



M U L T I S T A T E

[New York Ethics Opinion: Beware When Making Donations at Behest of Public Officials](#)

In late September, the New York State Joint Commission on Public Ethics (JCOPE) issued a rather broad advisory opinion underscoring the need for due diligence when making charitable donations at the behest of public officials. Corporate compliance departments and lobbyists are generally familiar with the legal hazards of providing gifts directly to public officials and employees. Less well-known are the regulations that may apply to making charitable donations at the behest of public officials. Throughout the rest of this article, we will follow California's convention in referring to these as "behested payments."

Charitable donations, on their own, generally do not raise any government ethics concerns. However, when such donations are solicited by a public official, they raise the specter that the donor is attempting to curry favor with the public official. To that end, more than a dozen states and certain municipalities specifically regulate behested payments.

Behested payments may be subject to mere reporting requirements, whether on the part of the public official soliciting the payments or the donor. Other jurisdictions may ban behested payments altogether. Typically, such bans are targeted to lobbyists, employers or clients of lobbyists, government contractors, or some other category of prohibited sources. The liability for prohibited behested payments may fall on the public official soliciting the payment, the donor, or both.

Under New York's preexisting gift rules, state officials may not direct impermissible gifts (including donations) to third parties. Gifts from lobbyists, employers or clients of lobbyists, or "interested sources" are "presumptively impermissible."

The recent JCOPE opinion elaborates on when a donation may be considered to have been solicited by a state official, and also when the presumption of impermissibility may be overcome. First, the opinion clarifies that the gift ban applies not only to donations solicited directly and personally by a state official, but also by any intermediary "whom the public official has designated, authorized, or knowingly permitted to act on their behalf." Such intermediaries may

include, but are not limited to, anyone “who openly self-identifies as connected to the official, or someone whom the solicited party understands to be acting for the benefit of the official or on the official’s behalf,” as well as “when the facts clearly demonstrate that an intermediary is, by all appearances, acting for a public official.”

Even in the absence of an explicit solicitation, a donation may be prohibited under the JCOPE opinion if: (1) a state official acknowledges the donation after the fact or “evidence demonstrates the [donor’s] understanding ... that the official would be aware of the gift”; or (2) “the totality of the circumstances indicate [] that the gift was intended to influence a public official.”

The JCOPE opinion also articulates an open-ended approach for determining when a behested payment may overcome the presumption that it is impermissible. For example, factors pointing to a donation’s permissibility may include:

- A donation made in response to a mass solicitation by a state official rather than a targeted ask;
- A relatively low-value donation, such as a toy given in response to a holiday toy drive;
- A “blind” process under which a state official will not know of the donation;
- If the donation is not made soon before or after a donor has a matter before the state official; or
- If the donor has a history of supporting similar organizations or causes irrespective of the state official’s solicitation.
- These factors are not exhaustive or determinative under the JCOPE opinion, and the agency “will determine, on a case-by-case basis” whether a behested payment is permissible.

All of this illustrates the need for heightened due diligence when companies are making charitable donations. Importantly, the legal review process should ask why the donation is being made, whether there were any discussions with government officials or their intermediaries regarding the donation, and whether the donation is furthering any political or government relations objectives.

[City of Austin defends taxpayer-funded lobbying ahead of contentious legislative session](#)

The City of Austin is a familiar sparring partner with the Texas legislature.

Bracing for a contentious legislative session when state lawmakers return to the Texas Capitol in January, city leaders defended the use of taxpayer-funded lobbyists to achieve and defend agenda goals while Republican leaders fight to end the practice.

“Everybody should have the ability, as effectively as they can, to advocate for their positions and make sure the legislators know what’s true and what’s not true,” Austin Mayor Steve Adler told KXAN. “People on the other side just don’t want to hear from folks in Austin or other cities — and the surest way to do that is to make sure they’re not part of the conversation, and that’s not right.”

In 2020, the City of Austin has spent \$435,000-\$824,000, [according to state ethics reports](#), on lobbying services with five firms. Three lobbyists on the City’s outside, taxpayer-funded team work for Focused Advocacy, an agency that specializes in lobbying for municipalities.

Focused Advocacy has received \$110,000-\$225,000 from the City of Austin this year and lobbies for 16 other cities, ethics reports show.

Brie Franco, director of the City’s Intergovernmental Relations Dept., said outside lobbyists are vetted for potential conflicts and follow the agenda set forth by the Austin City Council.

“Out of the 7,300 bills filed each session, about 2,500 affect cities,” Franco said. “It’s seeking that assistance for the legislative expertise, for the knowledge of how the system works, and then also the relationships with the members.”

Banning taxpayer-funded lobbying is a [legislative priority](#) of the Texas Republican Party. The state Senate is holding a hearing on the issue next month and presumed House Speaker-elect Dade Phelan supported a push to end the practice in the last legislative session.

More than \$40 million of taxpayer funds were spent on lobbying in the 2017 legislative session, according to a report by the Texas Public Policy Foundation.

Chuck DeVore, vice president of the foundation’s national initiatives, said cities could spend their resources on bill analysis and tracking, which isn’t considered lobbying under Texas law.

“I certainly would like to see a ban on taxpayer-funded lobbying,” DeVore said. “A lot of these lobbyists who have commercial clients also help guide or control those commercial clients’ campaign donation budgets.”

City of Austin lobbyists will spend the upcoming legislative session advocating for coronavirus relief and defending the City Council’s vote to [cut or reallocate up to \\$150 million](#) from the police budget.

Gov. Greg Abbott and Lt. Gov. Dan Patrick [have both vowed to punish cities](#) that “defund police” with legislation.

The City maintains that lobbyists help facilitate meetings between constituents and lawmakers and are key pieces to protecting local control, as they did when residents expressed concerns about [short-term rentals being used as party houses](#).

“I can’t think of a more grassroots way of using lobbyists so that these folks can tell their story of what’s happened in their homes and in their neighborhoods,” Franco said.

[Texas Republicans seek to ban local governments from using taxpayer money to hire Austin lobbyists](#)

Though the fog of the recent election is barely lifted, the Texas Senate State Affairs Committee has already announced its plans to discuss lobbying reform at its meeting on Monday.

The committee is chaired by Sen. Bryan Hughes, who proposes preventing taxpayer dollars from being used by city and county governments to send lobbyists to Austin.

"Banning taxpayer-funded lobbying will help stop the California-zation of Texas," James Quintero, policy director of Government for the People at Texas Public Policy Foundation, told The Center Square.

"Right now, local governments spend tens of millions to hire an army of contract lobbyists," Quintero added. "Those lobbyists then flood the Texas Capitol to argue for higher taxes, more spending, and bigger government. It’s an unethical practice that is turning Texas into something unrecognizable – and it’s being done on the public’s dime."

The past two legislative sessions have been efforts to crack down on local governments across many areas, including annexation rules and property taxes. Other issues to be brought up this session include limiting local officials' emergency powers and mass mailing absentee ballot applications.

To support their position of continuing to use taxpayer funds to access lobbyists, Quintero said local governments can try to argue that they have the right to free speech.

"Governments don’t have rights; they have powers," Quintero said. "Only citizens have rights."

These lobbyists also help local governments keep track of the many bills filed each session that could affect city or county residents. A mayor or county judge may not have time to keep up with all that legislation.

"Local officials oftentimes seek to justify taxpayer-funded lobbying by saying it's done in the public interest. But in reality, it only benefits government itself," Quintero said. "Last session's big fight on property tax reform is just one example of how the average person stands to lose. A taxpayer-funded lobbying ban won't stop local elected officials or their staff from contacting their state representatives. In fact, it means local officials will have to communicate even more – by phone, in-person, and in every other way that's available to the average Texan."

Those who support the lobbying ban say those funds could be used more effectively if directed to other community services.

"Liberal local governments threaten to take Texas in a socialist direction," Quintero said. "We must not let that happen. Freedom in the Lone Star State must be fought for, protected, and passed down to a future generation for them to do the same."