." *Lobbying Opinion 98-3*.

(d) *"Act to Communicate Directly with a Covered Executive Official to Influence a Decision Concerning Policy or Procurement"*

The definition of this term is clear enough. It comprehends "any direct communication by a person to such official by telephone, mail, commercial messenger, facsimile transmission, electronic mail, other direct means or in person. . . ."

The definition is more important for what it expressly excludes, set forth in eleven specific categories of communications:

- Requests for a meeting or for information on the status of an action, so long as the request does not include efforts to influence a "covered executive official."
- Communicative acts in the course of participating in an advisory committee or task force. This will be an important provision for employees of many organizations, including trade or professional organizations who engage in governmental advocacy, who should feel free in the context of such committee work to advocate to "covered executive officials" on matters of policy germane to the committee=s mission.
- Providing *written* information in response to a *written* request for information. When executive officials ask orally for information, they should be asked to follow up with a written request.
- Any communication compelled or coerced by legal process or some legally mandated filing or submission.
- Communications made in connection with
  - judicial proceedings or criminal or civil law enforcement matters or
  - filings which are legally required to be held in confidence by the government.
- Communications made in compliance with procedural rules governing adjudicatory proceedings. It would seem that this exclusion duplicates protection on the "policy" side of executive agent activity as "policy" is defined as excluding adjudications.

- A written petition for action that is required to be "a matter of public record pursuant to established procedures of the [executive agency]." Use of the word "petition" suggests that a petition for the adoption, amendment or repeal of a regulation pursuant to G.L. c. 30A, § 4, is what was intended, but the language of the exemption is broader than such petitions. Any writing to an executive agency asking for some action is likely to qualify as a public record.

- Communications in connection with an individual's benefits, employment, or personal matters.

- A response to a procurement solicitation or request for information relevant to a contract. In 1998, the Supervisor advised that this exemption applies only to the formal submission of materials in response to an RFP and that any additional substantive communications to the procuring agency relative to the proposal would not be exempt. *Letter to David M. Rogers* (February 27, 1998).

- Communications in the course of a bid conference.

- Communications made in connection with a review or appeal of a procurement decision.

Exemptions from Definitions of "Executive Agent" and "Legislative Agent", by Benjamin Fierro III from the MCLE, Inc. publication "Massachusetts Election Administration, Campaign Finance, and Lobbying Law" (3rd Edition 2012)