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New York law lets PR firms do their jobs

On June 17, the New York Legislature passed into law Governor Andrew Cuomo's proposed ethics package. The bill, which is primarily meant to curb ethics abuses by state officials, explicitly excludes communications between public relations firms and the press from the definition of lobbying.

In so doing, it reversed a much-publicized, and much-maligned, advisory opinion from the New York Joint Committee on Public Ethics. Many had believed, and justifiably feared, that the previous wording expanded the definition of lobbying in the advisory opinion to encompass many routine public relations activities and exposed PR consultants to significant regulatory and enforcement action.

In 2011, Cuomo signed into law the Public Integrity Reform Act. Passed in the wake of serial corruption scandals in the New York legislature, PIRA created JCOPE, an independent agency tasked with overseeing ethics and lobbying in the state executive and legislative branches.

In late January 2016, JCOPE issued an advisory opinion extending PIRA's coverage to public relations consultants seeking to influence reporters and editorial boards. The advisory opinion would require PR firms that performed commonplace activities, such as issuing a press release or speaking with a reporter, to file reports listing the name of their client, their compensation, and the legislation they were attempting to influence.

On March 8, five prominent PR firms filed suit in the U.S. District Court for the Southern District of New York, arguing that the advisory opinion was unconstitutional and seeking emergency relief to prevent its enforcement. Their complaint argued that the advisory opinion amounted to a "wholesale violation of the First Amendment's speech and press provisions."

The PR firms also claimed that the advisory opinion represented a dramatic expansion of existing law by "sweeping tens of thousands of people who have nothing to [do] with lobbying into its scope." The PR Council, the Arthur W. Page Society, and the Public Relations Society of America filed affidavits in support of the unconstitutionality of the advisory opinion. Naturally, JCOPE disagreed, and on May 13, JCOPE filed a motion to dismiss the lawsuit.

Both the firms' motion for emergency relief and JCOPE's motion to dismiss are pending in court.

Cuomo, while the lawsuit was winding its way through the courts, pressed forward with a new ethics bill. His ethics-reform measure is part of a sweeping effort to mitigate the "corrosive impact" of the U.S. Supreme Court decision in *Citizens United* on public elections and state government. At the same time, however, the governor's ethics bill made clear that the regulation of lobbying has limits. Indeed, Cuomo's ethics law indicates the governor's agreement with PR industry experts that the advisory opinion was burdensome, and also rebukes JCOPE for its overreach.

The new legislation significantly narrows the definition of lobbying to exclude "communications with a professional journalist, or newscaster, including an editorial board or editorial writer of a newspaper, magazine, news agency, press association, or wire service, relating to news."

The new law also excludes "communications relating to confidential and non-confidential news...and communications made pursuant to community outreach efforts for broadcast stations required by federal law." This clear reversal of the advisory opinion takes effect immediately.

Soon after Cuomo's ethics bill went into effect, the parties to the lawsuit were asked to brief the impact of the law on JCOPE's advisory opinion. This briefing is due on August 8. Under the plain language of the new law, however, a PR firm will not likely be required to register as a lobbyist unless the firm goes beyond communication with the press to influence a public official or galvanize the public to contact a public official.

Public relations firms thus appear to be removed from the lobbying regulatory scheme in New York and are free to use their normal channels for communication with the press without fear of enforcement actions. Accordingly, the reversal of JCOPE in Cuomo's ethics package appears to reflect the long-held industry expectation that public relations and political advocacy are activities protected under the First Amendment and that PR consultants are not de facto lobbyists. ●

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