

2-2014

The Seven Deadly Virtues of Lobbying

Nick Allard

Brooklyn Law School, Nick.allard@brooklaw.edu

Follow this and additional works at: <http://brooklynworks.brooklaw.edu/faculty>

Recommended Citation

13 Election L. J. 210 (2014)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks. For more information, please contact matilda.garrido@brooklaw.edu.

The Seven Deadly Virtues of Lobbyists: What Lawyer Lobbyists Really Do

Nicholas W. Allard

ABSTRACT

The perception of lobbyists as a corrupt, antidemocratic force for dishonest governance is rooted more in myth than fact. Lobbyists are adaptive, forward-thinking expert advocates who are vital to a healthy, self-correcting representative democracy. Good lobbyists achieve results by building consensus. They give voice to and empower those who seek to petition the government. While existing laws are more than adequate to address, punish and discourage corruption, more can be done to assure transparency and to address the problem of unfair influence by expanding the access of the less advantaged to professional lobbying. Any attempt to improve lobbying should also focus on the rapidly changing nature of the profession in an increasingly complex, global policy arena, in which increasingly people engage with the government electronically. Moreover, understanding the links between fund raising by lobbyists and governance is a rich subject for further study. A starting point to consider reforms and improvements is to have a better understanding of what lobbyists actually do. They have “seven deadly virtues”: First, lobbyists are an important source of information and analysis for government decision-makers. Second, lobbyists inform their clients about how the government works. Third, lobbyists hold each other accountable. Fourth, lobbyists hold government accountable. Fifth, good professional lobbyists comply with the rules. Sixth, they make sure others comply. Seventh, lobbyists are uniquely qualified to bridge partisan divides and find solutions to difficult problems. In sum, for those interested in practicing at the intersection of law, politics, and business, lobbying is an honorable and worthwhile profession. It is also an opportunity for lawyers young and old to make a real difference.

RECENTLY I STARTED a new chapter in my life. Last year I became a law school dean. My journey into legal education has given me the chance to reflect and gain some fresh perspective on my experiences over my decades-long experience as a professional lawyer-lobbyist. It is a privilege to be invited to participate in this outstanding confer-

ence.¹ I am enormously interested in the research and analysis of each of the distinguished presenters. The participants may be surprised to know that their scholarly work more often than not is consistent with my experience and thinking.²

Nicholas W. Allard is the Joseph Crea Dean and Professor of Law at Brooklyn Law School (BLS) in Brooklyn, NY. This article is an expanded version of remarks Dean Allard made on March 8, 2013, at State University of New York (SUNY) Buffalo Law School as part of the Baldy Center for Law and Policy Conference on the Law of Democracy: *Under the Influence? Interests Groups, Lobbying, and Campaign Finance*. The theme of “The Seven Deadly Virtues of Lobbyists” and other related topics was featured in Chapter 3 of Professor Beth L. Leech’s new book: *Lobbyists at Work* (2013).

¹I am especially grateful to Professor Michael Halberstam, SUNY Buffalo Law School, and Daniel P. Tokaji for the invitation, their effort to organize such a worthwhile and provocative conference.

²In particular, I refer to, for example, Professor Frank Baumgartner and his colleagues’ impressive empirical evidence on lobbying and public policy, and Professor Heather Gerken’s call for public financing to address asymmetry, among others. See, e.g., Baumgartner, Frank R., Jeffrey M. Berry, Marie Hojnacki, David C. Kimball, and Beth L. Leech, *Lobbying and Policy Change: Who Wins, Who Loses, and Why* (University of Chicago Press 2009).

Nevertheless, I must say there have been moments when I feel how an experienced trial lawyer must feel watching an episode of *Perry Mason*. So inspired and emboldened and determined not to pick nits, I think this is a good opportunity to go for a “teaching moment” and to attempt to wade through the bayou of vitriolic rhetoric that often surrounds lobbying. Unfortunately, much of the public debate about lobbying aims at demonization and scapegoating, which breeds visceral animosity and unfairly paints lobbying as undemocratic and inherently corrupt. I understand all too well that moving the needle toward more rational and insightful consideration of the topics covered in this conference is an ambitious exercise.

The sources of misunderstanding about lawmaking, policymaking, and lobbying are long established: an almost intractable negative public opinion about lobbying fueled in this century by politicians who, though they know better, find it expedient to feed the maw of dissatisfaction and distrust about politics and lawmaking.³ This enduring hostility is periodically heated by well published flaming examples of illegal lobbying.⁴

In the United States everyone is entitled to an opinion about our government. Sometimes it seems as if almost all of the 315 plus million American people are dead certain that lobbyists are corrupt, that money buys results, and that lobbyists possess superpowers that enable them to unduly influence weak and gullible government officials. When the Obama administration bashes lobbyists and acts as if its own officials must be wrapped in a cocoon of regulation to protect them from those who comply with the law and register as lobbyists, while winking at those who exploit influence and are not registered, it breeds distrust and cynicism about government, undermines transparency, and perpetuates a myth that policymakers are not driven by facts, honesty, and judgment.⁵ The administration does not want to allow lobbyists to be among those who serve on advisory committees lest they hornswoogle all the other pliable committee members and the administration’s own appointees who apparently are too witless to exercise their own independent judgment.⁶ And it advanced a proposed rule that would prohibit officials from the long-standing practice of participating in “widely attended events” if a lobbyist is present, apparently fearing that a lobbyist can telepathically hypno-corrupt an official if they merely are in the same convention venue or exhibition hall.⁷ They ought to know better, and they do.

For the past several years I have been writing and speaking about the myths and reality of how our incredible self-correcting system of government actually works, and defending lobbying as an honorable profession, while encouraging lawyers to consider government advocacy as a career.⁸ Well, now, as the dean of a law school, I think it worth one more try. In the remarks that follow, I first attempt to debunk some common misconceptions about lobbying and lobbyists. Next, I discuss the seven deadly virtues of lobbyists—the underappreciated contributions that lobbyists make to our political system—and ponder the future of this honorable profession, including some steps that can be taken to improve the current system. I conclude with some thoughts on why lobbying is a career that public-minded lawyers should consider.

³Since at least President Woodrow Wilson’s time, candidates in every U.S. presidential election have run against lobbyists. Donald W. Wolfensberger, *Factions and Public Interest: Federalist No. 10 in 2001* (May 18, 2001) (unpublished essay), available at <<http://www.wilsoncenter.org/events/docs/lobbyingintro.pdf>>. Barack Obama is the latest president to continue this tradition. James A. Thurber, “Changing the Way Washington Works?: Assessing President Obama’s Battle with Lobbyists,” *Presidential Studies Quarterly* (2011). James A. Thurber, “Obama’s Battle with Lobbyists”, Chapter 8, *Obama in Office* (2011); Also note references in each State of the Union Address by President Obama: Address Before a Joint Session of the Congress in the State of the Union 2009–13 Daily Comp. Pres. Doc. 1 (Feb 24, 2009, Jan 27, 2010, Jan 25, 2011, Jan 24, 2012, Feb 12, 2013).

⁴The public disfavor has reached an all-time low according to Lawrence Lessig, *Republic Lost. How Money Corrupts Congress—and a Plan to Stop It* (2011).

⁵James A. Thurber, *Obama in office*, chapter 8 (2011).

⁶<<http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agency-boards-and-commissions>>. Recently in *Autor v. Pitzker*, Civ. No. 12-5379 (Jan 17, 2014), a three-judge panel of the D.C. Circuit reversed the earlier district court’s dismissal of a challenge by six lobbyists to the so-called advisory committee ban. The appellate court remanded the case with instructions to consider the plaintiff’s constitutional claims on the merits.

⁷<<http://www.gpo.gov/fdsys/pkg/FR-2011-09-13/pdf/2011-23311.pdf>>, widely attended event proposal.

⁸Prior to becoming the Dean of BLS, at Patton Boggs LLP, I chaired the public policy department and the government advocacy practice—the perennially top-rated lobbying practice in the United States. For several years I have been writing and speaking on the profession of lobbying and related regulatory issues. See, e.g., Nicholas W. Allard, “Lobbying is an Honorable Profession: The Right to Petition and the Competition to Be Right,” 19 *Stanford Law and Policy Review* 23 (2008) [hereinafter *Honorable Profession*]; “My Turn: We Need More Lobbyists,” *Newsweek* (Feb. 22, 2010); Foreword (with Thomas Hale Boggs, Jr.) and “Practical Perspectives on the Practice of Lobbying,” Ch. 40, *The ABA Lobbying Manual: A Complete Guide to Federal Lobbying Law and Practices*, (4th Edition 2011 supplement, Luneberg, Susman and Gordon, eds.) [hereinafter *Practical Perspectives*].

THE MYTHS AND REALITIES OF LOBBYING

“Why should I have to hire a lobbyist to talk with my government?” It is a legitimate threshold question. After all, it is our government, which is supposed to be working for us. Well consider, for example, that you had a medical issue that, God forbid, required surgery. Would you operate on yourself? No, of course not. You would want the best, most experienced specialist that you could find. The same can be said if you have an interest in a significant public policy issue. It’s not always brain surgery, but you take my point. Lawyers have a saying: Anyone who represents themselves in court has a fool for a lawyer and an idiot for a client. Similarly, the arenas where our laws are written and policies made and implemented are even more difficult venues to make your case than in a court room. Professionals, expert advocates, are needed in both settings. There are no quick fixes, silver bullets, or magic wand solutions. If anyone offers that kind of lobbying service, the client should run the other way. Perversely, this is often the hardest lesson to “teach” clients, who often expect results with the snap of a finger, or perhaps a simple phone call. Traditional lawyers pursue the question, “What is the law?” Lobbyists pursue the question, “What should the law be?” The answer to that question, inevitably, is what is the best accommodation of competing, albeit legitimate interests—“What is in the public interests?”—and the plural “interests” is intentional. For any significant policy issue that touches multiple constituencies, the advocacy effort involves, in our heterogeneous democratic republic, the arduous process of consensus building over time, often in many arenas where our laws are made, shaped, and implemented.

The popular myths about the profession are a lot sexier than the reality. Consider the myth that “the system is rotten and all involved are corrupt” versus the reality that “the system works as intended and most everyone involved, including public officials and lobbyists are hard-working, dedicated, and honest.” Are there exceptions? Of course. But the exceptions prove the rule, and are often examples of the law being enforced. Inevitably the bad apple gets caught and punished, like notorious convicted lobbyist Jack Abramoff, former Representatives Randy “Duke” Cunningham and William Jefferson. And that is why you know about them.

They attract a lot of attention for the wrong reasons. Abramoff, for example, was not a lobbyist, he was a crook. He was running, in effect, a political Ponzi scheme, and Ponzi schemes always, inevitably, eventually collapse. Or consider the myth that “money buys results” versus the reality that “results are determined by public policy considerations.” The dirty little secret is that our Government cannot be bought—and in truth, it can’t even be rented—thanks to the complicated system our founders established, of levers and brakes, and the self-interest of lawmakers to remain in office.⁹ If you don’t believe me, consider what legendary political figures, such as California Senator Jesse Unruh, and former House Speaker Sam Rayburn colorfully and vividly had to say about the subject.¹⁰ This point is definitely contrary to conventional wisdom. I can be accused of many things, but being naïve is not one of them. Sure, there are unfortunate examples of corruption, and troubling asymmetries in the power to influence, but by and large, the system is legitimate.¹¹ Finally, think of the popular opinion that “quick fixes, cutting corners, and backroom deals are the rule of the day” versus “anything done can be undone, and the public process is itself highly competitive,” which are powerful self-correcting mechanisms. Granted the accuracy of this observation, the viability of our system to self-correct depends on transparency. Still, by and large the policy process is a never-ending and ongoing balancing act among vigorously competitive interests. No one in the long run has a monopoly on access, information, or persuasiveness. Hubert Humphrey was brilliant on this point. He memorably noted: “The right be heard does not automatically include the right to be taken seriously.”¹² To prevail in the policy process, to be heard above the cacophony of the multitudes of compelling

⁹Allard, *Honorable Profession*, *supra* note 8, at 30–31, nn, 19, 20; *see also* Lessig, *supra* note 4, at chapter 1 (discussing his concept of “dependence corruption”).

¹⁰Allard, *Honorable Profession*, *supra* note 8, at n.19.

¹¹I am not talking about what are referred to as “earmarks.” That is a practice where often there is too much of an appearance, if not the reality, that campaign contributions influence results, that taxpayer money ends up in the hands of those who lobby and pay politicians with campaign contributions and favors.

¹²Senator Herbert H. Humphrey, Remarks Before the Young Democrats of Arizona (Sept. 10, 1966), quoted in *Silencing the Opposition: Government Strategies of Suppression of the Freedom of Expression*, 194–95 (Craig K. Smok, ed. 1996).

voices trying to be heard, to make an effectively compelling case, to fashion a solution to overcome a political impediment, and to hang on to an outcome once achieved, it helps to have a good honest lobbyist.

Lobbyists, like many lawyers, are not hired to win popularity contests, much less to be loved. Indeed having a thick skin is one of the most essential tools of the trade. So the question arises: “Why should we care about the Olympic sport of Whack-a-Lobbyist?” Lobby bashing is almost irresistible in the present climate—like scratching a rash. While it may feel good at the time, it actually makes things worse. It breeds distrust of Government at a time when building trust is needed to obtain concessions and to forge solutions to tough problems. Usually it’s just about polls and politics. To paraphrase the quip often attributed to President Truman, who must have had tongue firmly in cheek, “if you are with me then you support the public interest, if you oppose me you are lobbying for a special interest.”¹³ It is counter-intuitive and not the conventional wisdom, but limits on lobbying favor the powerful who have many avenues to secure their objective, and disadvantage disproportionately the less advantaged people and groups in society. If the concern is undue influence, asymmetrical advantage, the best solution is to provide a professional advocate to the less advantaged. This is done in the civil and criminal justice systems with legal aid, public defenders, and other methods to provide needed legal services. Finding ways to give the less advantaged more access to lobbying muscle is a solution to unfair advantage in the policy arena. Moreover, lobby bashing, like three card Monte, is a game of diversion. It ignores and obfuscates the real problems and needed solutions. In my view, it has been a mistake for the Obama administration to burden, restrict, and penalize lobbyists who comply with law and register as lobbyists when required to do so, while there is little enforcement of lobbying rules and regulations against those who ignore or break the rules.¹⁴ Similarly, it is a mistake to take a simplistic approach to concerns about the so-called “revolving door.”¹⁵ The relevant questions for appointments to office are (1) is the person qualified for the position, and (2) can the person put the public interest ahead of their personal private interest and do they have a conflict of interest. The answers to these questions have nothing to do with whether the prospective appointee complied

with the law and is registered as a lobbyist. Moreover, most of the current political attacks on lobbying focus on yesterday’s headlines and ignore that lobbying is changing and that there are real new issues raised that beg to be addressed.

SOMETHING REALLY WORTH THINKING ABOUT: THE FUTURE

Roasting all the old chestnuts about caricatures of lobbying and lobbyists of the past ignores the transformation of how and where and what lobbyists actually now do and how they will operate in the new world of law. Often it seems as if reformers are arguing about, and want to change, a world that never really quite existed, but certainly has little to do with the future.

It is a cliché to say the world is increasingly a global community. Due to advanced online networks and the virtually borderless interconnected world we live in, more than ever before, lobbying skills are needed to address the multinational nature of issues. First, and most obviously, there are more multinational interests: overseas firms, for example, that wish to expand and invest in the United States, and U.S.-based concerns that have interests abroad.¹⁶ These global players require sophisticated multinational government advocacy representation. They also require expert compliance advice and risk assessment among other needed government

¹³See generally, discussion in Allard, Practical Perspectives, *supra* note 8, at 5 and n.18.

¹⁴Thurber, “Changing the Way,” *supra* note 3, at 6; Thurber, “Obama In Office,” *supra* note 3, at 9. Once elected President Obama restricted participation by federal registered lobbyists on his transition team and later his administration, but exceptions were allowed. He instituted a strong ethics code for all executive branch appointees, implemented a stricter gift ban, and restricted the “revolving door” for lobbyists both in and out of government. He also banned direct lobbying for funds and tax breaks from the Troubled Assets Relief Program (TARP) and the 2009 American recovery and Reinvestment Act of 2009 (ARRA) economic stimulus package. *Id.* Some would observe this last measure amounted to an unprecedented and one-sided interference with the use of effective counsel. Thurber questions the effectiveness of the new rules. *Sec C.9.* Lee Fang, “Where Have All the Lobbyists Gone?, The Shadow Lobbying Complex”, *The Nation* (Feb. 19, 2014).

¹⁵<<http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1719.pdf>> (revolving door rule).

¹⁶For a vivid description of the demands for and growth of these services, see Eric Lipton and Danny Hakim, “Lobbying Bonanza As Firms Try to Influence European Union,” *New York Times*, p. 1 (Oct. 13, 2013).

relations and regulatory services, especially those relating to financial services, privacy, and security.

Second, on many large issues, such as financial regulatory reform, climate change, and energy policy, for example, the policy advocacy has become a three- or four-dimensional chess game. For example, the core reason that the G7 became the G20 was because it was understood that it is not possible to effect financial regulatory changes unilaterally. Washington cannot act alone, unless, London, Brussels, and Asia are moving in roughly parallel directions and vice versa. The same can be said for spectrum policy, Internet privacy and security, climate change, energy, and a host of other issues of global borderless scope. On many issues the BRIC countries: Russia, Brazil, India, and China must be considered. Consequently, if you want to influence the U.S. government on policy rules, it helps to persuade other governments, including the so-called BRIC countries, and vice versa.

New technology: Broadband interconnectivity

Another major change is that increasingly the public interacts with the government electronically, often directly, without a middleman. The “face-to-face meeting” by a lawyer representing a client with an official, or simply providing raw information to clients, such as texts of bills and summaries of hearings, are diminished in value. This puts a premium on expert analysis of ever increasingly available information in the public domain, as well as professional advice and advocacy. There are also powerful new advocacy techniques that we are only beginning to fully appreciate. Witness how Google and others stopped the proposed anti-piracy legislation recently that the powerful Motion Picture Association of America backed (the Stop Online Piracy Act (SOPA)).¹⁷ In 2012, this legislation was a train on a fast track, supported by the powerful Hollywood studio interests, but it was killed overnight by new media techniques. Internet users also managed to block the Cybersecurity Act of 2012 with online grass roots techniques. It was like watching the Old School Redcoats marching in traditional battle formation getting picked off by unconventional online minutemen guerilla fighters. Such techniques, cyber lobbying, will increase as the One-hundred Thirteenth and later Congresses take up several privacy/security measures such as updating and reform to 1986 laws, the Computer

Fraud and Abuse Act¹⁸ and the Electronic Communications Privacy Act (ECPA),¹⁹ and the proliferating so-called “patent troll” inquiries gaining so much attention before Congress, the Federal Trade Commission (FTC), and States Attorneys. Consider also how President Obama uses very effectively, as do increasingly many political campaigns, new media to campaign, raise money, and build political support. Similar techniques can be used in lobbying and government relations advocacy campaigns.²⁰

Some other big questions that bear study

First, do we run the government like *American Idol*? Lawmakers essentially have the technological capability to run a referendum on innumerable issues before them. But should they? The issue of whether government officials are mere delegates or representatives is hardly new. Hopefully, we will remember the wisdom of Sir Edmund Burke, who told the electors of Bristol in 1774, “your representative owes you, not his industry only, but his judgment, and he betrays, instead of serving you, if he sacrifices it to your opinion.”²¹ (Of course, Sir Edmund did, in fact, lose his next election, so ignore public opinion at your peril.)

Second, do lawmakers and regulators treat all blogs and Tweets alike? Those with money and new media savvy can flood the media with their messages and drown out others who lack the technological means to join the “great melody” of public discourse. The answer is that the government is wrestling with how best to weigh and evaluate all the input it now seeks and receives electronically outside the time-worn contours of the traditional legislative and administrative process. Law journals are filling up with articles discussing whether and how electronic comments and blogs should be considered and weighed within the somewhat

¹⁷Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011). Regarding changing lobbying techniques *see* Holly Yeager, “Lobbying Shop McBee Strategic represents the changing business of Influence, The Washington Post (February 21, 2014).

¹⁸P.L. 99-474 (1986).

¹⁹18 U.S.C. § 2510 (2002).

²⁰I am not doing justice to the rough and tumble changing world of lobbying at the state level. Among the insightful and highly readable treatments of the topic is Jerry Kremer, *Winning Albany* (2013), a memoir written by a distinguished alumnus of Brooklyn Law School.

²¹Edmund Burke, Speech to the Electors of Bristol (Nov 3, 1774), in 2 *The Works of Edmund Burke* 7, 12 (1839).

dusty four corners of the Administrative Procedures Act.²²

Third, what should be done about the information “have nots”? Without access to affordable new mobile broadband technology and the know-how to use it, technology “have nots” lack the keys to both opportunity and participatory democracy. They are being left behind. It is imperative to find ways to close, what we used to call and still should be a prime concern, “the digital divide” to prevent people from becoming disenfranchised. It is, in my view, a fundamental principle that our society must ensure that the voices of the less advantaged are heard, that we help all to be heard effectively.²³

Fourth, what more can be learned about the connections, the interplay between elections and lobbying? I would submit that much is assumed, but not enough is well understood, about the subject. For example, how should we measure the impact of lobbyists on elections? Much is written about lobbyists as political donors, fundraisers, and “bundlers.” No doubt the election system is awash with money as Larry Lessig and others document.²⁴ And, it corrodes our democratic system (I would say corrodes rather than corrupts). What is the significance of money from lobbyists? Is it a drop in an ocean of money? Or, does it somehow have outsized impact, and if so, how to address that. Can legislators decline to take money from registered lobbyists during the election cycle, or during a Congress when a lobbyist appears before them?²⁵ How does the dependence on political fundraising actually relate to the role of lobbyists and governing, or the failure to govern between elections? Is it not the case that the impact of money in shaping outcomes is overstated and the real scandal is that nonstop fundraising leaves elected officials little if any time to do their jobs? It may make them more dependent on lobbyists—not for money, but to get the work of legislators done. In brief, the links between professional lobbying and elections should be better understood and the topic is rich and worthy of considerable further study.²⁶

THE VIRTUES OF LOBBYISTS

You don’t hear any of the 315 million experts in the United States say much about the benefits of lobbyists. I can list seven deadly virtues that explain what lobbyists actually do for a living.

The first thing lobbyists do is provide information to the government to inform its decisions. This is the best understood and most widely discussed function of lobbyists, at least among those who study the subject carefully.²⁷ While no one can deny that our federal and state governments have their fair share of experts in every field imaginable, often times the information simply does not reach the decision makers. Also, lawmakers may not appreciate the impact of proposals they are considering or the possible unintended consequences of legislation and regulations as drafted. It is especially frustrating when a provision is meant to be helpful to a business or constituency and quite the contrary is the case. Lobbyists bring information to those decision makers, and an informed decision is certainly preferred to simple guesswork. But members of Congress and other government officials have many sources of information. They do not just have to rely on lobbyists. They have the Congressional Research Service, they have staff, and they have information in the public domain. If there were no lobbyists, lawmakers would still be getting information.

Second, and perhaps at least as important, good lobbyists provide accurate information to their clients about how the government works, what to expect, what is realistic. This important role played by lobbyists empowers citizens to effectively

²²Bridget C.E. Dooling, “Legal Issues in E-Rulemaking,” 63 *Admin. L. Rev.* 893 (2011). Stephen M. Johnson, “Beyond the Usual Suspects, ACUS, Rulemaking 2.0, and a Vision for Broader, More Informed, and More Transparent Rulemaking,” 65 *Admin. L. Rev.* 77 (2013).

²³Edward Wyatt “U.S. fails to narrow its digital divide” *International Herald Tribune* p. 4 (August 16, 2013).

²⁴See Lessig, *supra* note 5.

²⁵The American Bar Association (ABA) Lobbying Task Force proposed limits on accepting contributions from lobbyists. ABA Section of Administrative Law and Regulatory Practice, Task Force on Federal Lobbying Laws, *Lobbying Law In The Spotlight: Challenges And Proposed Improvements* (2011) available at <<http://www.americanbar.org/content/doc/aba/migrated/2011-build/administrative/law/lobbying-task-force-report-010311.authcheckdoc.pdf>> [hereinafter ABA Lobbying Task Force].

²⁶Richard Briffault, *The Anxiety of Influence: The Evolving Regulation of Lobbying* (January, 2014) Columbia Public Law Research Paper No. 14-367. Available at SSRN: <http://ssrn.com/abstract=2384645>.

²⁷See Bertram J. Levine, *The Art of Lobbying: Building Trust and Selling Policy* (2008); *Congress: How the System Really Works* (2d Ed. 1996); Leech, *supra* note 1; William Luneburg, “The Evolution of Federal Lobbying Regulation,” 41 *McGeorge L.Kev.*85 (2009); Thomas Susman, “Lobbying in the 21st Century and the Need for Reform,” 58 *Admin. L.Kev.*737 (2006).

exercise their First Amendment right to petition the government. Navigating the maddeningly confusing maze of government bureaucracy and frequently encountering intransigence and delay severely constrains each citizen's ability to exercise their constitutional rights; lobbyists act as guides that inform and manage the expectations of their clients. This saves time and energy, resulting in a more efficient allocation of resources. When a client presents an issue and their objective, good lawyer-lobbyists will be able to advise the client whether their goals are realistic or not. They will explain to the client that "maybe if you try to seek something slightly different, you could accomplish something close to what you wanted." I am talking about the good lobbyists. Good lobbyists will not take credit for the sun coming up, and they will also say when they cannot do something. They will level with their clients, telling them things like: "That tax change has no chance of getting enacted this year." And, "By the way, what is the public policy argument for what you want done?" Because, unless there is a compelling policy argument, members of Congress and regulators aren't going to support it, because it's not a justifiable or sustainable result.

Third, lobbyists help keep the system honest by holding other interests and lobbyists accountable—it's an adversarial process. It is commonly accepted that competition breeds excellence and it is the lobbyist who competitively advocates for the ideas and interests of its clients. When the system works, and the rules are followed, the best ideas win out. This assumes transparency. It assumes that you know what's going on. Sunlight is one of the great disinfectants in the policy arena.²⁸ Professional lobbyists who play by the rules don't fear transparency. They embrace it because they want to have the opportunity, like a lawyer in court has, to challenge the other side. This is why one of the most effective techniques of being a lobbyist is to say to a decision maker: "Here's our case and this is why we like it. And this is what the other side is going to say, and this is why you should discount that." The lobbyists for each side hold each other accountable.

Fourth, lobbyists help keep the system honest by holding the government accountable. Government officials often do not like this—they would rather not have this thorn in their side—just like the press is often regarded as an annoyance, a necessary evil. Both the right to petition, and freedom of the press are protected in the First Amendment as

important checks on government power. Lobbyists act as conduits between the government and their constituents; when the constituents aren't happy, the government hears about it.²⁹

Fifth, professional lobbyists comply with rules. Crooks and amateurs do not do this. People who make their living lobbying *must* comply to continue practicing and their clients insist on compliance. Ironically, in my experience, the bigger the corporate client, the more the company is interested in compliance. Sometimes it seems that they prefer compliance to results. A related point is that the rules for lobbying—including things like the so-called and much bally-hooed "toothpick rule" concerning what food a lobbyist can serve to members and staff—including the gift rules and a long list of exceptions—address esoteric questions such as "when is food not a meal?"³⁰ These lobbying rules are so arcane and so complicated that a layperson could not be expected to understand them, much less comply. The rules are neither intuitive or common sense. So, clients need professional lobbyists to make sure that when they are making their case, they are doing it in a way that is appropriate and complies with the rules.

Sixth, lobbyists make sure others follow the rules—they are whistle blowers about noncompliance by other lobbyists. That is right out of the Lobbying 101 playbook. One of the standard tactics of lobbying in an adversarial situation is to check the lobbying registration of the opposing lobbyist and start making noise if they're violating the rules. Do you believe that most cases of scandal are discovered by the Justice Department or State Attorneys General? Heck, no. It is more likely that the

²⁸Louis Brandeis, "What Publicity Can Do", Harper's, Weekly, p. 10, Dec 20, 1913 ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.")

²⁹If I were a cynic, I would suspect that the Obama administration's prohibitions barring clients using registered lobbyists in TARP and ARRA meetings has more to do with avoiding the inconvenience of dealing with effective advocates than any realistic ethical concerns.

³⁰Under the House and Senate gift rules, members may accept free attendance at receptions where "food and beverage of nominal value when served as other than part of a meal" is available. Because "nominal value" is not defined, guidance indicates that snacks, hors d'oeuvres, etc. are acceptable at receptions (which do not have the diverse attendance requirement of widely attended events where a meal may be served) and hence the toothpick rule. Food that can eaten with a toothpick, standing up, without a plate, and certainly not a knife and fork, is probably permissible.

lobbyists for the other side or the press who discovered noncompliance from other lobbyists reported misconduct and noncompliance. Professional lobbyists help keep the system honest.

Seventh, lobbyists provide civility and help discordant, partisan dug-in interests come together and find solutions. Yes, they broker deals, get things done, guilty as charged. When there are partisan quarrels in Congress and in the government, lobbyists can be back-channel messengers, come up with solutions, talk to people, reduce flaring temperatures, and figure out how to overcome an impasse...that's what professional lobbyists do. You can accuse lobbyists of many things but I cannot think of a single, successful lobbyist who is rude or makes uncivil comments.

Notwithstanding these seven virtues, it seems often that the whole country is convinced that legislators and regulators are marionettes who need to be kept separated from the devious and dangerous puppet-master lobbyists. The unfortunate disingenuous anti-lobbying tenets of the Obama administration take advantage of this common misconception. The reality is that lawmakers in Congress and agencies make tough, informed decisions every day. They aren't impressionable children who need protecting from the dangerous influence of lie-peddling dealers of dopey, self-serving ideas. The administration's anti-lobbying position claims to be providing transparency and accountability through its hostile stance on lobbying, but what it really does is punish those who follow the law, those who register, report their activities, and do their job correctly. By imposing penalties on legal lobbying, the administration inadvertently is encouraging those who violate the law.

When students ask me what it is that lobbyists do, I tell them that lobbyists do what a good lawyer should do; they do what I call the 3 A's: Analyze, Advise, and Advocate. Like lawyers, lobbyists represent a client, analyze their problems or goals, advise those clients on what they should do, and then advocate zealously for their client. Lobbying—like any other honorable profession—has both good and bad apples. The fact of the matter is that lobbying is a necessary and important aspect of connecting American citizens to those who represent them in government.

In truth, lobbyists are not the source of the complex problems our nation currently faces, such as legislative gridlock, bitter partisanship, the economic

downturn, unpopular wars, and global threats, from terrorism to financial, to data privacy and environmental issues. Scapegoating lobbyists intentionally or unintentionally drains time and energy from debating and addressing these real issues. In addition to diverting attention away from the critical issues and overlooking the inherent value and necessity of public advocacy, rhetorical attacks on lobbyists feed the sad idea that politics is bad and that the honest, diligent women and men working in public service are gullible and corruptible, if not corrupt themselves. It breeds distrust in government precisely when greater trust and confidence are needed to achieve consensus and develop innovative solutions to very significant problems. In fact, successful lobbyists are honest and hardworking and follow the rules. In Washington, DC, alone there are approximately 80,000 attorneys, a large number of whom engage in public policy work broadly conceived. At this writing, there are about 12,000 people who are officially designated as lobbyists within the narrow definition in the Lobbying Disclosure Act. Exceedingly few of these people would contemplate breaking an ethical rule or tolerate anyone who does. In fact, lobbyists in law firms thrive on compliance with rules and must adhere to the bar associations' professional standards and codes of ethics in addition to government lobbying rules. Like the ad for the kosher hot dog company, lawyer lobbyists can honestly say: "we have to answer to a higher authority."³¹

Thus, in an environment of fundamental honesty and dynamic competition, quick fixes and cutting corners are sure paths to failure, and deceit and illegality will derail a career permanently. The successful practice of public policy is rooted in the mastery of procedures and the ability to explain how a given position advances the public interest. Like litigation, this advocacy work is conducted in a highly competitive, complex, and professional environment. The colorful, popular, wickedly glamorous image of the cigar-chomping, bird-hunting, joke-telling,

³¹The use and relevance of professional ethical standards of lawyers in the lobbying context is a fertile field for further study and consideration. See ABA Lobbying Task Force, *supra* note 25. Canadian federal and provincial regulations are examining related issues carefully including whether to adopt a Code of Conduct. See Canadian Lobbying Act, 1985, c. 44 (4th Supp.), available at <<http://laws.justice.gc.ca/en/showtdoc/cs/c-12.4>>. The issue of lobbying regulations has been a topic of vigorous discussion at the St. Petersburg Legal Forum in Russia (May 2013).

martini-drinking, Gucci-wearing door-opener overshadows the skills of most successful lobbyists who may enjoy some of these naughty pleasures, though never all at once. Moreover, what may or may not have worked for lobbyists in the past is beside the point. The profession, techniques, and rules of the road are evolving rapidly.

There is no question about it—lobbying can be improved. The practice is hardly perfect. Its public reputation is lousy. Lobbyists should continue to strive to conduct their activities with integrity and honesty; they should always be frank about what they do (while also respecting confidentiality) and always observe the highest professional and ethical standards. There could be more stringent enforcement of existing rules, including registration requirements and ethics laws, and increased disclosure of those activities that constitute lobbying.

If the public's true concern is asymmetry in the system, where some moneyed interests have more lobbying clout, then the answer is to endeavor to afford the underrepresented more lobbying clout. Contrary to conventional wisdom, the counterintuitive solution to the problem of undue influence is more lobbying, not less. Instead of trying to limit the use of expert advocacy, we should find ways to give the less advantaged a louder voice in the legislative and regulatory processes. Universal access to lobbying provides a check on special access and unfair influence and helps to hold lawmakers accountable. Thus, rather than determining ways to restrict lobbying, we should consider ways to increase access to public policy advocacy. For example, using the legal industry as a guide, we should set goals for the amount of pro bono work every lobbyist undertakes, annually recognize outstanding contributions, and make pro bono public service part of a lobbyist's job description—just as it is part of the American Bar Association's rules of professional conduct for lawyers. We should also empower Main Street Americans by helping them establish lobbying coalitions—groups of individuals united by a common purpose. People are already able to join their legal claims in class actions and often to the chagrin of big corporations, use contingency fees to retain lawyers they could not otherwise afford. Similar approaches to help individuals seeking to put their support behind a policy claim are worth exploring. In addition, we should encourage universities and colleges to extend their loan-forgiveness programs to graduates who lobby for underrepresented groups—

consider, for example, establishing a “Lobby for America” program modeled after Teach for America. Finally, we could find ways to provide all Americans with the access and know-how to use e-mail and social media, because we increasingly interact with our government online.

For these suggestions to catch on, of course, the American public needs to have an accurate picture of how the public policy advocacy system operates, as the reality is much different from the conventional or popular wisdom that lobbying is a simple, linear process whereby campaign contributions and other “favors” lead to relationships of special access and influence, which subsequently form the bedrock of essentially quid pro quo deal making. The best-kept secret in America may be that our government cannot be bought. If it could—if all it took to prevail were buying a few steaks, sponsoring a golf trip, or making campaign contributions—then anyone could buy an outcome. There would be no need to hire professional lobbyists to help steer through the procedural and political labyrinth. Fortunately, this is not the case.

In reality, successful advocacy ultimately depends on the lobbyist's ability to explain how a given position advances the public interest, to respond to counter-argument advances by persuasive and skillful advocates, and to do so credibly, consistently, and concisely. As opposed to a simple or linear model of influence, practicing the lobbying profession is in fact a multifaceted and competitive enterprise, involving more hard work than one might imagine. In actuality, lobbyists navigate congressional thickets, decipher 2,000-page bills and complex regulations, and fundamentally contribute to a marketplace of ideas that benefits everyone—not just the person who pays the most. Lobbyists work hard to help the public understand the government, effectively providing a “Rosetta Stone” for policy and politics to the average citizen. Whether it is explaining and helping constituents comprehend and shape complex health or financial regulation proposals or getting recovery funds from the government and back into the economy, Washington representatives are providing an important service to all American citizens—left or right, young or old, rich or poor, popular or unpopular.

LOBBYING AS A CAREER

Lobbying is not only a necessary and honorable profession; it also offers an interesting, worthwhile

career that provides a path to participation in the world's most renowned democracy, with an opportunity to make a difference. From another perspective, it provides a unique, exciting career path for new lawyers. For the right kind of lawyer—a lawyer who is fascinated by the intersection of law, politics, and client interests—it is an extremely attractive line of work, especially because the answer to the question of what the legal rules and policies should be necessarily involves achieving a consensus about what is in the public interest.

In the last few years, while discussing the subject of lobbying in articles, lectures, speeches, and other programs, I have been quite surprised to receive hundreds of inquiries from young lawyers and law students asking how they can get involved in public policy work as lobbyists. I initially assumed that such interest stemmed from the poor legal market; and I would sometimes facetiously say that they all must be broadening their horizons in an effort to secure gainful employment—surely, it must be a sign of how desperately bad the job market was that young lawyers were

“even” considering lobbying as an option. I was pleasantly surprised, however, when some colleagues, including my dear friend Professor Jesse Choper, the former dean at Boalt Hall, caught me up short and vigorously disagreed. Professor Choper told me that he believed the lawyers and students I was hearing from were actually responding because their eyes had been opened to the possibility of an exciting career in public policy. I hope that is true—if you are a law student considering your options or an attorney contemplating a career change, consider pursuing the public interest as a professional lobbyist. With apologies to Waylon Jennings and Willie Nelson: “Mommas, please let your babies grow up to be lobbyists.”

Address correspondence to:

*Nicholas W. Allard
Brooklyn Law School
250 Joralemon Street
Brooklyn, NY 11201*

E-mail: nick.allard@brooklaw.edu