

WHERE TO LOOK, WHAT TO ASK? FRAMES OF REFERENCE FOR ETHICAL LOBBYISTS

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The following examples set out situations where lobbyists may find themselves confronted with deciding among different courses of action that present ethical challenges. The purpose of this essay is to provide background and guidance on how the lobbyist might seek to answer that most important question: Is this the ethical thing to do?

Case 1: Larry Lobbyist represents a chemical company whose pesticide has come under attack by environmental groups for potentially damaging the ecosystem by killing non-target insects in surface and subsurface waterways. Pressure is building in the Congress to ban the chemical. Larry's brother, a chemist in Germany, has shared a report with Larry providing scientific support for the allegations being made. (a) Can Larry keep that information from his client? (b) Can he continue to assure members of Congress that the chemical is safe? (c) Can he appear on news shows defending the safety of the chemical?

Case 2: A staff member of the House Appropriations Committee has suggested to Linda Lobbyist that Junior, the son of the chairman of that Committee, might be very helpful in getting an earmark through for Linda's client if he were added to the lobbying team. The proposal for the earmark has been passed over without action more than once. (a) Should Linda bring this suggestion to her client's attention without recommendation? (b) Should she urge her client to add Junior to the team? (c) Should Junior's role be kept confidential by ensuring that his work does not trigger public reporting requirements, or should it be made public even if Junior doesn't meet those reporting requirements?

Case 3: Leonard Lobbyist represents two domestic clothing companies, both of which are interested in keeping certain tariffs high on imports from specific countries and in ensuring enforcement of wage and hour laws on textile workers in the Mariana Islands. Each client knows Leonard represents the other as well, but since their interests are the same, they are comfortable with the arrangement. Leonard works on an hourly basis for one client, on a retainer basis for the other. (a) Can Leonard charge each client for the full time spent lobbying on the common issues, effectively collecting twice for the same work? (b) What must Leonard tell each client about his arrangement with the other?

Case 4: Laura Lobbyist is given irrefutable evidence that Senator Bigshot – the family-values conservative who chairs a key committee and has single-handedly bottled up her client’s bill for the past 2 congresses – has been having an illicit affair with an under-age girl. The Senator is running for reelection; his prospects would be severely damaged if the information in Laura’s hands were made public. (a) Should Laura let the Senator know she has that information? (b) Must she ignore the information; after all, it is not relevant to the Senator’s official duties or her legislation? (c) Should she simply give it to her client and leave any further action to the client? (d) Does the public have any right to know about this conduct?

Case 5: Libby Lobbyist has been extremely successful raising money for Members of Congress and every few months usually has a bundle of contributions from her energy industry clients and their colleagues. Congressman Swingvote, a new member of the closely divided key subcommittee, has not announced a position on a key amendment affecting that industry, and Libby has obtained substantial commitments from her clients to give to Swingvote’s campaign this cycle. Knowing that it would maximize the impact of her lobbying message, Libby considers delivering the checks in proximity to the vote on that amendment. (a) Should she deliver the checks after the vote, to avoid any appearance that she was trying to buy anything? (b) Can she deliver them a week or two in advance of the vote? (c) Can she hand them over at the fundraiser the evening before that vote?

Case 6: Loren Lobbyist served on the Senate Finance Committee staff for a decade and is recognized as a tax expert. His boutique lobbying partnership specializes in lobbying on tax matters. Although he knows there is usually only one omnibus tax bill each year, Larry takes as many clients as he and his partner can handle, being careful, however, to avoid taking on more than one client in the same industry. Some clients pay Loren by the hour; some have him on retainer; and he has negotiated a contingent fee or bonus arrangement with a few clients. (a) Can Loren fairly represent clients seeking similar objectives (tax amendments) when some offer bonuses for success, while others do not? (b) If Loren succeeds in getting a major amendment on the tax vehicle for one client, but fails with a second, what is his obligation to the client for whom he has not yet succeeded: to inform it of the conflict problem; to withdraw; to slow the bill so that there will be a second chance for his other client? (c) Loren winds up sitting with the Finance Committee chairman at a fundraising event; should he mention his proposed amendment? Which one? More than one?

Each of the above cases presents the same question for the lobbyist: What is the ethical course of action? The cases may or may not present legal questions as well. This essay examines the sources where the lobbyist might find answers to these legal and ethical questions. Some answers may be found in laws (rules), others in lawyers’ or

lobbyists' codes of ethics. For others, there may be no objective guidance; when lobbyists confront these kinds of questions, we must have an array of subjective resources to which we can turn for guidance. Both the objective and subjective sources of guidance for ethical lobbying are explored in this essay.

Introduction to 21st Century Lobbying

Over the past few years the public, media, and Congress have given increased attention to lobbying, lobbyists, and the role of influence in shaping programs and public policies. Little wonder, considering the exponential growth of the lobbying profession in Washington. In 2008 there were 15,150 registered federal lobbyists, an increase of 5,000 since 1998. Their spending has increased along a similar trajectory, closing the year with \$3.24 billion in lobbying expenses. While many industries are facing a slowing economy, interest groups spent a record \$17.4 million in lobbying expenses each day Congress was in session in 2008, a record 13.7% increase over 2007.¹

Washington's 15,000 lobbyists have substantial resources at their disposal and they are working hard to influence legislation and shape agency regulations. While concern about the influence of special interests is often focused on campaign contributions, those groups have spent twice as much money lobbying public officials as they have on political contributions since 1998.² Unlike campaign contributions, the intent of lobbying expenditures is always clear: influence policy outcomes for the benefit of the client.

¹ <http://www.opensecrets.org/news/2009/01/washington-lobbying-grew-to-32.html>

² New Online Database details federal lobbying for reporters.4/7/05.
http://www.americanpressinstitute.org/pages/resources/2005/04/new_online_database_details_fe/

While this essay focuses on the federal lobbyists, statehouses are also frequented by an increasing number of lobbyists, with nearly 40,000 lobbyists registering in 2006.³ In Florida and Illinois there are 12 lobbyists per legislator, and in New York there are 24 lobbyists per lawmaker.

The overarching public perception is that lobbying is a corrupting force, and the high visibility of the downfall of Jack Abramoff and Congressmen Ney and Cunningham lent credibility to this perception. These highly visible public figures provide an encyclopedic agglomeration of corrupt activities spanning less than a decade:

1. Abramoff

-Secretly funneling money into PAC run by former House Republican Majority Leader Tom DeLay

-Defrauding and over-billing Native American tribes with gaming interests

-Giving bribes, gifts and spousal jobs to Members of Congress and executive branch officials in exchange for favorable actions for clients

-Sentenced to 5 years and 10 months in prison for illegal purchase of casino cruise boats (shortest possible term, for aiding investigation and showing remorse)⁴

Abramoff's corrupt activities led to convictions of a number of his colleagues, as well as their government officials and congressional staff. David Savian was convicted twice for obstructing the investigation into the now infamous 2002 golf trip to Scotland, in which Abramoff financed a 5 day vacation for Representative Ney, one of his staffers, the head

³ State Lobbying Becomes Billion-Dollar Business, 12/20/2006.
<http://projects.publicintegrity.org/hiredguns/report.aspx?aid=835>

⁴ Abramoff Is Sentenced for Casino Boat Fraud. Washington post. 3/29/06.

of the Christian Coalition, and Mr. Safavian. Representative Ney, admitted to the criminal charges brought against him and served 17 months in prison.⁵ Abramoff himself, and a former partner, Adam Kidan were sentenced to 5 years in prison and required to pay \$21.7 million in restitution for their involvement in the casino boat scandals.⁶

2. *Cunningham*

-Defense contractors paid bribes to Members of Congress and DOD officials, in return for contracts

-Duke Cunningham (CA-R) pled guilty to taking \$2.3 million in bribes; secured \$70- \$80 million in earmarks from House Intelligence Committee; pled guilty to tax evasion, conspiracy to commit bribery, mail fraud and wire fraud⁷, sentenced to 8 years, \$1.8 million in restitution. Longest sentence given to a former Congressman⁸

-Michael Wade, Owner of MZM, paid for Cunningham's house, yacht in DC; sentenced to 2 1/2 years

-Brent Wilkes, Owner ACDS, paid Cunningham \$2 million in cash bribes

3. *DeLay*

-Accepted gifts from Abramoff (Scotland golfing trip, luxury box), voted on legislation consistent with positions of Abramoff clients⁹

-Former aide and ex-Abramoff employee, Michael Scanlon, plead guilty to federal conspiracy charge¹⁰

⁵ <http://www.news-register.net/page/content.detail/id/512792.html>

⁶ <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/14/AR2006111400993.html>

⁷ <http://www.dukecunningham.org/bibliography/plea-agreement.html>

⁸ <http://www.cnn.com/2006/LAW/03/03/cunningham.sentenced/index.html>

⁹ <http://www.washingtonpost.com/wp-dyn/articles/A12416-2005Apr23.html>

In the Honest Leadership and Open Government Act of 2007, Congress responded to these scandals. It not only required all lobbyists to certify semiannually that they had read and were familiar with House and Senate gift and travel rules and had not knowingly violated any, it made any knowing violation a criminal offense. And it recommended ethics training for federally registered lobbyists. One of the vocal proponents for toughening the lobbying reform proposals was then-Senator Barack Obama.

It was little wonder, then, that both presidential candidates in 2008 limited the role of lobbyists in their campaigns and spoke out critically about how lobbyists infected the legislative process.¹¹ In his transition period, President-elect Obama insisted on limiting the areas of participation by lobbyists, and in the first full day of his term, the President issued an Executive order imposing additional revolving-door restrictions on lobbyists and constraining their ability to work in agencies they had lobbied. Likewise, the day after the new Treasury Secretary was confirmed, his Department issued a release forbidding lobbying by organizations that had received federal bailout funds.¹²

The lobbying community, in addition to defending itself from the incessant attacks it was receiving, actually supported many of the reforms and emphasized its

¹⁰ <http://www.cnn.com/2005/POLITICS/11/21/scanlon.plea/>

¹¹ Obama, McCain both have lobbyist ties, <http://www.cnn.com/2008/POLITICS/07/29/lobbyists/>

¹² Treasury Secretary Opens Term Opens With New Rules To Bolster Transparency, Limit Lobbyist Influence in Federal investment Decisions, <http://www.treas.gov/press/releases/tg02.htm>.

commitment to ethics training and ethical lobbying. But the efforts mainly focused on rules (relevant federal laws and applicable congressional rules).

Most of my writings on the subject of lobbying and lobbyists have also focused on rules: what they are and what they should be. The anchor for this body of work is the American Bar Association's definitive LOBBYING MANUAL, collecting extensive and exhaustive chapters on the laws governing lobbying and lobbyists and how to comply with those laws.¹³ In a series of articles and essays I also explored issues relating to reciprocity, the common good, campaign finance, and needed changes to the federal lobbying laws.¹⁴ In an article addressing contingent fee lobbying, I not only examined the laws applicable to contingent fee lobbying and recommended changes to those laws, but also explored the ethical issues implicated in the absence of applicable laws.¹⁵

Without a doubt, looking *beyond rules* – to principles, standards, and various subjective guideposts for pointing the lobbyist toward ethical actions – presents a more challenging task. In the pages below, the first stop on my journey will be a review of the rules governing lobbyists and lobbying, for they are surely important to ethical decision-making and are a major preoccupation of the practicing lobbyist. My next stop will be the principles that can help guide ethical decisions by lobbyists, with a focus on codes of ethics. I will end in more uncertain terrain, examining how lobbyists might go about seeking answers to questions and solving ethical dilemmas that are not mandated by rules or guided by clear principles.

¹³ William V. Luneburg & Thomas M. Susman, eds., *The Lobbying Manual: A complete guide to federal law governing lawyers and lobbyists* (3rd ed. 2005).

¹⁴ Cites to *Stanford Journal*; *Notre Dame Law & Legis. J.*; and *Admin. Law Review*

¹⁵ Cite to *Seton Hall Leg. Journal*

Laws Governing Lobbyists

Compliance with relevant laws is the first – and often the most – important mandate for ethical lobbying. It must be repeated, however, that, at least outside the lobbying arena, violation of the law does not necessarily define unethical conduct. In fact, adherence to high moral principles may require violation of the laws. (The classic cases, of course, are harboring Jews in Nazi Germany and serving Negroes in the segregated South.) So also, compliance with the law does not always define ethical conduct: a closer-to-home example might be timing campaign contributions to coincide with key committee votes.

States have many and varied laws governing lobbyists and lobbying,¹⁶ but for simplicity I will focus here on federal laws. A review of the key laws with which federal lobbyists must comply must begin with those federal criminal statutes that apply more broadly, but have often been used to convict corrupt lobbyists:

1. **Bribery:** The bribery statute requires a showing that something of value was corruptly given, offered, or promised to a public official, or corruptly demanded, sought, received, accepted, or agreed to be received or accepted by a public official, with the intent “to influence” an official act or “to be influenced” in an official act.¹⁷
2. **Illegal Gratuities:** The illegal gratuity provision requires a showing that something of value was given, offered, or promised to a public official, or demanded, sought, received, accepted, to agreed to be received or accepted by a public official “for or because of any official act performed or to be performed by such a public official.”¹⁸

¹⁶ Cite to Center for Ethics at NCSL website on laws governing lobbyists and legislators.

¹⁷ 18 U.S.C. § 201(b)(1)-(2); see, e.g., U.S. v. Abramoff, No. CR-06-001 (D.D.C. Jan. 3, 2006).

¹⁸ 18 U.S.C. § 201(c)(1) (A); see, e.g., U.S. v. Sun-Diamond Growers of California, 526 U.S. 298, 404-405 (1999).

3. **Compensation for Representational Services:** 18 U.S.C. § 203 prohibits receipt by, or payment to, a federal employee, or compensation for certain representational assistance in matters in which the United States has a direct and substantial interest.¹⁹
4. **Supplementation of Salary:** A federal employee is prohibited from receiving, and anyone, other than State, county, or municipal treasuries, is prohibited from giving, anything of value to supplement the employee's government salary.²⁰
5. **Deprivation of Honest Services:** 18 U.S.C. §1346 criminalizes the use of a "scheme or artifice to deprive another of the intangible right of honest services." This has been interpreted to cover mail and wire fraud.²¹
6. **Mail or Wire Fraud:** It is a crime for anyone to use the U.S. mail or other interstate carrier to defraud, or to obtain money or property by means of false or fraudulent pretenses, representations, or promises.²²
7. **False Reporting:** Anyone who knowingly and willfully falsifies, conceals, or covers up by any trick, scheme, or device a material fact; makes any materially false, fictitious, or fraudulent statement or representation; or makes or uses any false writing.²³

Each state has its own panoply of laws regulating lobbying and lobbyists.²⁴ This essay focuses for convenience on the federal establishment. These laws have proved adequate to ensure that egregious conduct by lobbyists such as Jack Abramoff can be punished. But they are not the only laws with which lobbyists must comply. The broadest statute covering federal lobbyists is the Lobbying Disclosure Act of 1995 (LDA),²⁵ which defines lobbyist and lobbying and requires lobbyists who engage in a certain level of lobbying (subject to numerous exceptions) to register with the Clerk of the House and Secretary of the Senate and to report quarterly on their clients, revenues

¹⁹ See, e.g. U.S. v. Sun-Diamond Growers of California, 526 U.S. 298, 404-405 (1999).

²⁰ 18 U.S.C. § 209; see, e.g., Judicial Watch, Inc. v. Clinton, 880 F.Supp. 1 (D.D.C. 1995).

²¹ See, e.g., U.S. v. Sawyer 74 F. Supp. 2d 88 (D. Mass. 1999).

²² 18 U.S.C. § 1341; see, e.g., U.S. v. Bereano, 526 U.S. 1130 (1999).

²³ 18 U.S.C. § 1001; see, e.g., U.S. v. Safavian, 528 F.3d 957 (D.C. Cir. 2008).

²⁴ States' Legislative Ethics and Lobbying Laws, http://www.ncsl.org/programs/ethics/e_ethics_laws_URLs.htm

²⁵ Pub. L. No. 104-65, 109 Stat. 691 (1995), codified and amended in scattered sections of 2 U.S.C. (2000).

(or, in the case of firms employing lobbyists, expenditures), issues being lobbied, and agencies or House of Congress lobbied. While far from perfect,²⁶ this legislation, as strengthened by the Honest Lobbying and Open Government Act of 2007,²⁷ opens a significant window of transparency on federal lobbyists and lobbying.

In addition to the basic lobbying disclosure scheme put in place by the LDA, other federal statutes and regulations regulate or require disclosures by lobbyists. Those include:

1. Foreign Agents Registration Act: This statute, enacted in 1938, requires that individuals lobbying on behalf of foreign countries register their affiliations with the US government. There are fewer of these individuals registered than those registered at the state and federal level.²⁸
2. Byrd Amendment: Stipulated that funds appropriated by Congress cannot be used to lobby for any federal awards and requires disclosure by individuals who use non-appropriated funds to pay lobbyists to obtain federal contracts. It applies to all recipients of funds and subcontractors in all levels.
3. Federal Acquisition Regulations: FAR regulates the relationships between government agencies and private businesses by setting limitations on the reimbursement of contractors' lobbying expenditures.
4. Antitrust consent decree lobbying disclosure requirements: These regulations, included in the 1974 Antitrust Procedures and Penalties Act (Tunney Act), were designed to increase transparency of procedures surrounding antitrust settlements issued via consent decree. In order to achieve this goal, defendants are required to disclose "all written and oral communications... with any officer or employee of the United States."²⁹

²⁶ Cite Luneburg & Susman Recipe article in Notre Dame; Luneburg article in McGeorge.

²⁷ Cite

²⁸ Lobbying and Advocacy, Deanna Gelak.

²⁹ Cite Lobbying Manual chapters for each item.

Finally, there are special tax laws applicable to and restricting lobbying expenses—businesses may not deduct lobbying expenses under the Internal Revenue Code and nonprofit organizations are restricted in how much they may expend for lobbying.

Taken together, this rather substantial body of laws governing lobbying has generally, despite occasional anecdotal evidence to the contrary, had salutary results: Lobbying in the Capital of the United States in the 21st Century is the most transparent and honest lobbying – both in our own history and in the world today. Nonetheless, this network of laws does not provide the answers to most of the ethical questions raised by the conduct described in the hypothetical cases that began this essay. We are assisted in our search for answers to these questions by principles that might guide us – principles that go beyond the rules, the laws, described above.

Principles Guiding Ethical Lobbying

Codes of ethics often provide quite detailed roadmaps to assist the lobbyist in traversing ethically dangerous terrain. Some of these codes look like laws, but are distinguished by their not being enforceable. Others may be enforced through the disciplinary processes of professional organizations.

The great grandfather of ethics codes is, of course, the Ten Commandments. Some of the proscriptions in this code, as in others, have been embodied in laws: thou shalt not murder or steal. Others remain aspirational: honor thy father and mother; do

not covet thy neighbor's wife or possessions. That they have remained viable for thousands of years suggests the power of even unenforced codes.

Lawyers know about codes of conduct.³⁰ Our professional codes – part rule, part principle – are in many ways enforceable. A violator may risk losing her license or be forced to withdraw from representing a major client. But they also provide important principles governing our conduct and our relationship with both clients and institutions.

Lobbyists, too, have codes of ethics. The best-known code in Washington is that of the American League of Lobbyists.³¹ ALL's Code, developed in 2000, sets out nine guidelines and standards designed to assist lobbyists in acting in the "highest ethical and moral manner"; these deal with: honesty and integrity; compliance with applicable laws, regulations and rules; professionalism; conflicts of interest; due diligence and best efforts; compensation and engagement terms; confidentiality; public education; and duty to governmental institutions. They are sufficiently general to provide worthwhile practical guidance for the working lobbyist; however, they avoid entirely any mention of the proper role or dangers of campaign contributions and other campaign activities.

A comprehensive code of ethics for lobbyists emerged from a project of the Woodstock Theological Center. These Principles for the Ethical Conduct of Lobbying³² were developed specifically to provide practical guidance for lobbyists, and they do in

³⁰ Cite to ABA Model Rules and to a comprehensive volume on legal ethics.

³¹ American League of Lobbyists Code of Ethics, available at <http://www.alldc.org/ethicscode.cfm>.

³² Woodstock Theological Center, *The Ethics of Lobbying: Organized Interests, Political Power, and the Common Good* 81 (2002).

many respects. The Principles have seven sections addressing: lobbying and the common good; lobbyist-client relationships; lobbyist-policymaker relationships; lobbyists and shapers of public opinion; conflicts of interest; lobbying strategies and tactics; and the integrity of the lobbying profession. I have elsewhere identified two concerns about these Principles—one based on omission, one on commission.³³

As with the ALL Code, the Woodstock Principles do not address in any helpful way the troubling relationship between financing political campaigns and lobbying. Although the authors of the Principles often refer to the role of money in bringing about decline in respect for government, the Principles themselves only say a couple of things on this subject: that "financing political campaigns should not compromise elected officials or undermine public trust in their independence and impartiality" [principle 1], and that "fund-raising efforts or campaign contributions" should not be "linked to support for a particular policy objective" [principle 3(f)]. I agree with both points, but am concerned that they do not say enough.³⁴

As to commission, the first and highest Woodstock Principle is that "The pursuit of lobbying must take into account the common good, not merely a particular client's interest narrowly considered." This presumes that there is a knowable and timeless "common good" that should not just be considered, but should be given special attention, even primacy, in lobbying activities. It would be too easy to say that, as a lawyer, I am

³³ Thomas M. Susman, "Lobbying: Ethical, though not bound by the Common Good," Oct. 24, 2002, Georgetown University forum on The Ethics of Lobbying, at <http://woodstock.georgetown.edu/publications/report/r-fea72.htm>.

³⁴ Cite to my Stanford article.

bound by the codes and canons that require my allegiance to clients first and foremost, even if a societal interest must take second chair. But beyond that, I have trouble with the concept that there is an immutable common good that provides a measurable guidepost for lobbying activity. I think it fair to propose that Members of Congress remain faithful to the goal of promoting the common good, as well as the interests of their constituencies. But is it my job, as a lobbyist, to determine whether the common good is best served by cheap power provided by hydroelectric plants that can make electricity more readily available to the poor or, rather, by not building such plants and thereby maintaining free-flowing rivers for the generations that follow us? I think that is Congress's role, not the lobbyist's. Is the common good measured in the here and now, or looking only to the future? A short-term view would mean much environmental protection legislation that raises costs and eliminates jobs to protect a view or recreation or a species would have to be opposed. Also, the common good can change in the long run. Societies believed slavery to be beneficial to the common good for 2,000 years; since slaves weren't citizens, their interests were not relevant. Finally, what do we do with strong opposing moral claims? Is the common good better served by protecting the life of an unborn child or advancing the health and well-being of the mother? Perhaps it is unfortunate, but I do not see pursuit of the common good as providing a useful ethical guidepost for lobbyists. While lobbyists identify with their clients and employees cases, some studies suggest that they also pursue independent agendas.³⁵ This may be explained in part by their interesting pursuing the common good despite client interests.

³⁵ Cite article in Critical Review.

There are other codes applicable to lobbyists in other jurisdictions: some state lobbying associations have their own codes of ethics. In addition, states often adopt legislation regulating the contacts between lobbyists and public officials. Forty states have created ethics committees to oversee the implementation of lobbying ethics regulations.³⁶ These committees have taken many forms: some are created in an ad hoc fashion by the legislature; some are joint committees overseeing both chambers; others still are standing committees. All hear complaints and have some authority to investigate and prosecute ethics violations.

Lobbyists in Canada and Quebec are bound by a code that is enforced by a national Commission and lobbying associations in the European Union have a general code that applies to their members.

All these ethics codes are valuable even where not part of an enforcement regime. A code of ethics can establish community standards and, thereby, define behavior expected by clients and members of legislatures. A lobbyist's success and reputation will turn on compliance with those standards. A code of ethics not only informs the public (and clients) of the values of the group adhering to that code, but it also informs members what is expected of them. Even in the absence of an enforcement mechanism, a combination of adverse media coverage and peer condemnation will usually provide sufficient motivation for compliance. The competitive market focus may also influence

³⁶ NCSL Table of States and Territories- State Ethics Committees.
http://www.ncsl.org/programs/ethics/ethics_committees.htm

lobbyists ethics³⁷ but incomplete information by clients and employers often impedes the efficacy of these forces.

Before turning from the subject of principles, as embodied in ethics codes, I would point the reader to the very valuable sources of ethical guidance provided by organizations, boards, committees, and the like that have either assumed the role or been empowered with the authority to interpret the codes (and sometimes relevant laws as well). These include the Office of Government Ethics; the House of Representatives Committee on Standards of Conduct; the Senate Ethics Committee; state bar counsels and the ABA Center for Professional Responsibility; state ethics commissions; and the Office of the Commissioner of Lobbying of Canada.³⁸

We now depart the realms of rules (laws) and principles (ethics codes) to enter more subjective territory. Yet this is often where the practicing lobbyist finds himself. Ethics Codes are often so general in their guidance as to be entirely unhelpful in specific situations or contradictory in some of their applications to concrete cases. Where, then, do we look when seeking answers to some of the questions posed at the beginning of this essay?

Ethical Decisionmaking beyond Codes

³⁷ See Demise of PMA

³⁸ It is perhaps the appropriate time to point out that the author has for over a decade been Ethics Committee Chair of the American League of Lobbyists and, in that role, has voluntarily provided nonbinding guidance to members with questions on ethics.

Being without laws or codes to guide us does not mean being rudderless. This final section of my essay first reviews a sampling of frameworks for ethical decisionmaking offered by some well-known authorities in the field. I then end by offering some additional, perhaps more subjective, approaches to answering ethical questions that lobbyists may have.

Contemporary Frameworks for Resolving Ethical Challenges

Rushworth Kidder

Rushworth Kidder is a former journalist, an author and the founder of a nonprofit organization devoted to ethics education. His recent books, *How Good People Make Tough Choices* and *Moral Courage*, have guided numerous individuals and organizations in making ethical decisions while operating in treacherous business climates.

Kidder argues that tough choices are not questions of right versus wrong, but rather, of right versus right. These are situations in which there are two right options, but no clear solution. Kidder presents a number of ethical paradigm pairs, one of which is usually dominant in any ethical dilemma. They are truth vs. loyalty, individual vs. community, short-term vs. long-term, and justice vs. mercy. A checklist to ensure ethical decision making is one of the practical tools Kidder suggests using. Some highlights include checking to see if a problem is a right vs. wrong or a right vs. right dilemma. The first is a moral issue, while the second falls into the ethical category. He identifies three

principles that can be applied to ethical dilemmas, an end-based approach, a rule-based approach and a care-based approach.

Each of these principles provides a different framework within which a solution to the ethical decision may be made, one centers on the greatest good for the greatest number, the second is based on the golden rule and suggests doing for others what one would want done to himself.³⁹ Meanwhile the care-based approach advocates decision making based on ones own understanding of principles.

*Markkula Center*⁴⁰

The Markkula Center for Applied Ethics, located at Santa Clara University, was established to promote and encourage ethical education and decisionmaking in various sectors.

The Center's framework for ethical decisionmaking involves asking a number of questions while processing the dilemma through five different approaches: utilitarian, rights based, fairness or justice, common good, and virtuous. Each approach explores a different angle of the available solutions. For example, the utilitarian approach attempts to maximize the good while keeping bad consequences to a minimum, whereas the rights approach is based on the philosophical argument that the appropriate action is that which respects the rights of individuals.

³⁹ www.globalfuture.com/book-kidder.htm

⁴⁰ www.scu.edu/ethics/practicing/decision/framework.html

Decisions should be made after consideration is given to all the approaches, at which point the individual is asked to consider explaining the decision on television. This is intended to test the visceral reaction to one's decision and whether it would bear public scrutiny. However, this is not a simple process. Problems arise because the values upheld in each of these approaches are not universal, and conflicts emerge over what the practical meaning is of philosophical concepts such as 'the common good.' Though the approaches may guide decisions about what is ethical, the final answers for each may vary greatly. But the Markkula Center focuses on the information produced by trying each approach on for size. With this wealth of information, ethical decision making becomes a more manageable process.

Michael Josephson

The Joseph and Edna Josephson Institute of Ethics was created to improve the ethical quality of society. Founded in 1987 by Michael Josephson in honor of his parents, the mission of the Institute is to improve the ethical quality of society by changing personal and organizational decision making and behavior.

Josephson recognizes that religion and philosophy provide other avenues to making ethical decisions. He calls the "most basic and useful ethical theory" the do-unto-others standard of the Golden Rule. But he recognizes that this approach "falters in situations that involve a complex network of stakeholders with conflicting interests" – essentially, lobbying today. Another is Kant's Categorical Imperative, which assumes that moral obligations are absolute but embodies a rigidity that provides no help when we

must select between ethical values. Finally, there is Utilitarianism, under which we should judge the merits of an act by its foreseeable consequences, often resulting in elevating expediency over principle when the end justifies the means.

Josephson offers his own approach, defining an ethical decision a decision that is consistent with his Six Pillars of Character: trustworthiness; respect; responsibility; fairness; caring; and citizenship.⁴¹

Susman's Guides

It is not that there is insufficient value in the very well thought-out and refined frameworks for ethical decisionmaking described above. It is only that, through the years, I have found that I can rely on simpler tests for lobbyists to employ when called upon to resolve many ethical challenges facing lobbyists. These tests, like those set out by Confucius, Aristotle, Kant, Kidder, Josephson, and others, are likely to be reliable only where applied by a lobbyist with an informed conscience. Ethics tests provide no better guidance to sociopaths than do ethics codes or, for that matter, laws. But most of us can apply them quickly—and reliably—in our day-to-day lobbying activities, as a supplement to those codes and laws.

Visceral Response

Our own gut reaction is often the most reliable of indicators that a potential course of action is likely to be unethical. Over the years, in fielding calls from lobbyists seeking my ethics advice as ALL's Ethics Chair, I found that most of the time the caller already

⁴¹ See generally Michael Josephson, *Making Ethical Decisions* (2002).

felt uneasy about the conduct she was describing as a possible course of action. I often would ask “What does your gut tell you?” And the response invariably corresponded with what my assessment using various more complex analytical tools would yield. It is not wrong, or a waste of time, to seek external validation of a gut reaction. After all, it may occasionally be difficult to tell one’s crisis of conscience from a bad case of indigestion. But for professional lobbyists who understand their trade and the institutions with which they work, the visceral response can be a highly reliable ethics indicator. The educated gut is, of course, informed by applicable objective ethical standards. But it also works beyond rules and codes to fill their gaps.

Projected Post hoc assessment.

This test is certainly related to the visceral reaction, but it asks for an imagined reaction: how do you think the conduct will look to you in retrospect after it takes place? In the Nation’s Capital, I refer to this test as the “Washington Post hoc” assessment: how would you feel (the viscera, again) if you were read about what you are contemplating doing in The Washington Post? Would you want to hide, or show the article to your family?

Speaking of family, one way to test this perspective involves “relative ethics” of a different kind: Would your mother, spouse, or teen-aged son be proud or embarrassed if you told them what you had done? This calls for assessing a vicarious visceral response, but might be helpful when the gut doesn’t seem definitive enough.

While post hoc reasoning is usually condemned in philosophical circles as a fallacy, it nonetheless provides a construct for stepping back, gaining perspective, and perhaps magnifying the reliability of the gut reaction.

Aspiration

Finally, a lobbyist might not feel guilty or self-conscious when contemplating the questionable action and might not be able to project how a family member would react. That could well be because the action seems so well-accepted already: Others are doing it and they don't seem uncomfortable; why should I? Here we move from the visceral and emotional to the intellectual. Everyone is doing it, but it ought to be wrong—and should be changed.

My favorite activity to fail this test is the commonplace immersion of lobbyists in political campaigns through contributing, holding fundraisers, bundling checks, chairing a candidate's finance committee, or otherwise playing a significant role in a candidate's election effort. It is not illegal. It violates no code of ethics. And it probably doesn't feel wrong- at least not inside the Capital Beltway, even when we read about it in the news. But to someone who aspires to remove the inevitable taint that mixing money with lobbying brings to government—and perhaps to improve the quality of government at the same time—public financing of congressional campaigns will be seen as the aspirational alternative to our present campaign finance system. It is possible that expanded public participation in campaign financing might take some pressure off of special interest financing....

Applying Lessons Learned

[Discuss case examples]

Conclusion

If lobbyists are legitimately to claim ours as a profession—an honorable one at that—and to cloak our work in the flag of the First Amendment, then we must act honorably and professionally. That means, of course, obeying applicable laws. It means adhering to principles set out in relevant codes of conduct. But it also means conducting ourselves ethically and being guided by whatever subjective ethical tests work for us successfully: taking actions that don't give us heartburn, that we're proud to share with our families, that we look forward to being reported in the press, and that we believe will best serve society and the common good.

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