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## **NEW JERSEY STATE BAR ASSOCIATION**

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## ***MEMORANDUM***

To: All Section and Committee Chairs and Legislative Coordinators  
All County Bar Association Presidents

From: Valerie Brown, Legislative Counsel  
James Condon, Assistant Legal and Legislative Counsel

Date: March 1, 2006

Re: **MEETING NOTICE – APRIL 26, 2006**  
**New ELEC Rules Concerning Lobbyists and Governmental Affairs Agents – Meeting to Draft Request for Advisory Opinion**

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The Election Law Enforcement Commission (ELEC) has adopted new rules concerning lobbyists and governmental affairs agents. The recently adopted rules became effective January 1, 2006 and can be reviewed at ELEC’s website at [www.elec.state.nj.us/LegalResources/reg\\_adoptions.htm](http://www.elec.state.nj.us/LegalResources/reg_adoptions.htm). The NJSBA has been actively involved in the rule making process for these new rules because of their potential effect

upon the legal community. **We now solicit your questions regarding these rules to include in a comprehensive request for an advisory opinion which the NJSBA will submit to ELEC. Section and committee chairs and other interested parties are invited to attend a meeting at the Law Center on April 26, 2006 at 6:00 p.m. to discuss what issues should be addressed in the request for an advisory opinion.**

The new rules were a year in the making. ELEC's original rule proposal was published on January 17, 2005 in the Jersey Register at 37 N.J.R. 224(a) and **could have required many attorneys engaged in the practice of law to register as lobbyists and comply with ELEC reporting requirements.** As a result of testimony and comment ELEC received, including that of Paul Josephson, Esq. who testified before ELEC on behalf the NJSBA, the Commission determined that its proposed lobbying rules required significant changes. ELEC published a rule reproposal on August 1, 2005 in the New Jersey Register at 37 N.J.R. 2838(a), which exempted "communications by an attorney representing a client in the regular course of routine litigation or administrative proceeding with the state, or in the course of a quasi-judicial civil or administrative proceeding with the state" from activity which triggers compliance with ELEC's reporting requirements. This reproposal was subsequently adopted by ELEC.

Despite the inclusion of this exemption in the reproposal, there are still many questions which remain regarding the application of the new rules to members of the legal profession. Further clarification of these rules through the advisory opinion process is necessary. **Therefore, we welcome all sections and committees to submit questions for inclusion in a comprehensive request for an advisory opinion from ELEC and to attend the meeting at the Law Center on April 26. You may register for this meeting at the NJSBA website Meetings Calendar. Please contact the NJSBA meetings department for assistance with registration. For more information please contact Laurie Weresow at (732) 937-7540.**

Cc: NJSBA Board of Trustees, Legislative Committee, All County Bar Association Executive Directors



March 9, 2005

Election Law Enforcement Commission  
P.O. Box 185  
Trenton, New Jersey 08625-0185  
Attn: Michelle R. Levy, Assistant Legal Director

**Re: Comments on Proposed Amendments and New Rules Implementing the  
"Legislative and Governmental Process Activities Disclosure Act," N.J.S.A.  
52:13C-20**

Dear Honorable Commissioners:

On behalf of the New Jersey State Bar Association, please accept this correspondence forwarding our concerns and comments regarding the amendments and new rules proposed by the Election Law Enforcement Commission (the "Commission") to implement the "Legislative and Government Process Activities Disclosure Act," N.J.S.A. 52:13C-20 (hereinafter the "Act").

While the phrase "lobbying" has acquired negative connotations in recent years, it is crucial to note that lobbying is core First Amendment activity: the right to petition the Government for redress of grievances. While this is not the forum to debate the constitutionality of the Act, the Commission quite obviously must take care that its regulations be narrowly tailored to advance the purposes underlying the Act so as not to infringe upon First Amendment rights.

Our primary concern with these proposed amendments and new rules is that they improperly encroach on the New Jersey Supreme Court's authority to regulate the practice of law. The proposal significantly expands the scope of reportable lobbying activity, beyond attempts to influence legislation and regulation, to include a far-reaching list of "government processes" that have traditionally fallen under the rubric of the practice of law, including the development, negotiation, award, modification or cancellation of public contracts; issuance, denial, modification, renewal, revocation or suspension of permits, licenses or waivers; and procedures for bidding.

In addition to these constitutional concerns, the Act should be read in pari materia with, and in a manner that does not conflict with or add to, preexisting statutes governing the practice and procedure of administrative law, including but not limited to the Administrative Procedure Act (“APA”), Open Public Records Act (“OPRA”), Open Public Meetings Act (“OPMA”), and other agency-specific statutes, for example the well-regulated body of law and practice concerning state public contracting and protests.

**I. THE PROPOSED AMENDMENTS AND RULES USURP THE SUPREME COURT’S EXCLUSIVE AUTHORITY TO REGULATE THE PRACTICE OF LAW.**

The proposed definitions of the terms “governmental affairs agent,” “governmental process,” and “influence governmental processes,” (proposed N.J.A.C. 19:25-20.2) will require attorneys and law firms involved in adjudicatory, adversarial proceedings and in both formal and informal appearances before public entities regarding the award of public contracts and other administrative matters to comply with the reporting requirements of the Act and proposed implementing rules and amendments. If it promulgates these rules and amendments in their current form, the Commission would usurp the Supreme Court’s constitutionally-grounded power to regulate attorneys and the practice of law.

The New Jersey Constitution provides that “[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.” N.J. Const. Art. VI, s. II, p. 3. Thereby, the Constitution grants authority to the Supreme Court to impose conditions on the practice of law by attorneys in New Jersey. Unmistakably, the Constitution made the Supreme Court the exclusive repository of the State’s power to regulate lawyers and the practice of law. In *Winberry v. Salisbury*, 5 N.J. 240, 247, cert. denied, 340 U.S. 877, 71 S.Ct. 123, 95 L.Ed. 638 (1950), our Supreme Court interpreted this constitutional provision as providing the judicial branch with exclusive authority over court administration, including court practice and procedure. Consequently, under this constitutional mandate, the regulatory authority of the Supreme Court “transcends the power of the other branches to enact statutes or promulgate regulations inconsistent with the authority so granted.” In the *Matter of City of Newark*, 346 N.J. Super. 460, 472 (App. Div. 2002) (citing *Passaic County Probation Officers’ Ass’n v. County of Passaic*, 73 N.J. 247, 255 (1977)).

Similarly, in 2002, both the Commonwealth Court and the Supreme Court of Pennsylvania struck down the Commonwealth’s “Lobbying Disclosure Act” because it impermissibly infringed on the Court’s exclusive authority to regulate the practice of law. *Gmerek v. State Ethics Commission*, 596 Pa. 579, 807 A.2d 812 (2002). The legislation contained similar definitions and penalties for violators as those proposed in the Commission’s rules and amendments. Likewise, we believe the Commission’s proposed amendments and rules improperly encroach upon our Supreme Court’s exclusive authority to regulate of the practice law.

The proposed rules impose a reporting requirement on a broad community of administrative law attorneys who regularly “influence governmental processes” as they

engage in communication with authorities, boards, commissions and administrative agencies during the course of providing legal representation to their clients. To the extent the rules also prohibit former government employees who enter private practice from affecting government processes altogether, the rules even more directly tread on the Supreme Court's province to regulate the practice of law.

If these proposed rules and amendments are adopted in their current form, the Commission would be impermissibly regulating the practice of law because attorneys would become subject to the disclosure provisions for making legal communications with members of the Legislative and Executive Branches of state government. Already, attorneys are pervasively regulated professionals and the regulation of their conduct falls clearly within the Supreme Court's rule-making prerogatives. See N.J. Const. Art. VI, s. II, p. 3; New Jersey Rules of Court; New Jersey Rules of Professional Conduct.

For example, in proposed N.J.A.C. 19:25-20.2, the Commission's expanded definition of lobbying, now "influence governmental processes," includes any attempt to assist a represented entity or group to engage in communication with any authority, board, commission or other agency. The proposed rule does, indeed, regulate the practice of law insofar as the services administrative and government procurement attorneys provide to their clients constitute "influence" as so defined. Clients often require the assistance of an attorney to communicate effectively with State agencies, or to assist in developing the substance of a communication that will be made by the client. In fact, much of the practice of administrative law requires attorneys to successfully navigate their clients through the processes by which an agency applies its substantive law to those entities subject to its authority. See John H. Reese, *Administrative Law Desk Reference for Lawyers* §1.01 at 4 (2003).

The Pennsylvania Supreme Court came to this conclusion when presented with the question. That court observed that the legislative definition of lobbying before it "clearly encompasses the practice of law," because it defined "efforts to influence legislative or administrative action" to include "direct or indirect communication" with executive and legislative branch officials. While defining the boundaries of legal practice can be an "elusive, complex task, ... [w]here ... a judgment requires the abstract understanding of legal principles and a refined skill for their concrete application, the exercise of legal judgment is called for. ... [N]ot only do [the plaintiff attorneys] provide legal analysis to their clients regarding proposed legislation that is either communicated to state officials by [the attorneys] themselves or their clients, but they also appear before executive departments during the legislative process and discuss, inter alia, the applicability of certain regulations to particular situations." *Gmerek v. State Ethics Commission*, 596 Pa. at 590, 807 A.2d at 819.

(New Jersey's definition of the practice of law is even more sweeping. One engages in the practice of law "whenever legal knowledge, training, skill and ability are required." *In re Jackman*, 165 N.J. 580, 586 (2000); see also *State v. Rogers*, 308 N.J. Super. 59, 66 (App. Div. 1998) ("Although our Supreme Court remarked that the "practice of law does not lend itself 'to [a] precise and all-inclusive definition,' " it is clear that the "practice of law" is not limited to litigation, "but extends to legal activities in many non-litigious fields." *New Jersey State Bar Ass'n v. Northern New Jersey Mortgage Associates*, 32 N.J. 430, 437, 161 A.2d 257 (1960) (quoting in part Auerbacher

v. Wood, 142 N.J. Eq. 484, 485, 59 A.2d 863 (E. & A.1948)). Hence, the practice of law is not “limited to the conduct of cases in court but is engaged in whenever and wherever legal knowledge, training, skill and ability are required.” *Stack v. P.G. Garage, Inc.*, 7 N.J. 118, 121, 80 A.2d 545 (1951). What constitutes the practice of law is often required to be decided on a case by case basis because of the broad scope of the fields of law. See *In re Opinion No. 24 of Committee on Unauthorized Practice of Law*, 128 N.J. 114, 122, 607 A.2d 962 (1992).”))

A concurring justice raised another area in which lobbyist regulation as applied to lawyers could not be reconciled with attorney ethics and regulation: the “very real specter” that a requirement in the Pennsylvania statute that lobbyists report their expenses and retain records to substantiate those expenses would “inevitably intrude” upon the duty of confidentiality attorneys owe their clients to protect not only privileged communications, but all information concerning the representation. In language equally applicable here, this justice held that though the law there was well intended and a vehicle for good government, “it intrudes on core aspects of lawyer/client relationships and ... cannot stand.” *Id.*, 596 Pa. at 593, 807 A.2d at 821.

Thus, the Commission’s concededly difficult charge is to promulgate proposed amendments and rules that do not regulate the conduct of attorneys engaged in the practice of law and thereby infringe on the Supreme Court’s exclusive jurisdiction to regulate the conduct of attorneys.

The Commission’s proposed rules attempt to achieve a commendable public purpose, i.e., promoting the transparency of the State’s legislative and administrative processes. Unfortunately, they fail to reconcile the disclosure and reporting requirements and the post employment and other restrictions contained in the Act with the Supreme Court’s exclusive authority to regulate attorneys and the practice of law. That irreconcilability may result in an untenable burden on the Supreme Court’s exercise of judicial authority over the regulation of the practice of law within the State.

The impact of the overly broad rulemaking as it pertains to the practice of administrative law is perhaps nowhere more draconian than in its application of the one year post-employment ban prohibiting former legislators, governors and department heads from affecting governmental processes whatsoever. The result is that former government executives who are attorneys will be effectively unable to practice any form of administrative law whatsoever, not merely prevent them from lobbying their former agencies as is currently the case. This too directly contradicts the Court’s recent promulgation of new ethics standards in 2003 concerning permissible representations by former government employees under R.P.C. 1.11, which were adopted only after months of considered study and public comment.

And the impact of the post-employment ban will be more widespread than a handful of former Cabinet officials; the rulemaking will unwittingly discourage qualified attorneys who practice in fields requiring frequent contact with State agencies from considering high level public service, especially in the Executive Branch, because they will be precluded by the proposal from returning to their former practices (or any sort of administrative law whatsoever) for a year after leaving State service.

Another example of the incongruity between the proposed rules and current judicial regulation of lawyers is the proposed prohibition against the receipt of contingency fees; the Supreme Court expressly authorizes attorneys to accept contingency fees for all manner of representations in the Court Rules.

These two examples demonstrate that statutory and regulatory procedures grafted on the rule-making authority of the Supreme Court, like those envisioned by the Commission proposal, would defeat the Court's control and uniformity in regulation of the practice of law and the conduct of attorneys. Therefore, the proposed rules impermissibly conflict with the Supreme Court's rules and decisional law expressly providing for the regulation and discipline of the State's attorneys. Notwithstanding the apparent legislative mandate pursuant to which the Commission is acting, it is hornbook law that the Commission lacks the authority to promulgate rules that violate the Constitution.

Accordingly, we propose that the best approach is to except attorneys currently licensed by the Supreme Court and in good standing from the purview of the proposed rules. The Commission should defer to the Supreme Court and allow that branch to regulate attorney conduct in the practice of administrative law. We propose language to implement this recommendation after discussing the problems raised by applying the proposed rules to one specific area of law.

## **II. THE PROPOSED AMENDMENTS AND RULES SEEK TO REGULATE GOVERNMENT CONTRACT PROCESSES FOR WHICH REGULATORY PROCEDURES ALREADY EXIST.**

One of the many substantive areas of law that the proposed amendments and rules will significantly affect is the practice of government procurement law. Currently, a number of statutory schemes exist whereby a bidder or prospective bidder's legal representative following existing regulated processes might inadvertently trigger the reporting requirements of the Act and proposed amendments N.J.A.C. 19:25-20.4, 19:25-20.5 and 19:25-20.9.

For example, N.J.A.C. 17:12-3.2(a) and (b) permit a prospective bidder to submit a written protest of a specification of any bid solicitation document to the Director of the Division of Purchase and Property prior to the scheduled date and time of bid opening. Likewise, N.J.A.C. 17:12-3.3(a) permits a bidder to file a written protest with the Director concerning the rejection of the bidder's proposal and/or the notice of award of contract or of intent to award contract pertaining to the subject procurement. Similarly, bidders and prospective bidders may also become involved with an awarding agency where the bidder or prospective bidder is denied qualification or pre-qualification status under the statutory and regulatory provisions governing the same. Therefore, regulatory processes already exist to control the communications between agencies and represented entities during the public contracting process.

Likewise, after the award of a public contract, represented entities that have received the award may and often do encounter disputes during the term of the contract. The legal representative of these entities must contact the contracting agency to resolve many such disputes and may be required, for example, to provide notice to the agency of any impending claims under the New Jersey Prompt Payment Act, N.J.S.A. 52:32-32, et

seq., and the New Jersey Contractual Liability Act, N.J.S.A. 59:13-1, et seq. Again, unless more narrowly defined, the proposed amendments and rules will subject many attorneys to the disclosure provisions for legal communications with administrative agencies that are already statutorily regulated.

The above are only a few examples of how bidders and prospective bidders become involved in litigation, appear before an agency or communicate with the same during the normal course of a public contract award. Under New Jersey's existing statutory and regulatory public bidding scheme, the procedures contemplate the drafting and submission of formal, legal documents. The contracting agency creates a record with every award and protest thereby allaying the Commission's fears that the public lacks available information regarding the organizations and entities having an impact on the everyday activities of State government. Further, all communications are in writing and do not occur ex parte. The statutorily established procedures concerning the award and protest of public contracts involve a legal process rather than lobbying activities, as evidenced by the rendering of a final agency decision, based on a formal record, appealable to the Appellate Division.

We also are constrained to note the apparent incongruity of the Commission's proposal to except from the rules sales calls made by prospective vendors, N.J.A.C. 19:25-20.3, but to still regulate contacts made by the salesperson's legal representatives.

Unless the legal representation of a bidder or prospective bidder throughout the award of a public contract is specifically exempted, the breadth of the proposed amendments will create confusion regarding the point at which legal counsel unwittingly become subject to the reporting requirements. Moreover, the proposed amendments will negatively impact the general practice of administrative law for government procurement and administrative law attorneys. Much of an administrative law and/or government procurement attorney's practice involves frequent contact with governmental agency decision-makers through written filings of protests and appearances at quasi-judicial administrative proceedings and informal hearings. The Commission's definition of "influence governmental processes," though intended to regulate the actions of New Jersey's lobbyists, actually and broadly regulates the practice of administrative law. Regulated entities retain administrative law attorneys precisely for assistance in communicating with New Jersey's administrative agencies when the acts and final decisions of those agencies conflict with their private rights.

### **III. THE ACT SHOULD BE READ IN PARI MATERIA WITH OTHER STATE ADMINISTRATIVE LAWS AND RULES.**

The foregoing discussion concerning the problematic interplay of the rules proposed under the Act and preexisting laws and rules governing contracting actions could be repeated in numerous contexts for each principal Department of the Executive Branch. We would anticipate similar comments from other quarters of the Bar, including environmental, casino, land use and other practitioners, and will not burden the Commission with detailed reviews of each realm of administrative law.

Instead, we urge the Commission to revise the rules more generally so as not to govern (and inevitably chill) communications, and preparations for communications,

made pursuant to other statutes that already provide a procedural framework for such communications.

For example, the proposed rules would appear to require attorneys (and the lay public) to file and report even if the communication is to request documents of state agencies pursuant to OPRA, to comment at public hearings on proposed regulations pursuant to the APA, or to make statements at public meetings pursuant to the OPMA, or in the context of two exemplary agency specific statutes, concerning proposed actions by casino regulators under the Casino Control Act, or by municipal and housing regulators pursuant to Department of Community Affairs or Commission on Affordable Housing (COAH) statutes and regulations.

Instead, the Act should be read in *pari materia* with the OPRA, OPMA, APA and other agency specific statutes (such as the CCA) that seek to foster full participation by members of the public and affected parties in governmental processes. In reading the statutes in *pari materia*, the Commission should conclude that seeking public records, appearing at public meetings, and submitting written comments and testimony at public hearings on proposed regulations and other actions, as well as participating in adjudicatory and informal hearings and agency supervised mediation, should be exempt from the filing and reporting provisions of the new lobbying legislation.

The Commission recognized as much when it noted in its Notice of Proposed Rulemaking that Governor McGreevey's Statement upon signing the Act indicated that "the bill should not be read to require attorneys representing clients in the regular course of a routine litigation or administrative proceeding to register with" the Commission. Unfortunately, that critical clarifying statement is not reflected among the exemptions proposed at N.J.A.C. 19:25-20.3, which only reflects the two statutory exemptions. The Commission should formally reflect this intent in its rules, and the concept of an "administrative proceeding" should be construed broadly to cover not just formal proceedings before the Office of Administrative Law but any contacts with an agency that are governed by existing statute or regulation.

The Commission already proposes to promulgate by rule additional exemptions beyond the express exemptions set forth in the Act for other areas of contact, most notably sales calls, by virtue of other states' and federal law. There is no reason the Commission should not do the same for the "attorney-administrative proceeding" exemption expressed in the Governor's Signing Statement.

#### **IV. SUGGESTED LANGUAGE**

Accordingly, we suggest the proposed definition of "governmental affairs agent" include an exemption for licensed New Jersey attorneys in good standing representing entities before any authority, board, commission or other agency or instrumentality of the state government.

Specifically, we suggest the following language be added to the proposed definition of the term "governmental affairs agent":

A person shall not be deemed a governmental affairs agent who is (1) the legal representative of a regulated entity with respect to communications with and appearances before any authority, board, commission or other agency or

instrumentality in or of a principal department of the Executive Branch of State Government; (2) the legal representative of a bidder or prospective bidder to a public contract regarding a challenge to the specifications to a bid or to the award of a public contract; or (3) is the legal representative of a bidder or prospective bidder to a public contract regarding a determination of the entity's qualification to bid on public contracts. A legal representative shall mean an attorney at law licensed to practice in the State of New Jersey in good standing and his or her employees and agents.

In addition, we suggest the following language be added to the proposed definition of the term "influence governmental processes":

Influence governmental processes shall not include (1) representing a regulated entity in any pending or anticipated administrative proceeding before any authority, board, commission or other agency or instrumentality in or of a principal department of the Executive Branch of State Government; (2) protesting the specifications of a Request for Proposals or a Request for Qualifications; or (3) challenging a business entity's or individual's classification, pre-qualification or qualification status regarding their ability to bid on or be awarded a public contract.

#### **V. ATTORNEY-CLIENT PRIVILEGE EXEMPTION REQUIRES REVISION**

The proposed amendments do contain a very limited exemption for lawyers regarding their attempts to influence governmental processes for:

any communications, matters or acts of an attorney falling within the attorney-client privilege while engaging in the practice of law to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;

N.J.A.C. 19:25-20.3(b)1.

The definition requires improvement and expansion beyond the attorney-client privilege, which is a narrow rule of evidence. The rule does not extend to every type of confidential communication from client to attorney. Specifically, under New Jersey law, communication between attorney and client will not be privileged if communication was made with the understanding that it would be imparted to third parties. *Robertson v. Central Jersey Bank & Trust Co.*, 834 F.Supp. 705 (D.N.J. 1993). Thus, the above exemption seems inherently contradictory: if an attorney is communicating with an agency on behalf of his or her client, there is no attorney-client privilege.

Moreover, the inadvertent exposure to the Act's reporting requirements for administrative law attorneys and represented entities caused by the proposed definitions will create a chilling effect on the Act's greater purpose, namely to advance the integrity of the State's legislative and administrative processes. In addition, the Act and regulations focus on making governmental processes more open and informative for the public in hopes of creating fairness in the everyday operation of State government. Specifically, the process of public contracting requires a great deal of fairness. The

purpose of the existing statutory regulations of this governmental process is to ensure full and fair competition for State contracts through the adversarial process by permitting disappointed bidders to bring forth relevant information concerning a defective bid proposal or a tainted bid process.

If representatives of bidders or prospective bidders are required to disclose information regarding their clients' businesses or complaints with the contracting agency because the Act's reporting requirements and proposed regulations apply, and further, do not contain adequate exemptions for attorneys, those represented entities may not challenge inequities in the public contracting process to protect information about their business activities and industries.

Additionally, as noted above, the reporting provisions of the Commission's proposed amendments and rules create the very real likelihood of an attorney being required to inform against his client. The confidentiality inherent in the attorney-client relationship is more broadly protected under the New Jersey Rules of Professional Conduct than the attorney-client privilege. See RPC 1.6. An attorney's duty of confidentiality extends well beyond mere privileged communications to encompass all information concerning the representation. *Id.*

In that respect, the proposed rules inevitably and directly intrude upon the attorney-client relationship, including the attorney's duty to maintain confidentiality. Thus, the Commission's proposed regulations do not dovetail with the duty an attorney owes to his client under New Jersey's Rules of Professional Conduct governing the practice of law. Therefore, the attorney-client privilege exemption contained in the Commission's proposal should be expanded to include the confidentiality required of attorneys by the Rules of Professional Conduct.

In conclusion, we recommend that exemptions be added to the proposed definitions and revisions be made to the proposed attorney-client privilege exemption to remedy the aforementioned problems administrative law and government procurement attorneys will face by inadvertently triggering requirements meant to regulate lobbyists' interactions with government officials.

Thank you in advance for your consideration of our concerns and comments.

Very truly yours,

Edwin J. McCreedy, Esq.  
President



September 20, 2005

Election Law Enforcement Commission  
PO Box 185  
Trenton, NJ 08625-0185  
Attn: Michelle R. Levy, Assistant Legal Director

Re: Reproposed Amendments and New Rules Implementing changes to the  
"Legislative and Governmental Process Activities Disclosure Act,"  
N.J.S.A. 52:13C-19, et seq., published for comment at 37 N.J.R. 2838 et  
seq. (August 1, 2005)

Dear Honorable Commissioners:

This letter is submitted on behalf of the New Jersey State Bar Association (NJSBA) in response to the new rules and amendments regarding lobbyists and governmental affairs agents reproposed by the Election Law Enforcement Commission (ELEC or the Commission).

It is evident that that ELEC has carefully considered the comments that it received regarding its initial proposal, and the revised proposal goes a long way towards addressing the concerns expressed by the NJSBA and other commenters. However, we believe that attorneys will still be required to register as governmental affairs agents in far too many cases, and that ELEC should go further in exempting attorneys from these requirements. Moreover, there remain various ambiguities and potential inconsistencies in the revised proposal that merit further consideration. As the preamble to the American Bar Association's Model Rules of Professional Conduct state, "a lawyer's conduct should conform to the requirements of the law...." Our members take this obligation seriously, but a necessary prerequisite of course is to understand what the law requires. Further clarifications to the proposed regulations will enable our members, and indeed all citizens and businesses of New Jersey, to understand what is required of them in connection with this new and complex law.

First, to avoid expected confusion and a barrage of advisory opinion requests, we respectfully submit that ELEC should establish a framework for further defining what constitutes a “routine administrative proceeding”, or a “routine, ministerial matter” as those terms are used in N.J.A.C. 19:25-20.3 to provide exemptions from the Act. The principal new exception strictly for attorneys is for communications in the course of representing a client in the regular course of a routine litigation or administrative proceeding or in the course of a quasi-judicial civil or administrative proceeding. (The other exception for matters falling within the attorney-client privilege is not likely to have a substantial effect, because by definition a communication to a third party such as a governmental agency is not a communication with a client subject to the attorney-client privilege). However, the implications of this exemption are far from apparent. For example, there is an endless variety of administrative proceedings that do not rise to the level of quasi-judicial proceedings, where parties may submit written comments or present oral statements without there being discovery, sworn testimony, cross-examination or the other accoutrements of quasi-judicial proceedings. Unless these proceedings are routine – and the Commission has offered no basis to categorize a proceeding as routine or not – they will be reportable under the revised regulations.

Similarly, ELEC proposes to establish an exception for “routine, ministerial matters,” including but not limited to applying for a permit or license as required by law. This is certainly a reasonable exception and fully consistent with the Legislature’s goals in enacting this new law. However, ELEC has not attempted to flesh out the portion of the definition of “governmental process” which includes “issuance, denial, modification, renewal, revocation or suspension of permits, licenses or waivers.” The implication is that *applying* for a routine permit or license is not an attempt to influence a governmental process, but that engaging in *any* follow-up effort to ensure that the permit or license is issued crosses the line and becomes a reportable activity. Presumably this is not what the Commission intended. Applicants for routine permits and licenses should be comfortable that they can complete the process without running afoul of ELEC’s rules.

NJSBA acknowledges that the distinction between routine and non-routine proceedings, or routine and non-routine permits and licenses, may not be self-evident. Therefore, NJSBA suggests that ELEC ask each agency engaged in the conduct of proceedings or the issuance of licenses or permits to specify in that agency’s own rules which proceedings and which licenses or permits are deemed not to be routine. This would enable parties and applicants to know up front the rules relating to the particular administrative proceeding, permit or license, and it would also free ELEC of the task of responding to requests for advisory opinions as to whether a particular proceeding, license or permit is routine or not, a question that surely can be answered more easily by the agency administering the program in question rather than ELEC.

The licensing issue is particularly sensitive for attorneys because, as noted above, ELEC proposes to exempt communications by an attorney in the regular course of a routine litigation or administrative proceeding or in the course of a quasi-judicial civil or administrative proceeding. Attorneys frequently assist clients in obtaining licenses and permits, but under ELEC’s new proposal it is not at all clear whether a license application is an administrative proceeding. Such applications may be docketed by the agency for

tracking purposes, but typically there would be no hearing or other “proceeding,” unless ELEC intends a particularly broad interpretation of the word “proceeding.” Moreover, if the license or permit itself is not a routine one, thereby potentially taking it out of the exception proposed in N.J.A.C. 19:25-20.3(a)(7)(v), can the “proceeding” to obtain such a license or permit itself still be “routine,” or should the regulations be read to force the conclusion that the attorney is now acting as a governmental affairs agent?

A second example of a potentially confusing term in the law that the Commission has so far not addressed is the inclusion in “governmental process” of “rendition of administrative determinations.” Read literally, everything an administrative agency does could be regarded as an administrative determination. When an attorney confirms with an agency that a particular proceeding will *not* be necessary under the facts presented, has that attorney influenced a governmental process by obtaining an “administrative determination”, even though the proceeding itself, had it been required, would unquestionably have been a routine one that the attorney could have pursued as an exempt activity under N.J.A.C. 19:25-20.3(b)(2)?

Presumably the Legislature did not intend “rendition of administrative determinations” to be read so broadly, but unfortunately it did not provide any further guidance as to what it meant, instead leaving it up to ELEC to flesh out this cryptic term. ELEC has done so admirably with respect to many of the Legislature’s cryptic instructions, but by leaving this particular term unexplained, it has created the potential for a flood of requests for advisory opinions.

Another concern we have relates to non-attorney participants in quasi-judicial proceedings. As noted above, ELEC proposes to create an exception for attorneys in “quasi-judicial proceedings,” which presumably is intended to equate with contested cases subject to the procedural strictures of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. (APA). We strongly support this exception, but would encourage the Commission to extend this exception to all participants in such matters. In these proceedings before heads of agencies or Administrative Law Judges, the process used is transparent and on the record. There is no indication that the Legislature intended these traditional adjudicatory proceedings to be subject to the same reporting requirements as other “behind the scenes” activity. Limiting the exception to attorneys may cause countless other participants in these proceedings to become subject to the registration requirements, thereby potentially chilling their participation.

Another area where the proposal might chill participation is the 20-hour threshold for “isolated, exceptional or infrequent” activity. While ELEC has stated that it wishes to defer raising this threshold, we respectfully suggest that this point be reconsidered. Given the number and scope of executive agencies, the number of employees in New Jersey who spend an average of 30 minutes per week in communication with administrative agencies, which would be sufficient to pass the 20 hour threshold, is likely to be many thousands. Doubling the threshold to 40 hours, which would still be less than an hour a week, or clarifying that the threshold should be applied separately to each administrative agency, will provide a bit more flexibility without doing violence to the act’s purposes.

The last area that NJSBA would ask ELEC to revisit concerns the use of experts in administrative proceedings. The Commission has proposed to exempt experts or employees from the need to register as a governmental affairs agent when they communicate “in the company of a governmental affairs agent for the sole purpose of providing technical or expert advice.”<sup>1</sup> NJSBA has two comments in this regard. First, the word “sole” is dangerously absolute. A presentation by an expert or employee may be intended to offer expertise or technical advice but may also necessarily or inadvertently encompass a variety of other non-technical or policy areas. If, while offering expertise, he or she expresses an opinion that a particular administrative action would constitute sound public policy or simply good common sense, does that run afoul of the requirement that the communication have a “sole” purpose of providing technical or expert advice? Presumably not, but the use of the word “sole” raises too many questions, and it can be omitted without altering the gist of the proposal.

Second, as proposed the expert must communicate “in the company of a governmental affairs agent”. However, the Commission has also proposed eliminating attorneys as “governmental affairs agents,” at least in “routine” proceedings. Since it is typically attorneys who present experts, the regulation seems to require that a third person, a registered governmental affairs agent, must also be in attendance to shield the expert. This is an unnecessary burden, and the exemption should extend to experts or employees appearing in the company of a licensed attorney.

In sum, we support the Commission’s attempt to craft reasonable requirements, but it is well known that the “devil is in the details”, and we urge the Commission to give further consideration to the issues raised in this letter. We thank the Commission for its consideration of our comments and suggestions that are intended to make those rules as effective as possible consistent with legislative intent.

Respectfully submitted,

Stuart A. Hoberman  
President

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<sup>1</sup> Technically, the Commission has created this exception solely by modifying the financial reporting requirements. We encourage ELEC to clarify this by adding a subsection 9 to 19:25-20.3(a) (exemptions from Act) that would provide as follows: “Any communications by an expert or employee, other than a governmental affairs agent, when the communication is made in the company of a governmental affairs agent or attorney subject to 19:25-20.3(b)2, for the purpose of providing technical or expert advice.”