

## **Questions and Answers on Ethical Implications of the New Lobbyist Disclosure Statute**

Florida Bar staff has received inquiries on the ethical implications of the new lobbying disclosure statute. The following article provides a brief description of the new law, and bar staff's opinion on the ethical implications of that law, in order to quickly provide Florida Bar members who are lobbyists with advice on how the new statute may affect their ethical responsibilities to clients.

The Florida Legislature recently enacted new requirements for all lobbyists and lobbying firms and their lobbying clients, which was signed by Governor Jeb Bush on December 20, 2005. The legislation is effective January 1, 2006. The legislation, Chapter 2005-359, Laws of Florida, requires all lobbyists to identify their lobbying clients' "main business" at the time the lobbyists register. The new law requires lobbying firms, including individual contract lobbyists, to make quarterly reports on the amount of compensation paid to the lobbyist or lobbying firm for lobbying activities by each lobbying client.

The statute defines lobbying as "influencing or attempting to influence legislative action or nonaction through oral or written communication or an attempt to obtain the goodwill of a member or employee of the Legislature."

The legislation also provides that random audits of a specified percentage of lobbying firms shall be made to determine compliance with the legislation. A lobbying firm may also be audited as a result of a failure to file required reports or based on a complaint. The new law also requires lobbyists and lobbying firms to keep specific records that would substantiate the compensation paid for lobbying activities for four years and to allow auditor access to these records at the request of the auditor. The statute provides for legislative subpoena to obtain the records. Auditing provisions are effective February 15, 2007.

The new law imposes similar registration and reporting requirements on those who lobby the executive branch of state government. The new law provides that lobbying before the executive branch is "seeking, on behalf of another person, to influence an agency with respect to a decision of the agency in the area of policy or procurement or an attempt to obtain the goodwill of an agency official or employee." The term "agency" includes the Governor, the Cabinet, and any department, division, bureau, board, commission, or authority of the executive branch. Agency officials and employees are specifically defined as those persons required by law to file a full or limited public disclosure of their financial interests.

Specifically exempted from the definition of a lobbyist before the executive branch is "an attorney, or any person, who represents a client in a judicial proceeding or in a formal administrative proceeding conducted pursuant to chapter 120 or any other formal hearing before an agency, board, commission, or authority of this state."

[The text of the legislation](http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2005B&billnum=6) can be found at [http://www.flsenate.gov/session/index.cfm?BI\\_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2005B&billnum=6](http://www.flsenate.gov/session/index.cfm?BI_Mode=ViewBillInfo&Mode=Bills&SubMenu=1&Year=2005B&billnum=6).

This article addresses, in a question and answer format, ethical implications of the legislation for lawyers who perform lobbying activities.

Q: If I am a lawyer who engages in lobbying, do the Rules of Professional Conduct (Chapter 4) in the Rules Regulating The Florida Bar apply to the lobbying activity?

A: In almost all instances, the Rules of Professional Conduct will apply.

Q: Under the Rules of Professional Conduct, is the information being sought by the Legislature confidential?

A: Under Rule 4-1.6, Rules Regulating The Florida Bar, all information that relates to a client's representation is confidential and may not be disclosed voluntarily without the client's consent, unless certain limited exceptions apply. None of the exceptions to the confidentiality rule are applicable to disclosure of compensation for lobbying services. Therefore, the information relating to the compensation is confidential.

Q: If the information is confidential, how can I disclose it to comply with the statute?

A: Lawyers who are lobbyists must obtain the consent of each client for whom the lawyer performs lobbying services as defined in the statute in order to comply with the statute's disclosure requirements. The lawyer should seek consent to disclose only the information that is covered by the legislation and should assure the client that the lawyer will disclose no information that is not required to be disclosed by the statute.

Q: How do I obtain clients' consent?

A: For new clients, lawyers should consider including a provision in fee contracts that explains the new statute's disclosure requirements and obtain the client's written consent via that contract. For existing clients, lawyers should consider providing written information about the new statute's disclosure requirements and providing a written consent form for clients to sign. Appropriate disclosure to clients could include a brief summary of relevant portions of the statute affecting the client, that the statute is intended to be applicable to all lobbyists (both lawyers and nonlawyers), that the lawyer's records may be subject to audit, and that the lawyer will not disclose information relating to any representation that is not required by the statute.

Q: Must the client's consent be in writing?

A: The consent to disclosure of the information is not required to be in writing, but written consent is advisable.

Q: What if a client refuses to consent to the disclosure of the information as required by the statute?

A: If it is an existing client, the lawyer should withdraw from the representation to avoid violating the statute. If a prospective client refuses to consent to the disclosure, the lawyer should decline to represent the client in the lobbying activity.

Q: What steps should I take to ensure that I don't disclose anything that is not covered by the statute?

A: Lawyers should consider segregating the information that relates to lobbying activities as defined in the statute from all other representation of the client. Lawyers should consider separating any accounting and billing records for lobbying activities from records that relate to other forms of representation. Lawyers should also consider reviewing their billing practices to ensure that no privileged information appears in such records, as the records may be audited.

Q: What should I do if I receive a legislative subpoena to be audited?

A: The lawyer should review the records being sought by subpoena to determine if the records contain any privileged (as opposed to merely confidential) information. If the records do not contain any privileged information, the lawyer may provide them to the auditor. If the records contain privileged information, the lawyer should seek a court determination on the issue of privilege and whether the record must be disclosed. As discussed above, all information relating to a client's representation is confidential under bar rules and cannot be voluntarily disclosed. Privilege is an evidentiary legal doctrine that is much narrower than confidentiality, concerning what information can be compelled to be disclosed. Privilege generally applies only to communications between a lawyer and client for the purpose of seeking and/or obtaining legal advice that no third party has been privy to.

Q: What if the auditor does not subpoena my records, but merely asks me to cooperate in providing the records?

A: The lawyer should ask the auditor to subpoena the records.

*Questions regarding a lawyer's ethical responsibilities under the statute or any of the Rules of Professional Conduct may be directed to the Ethics Hotline at 800-235-8619. The Ethics Hotline is open Monday through Friday from 9 a.m. until 5 p.m. Email inquiries may be sent to [eto@flabar.org](mailto:eto@flabar.org).*