NEW YORK STATE BAR ASSOCIATION

NYSBA

Task Force on Government Ethics

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TASK FORCE ON GOVERNMENT ETHICS

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Executive Summary

The Task Force on Government Ethics was created by President Stephen P. Younger in June 2010 in the face of the public's increasing loss of confidence in state government due to numerous scandals and incidents of corruption involving state officials. The Task Force was asked to propose recommendations for reforming public sector ethics laws, focusing on four areas: (1) improving the structure of the state's enforcement mechanisms in the area of ethics, consistent with our notions of fairness and due process; (2) enhancing the ability of state prosecutors to bring criminal charges where a public official failed in his or her obligation to provide honest services to the public; (3) enhancing requirements of public disclosure where needed to increase transparency and the public's knowledge of potential conflicts; and (4) modernizing the ethics laws applicable to municipal and local governments. The Task Force was organized into four subcommittees, one to address each topic.

In this report, the Task Force presents its recommendations for bolstering the ethics climate in New York State, which should help enhance the public's view of State government. The Task Force believes that adoption of these recommendations would bring substantial benefit by creating an environment in which public officials could effectively carry out their responsibilities while restoring citizens' confidence that these officials are acting solely in the public interest.

The recommendations are as follows:

Enforcement and Due Process

1. Restructure the Commission on Public Integrity. The Commission would have expanded jurisdiction to include oversight of the Legislature, and would consist of up to nine members, each serving a five-year term, with the terms to be staggered. The Chair would be appointed by the Governor and require Senate confirmation. The Governor would appoint two additional members, who could not be of the same political party, the Attorney General and Comptroller would each appoint one member, and the legislative leaders would each have one appointment.
2. The commission would have jurisdiction over the ethics provisions of the Public Officers Law, the Lobbying Act, and the Legislative Law.

3. The commission's staff would consist of two separate bureaus to assure that enforcement is separated from the other work of the commission – the Bureau for Advice and Education and the Bureau for Enforcement. Each would report to the Executive Director.
4. The Inspector General should be appointed by the Governor, subject to Senate confirmation, for a five-year term, removable only upon good cause. The Inspector General should report to the Governor, rather than to the Secretary to the Governor, except when the Governor is under investigation.
5. Where multiple agencies have jurisdiction over the same matter, the Ethics Commission and the Inspector General should both be subject to a stay when there is an ongoing criminal investigation.
6. Public officials found to have violated the ethics laws should be subject to penalties in addition to monetary penalties, including suspension from office or, in the most serious cases, expulsion from office and a bar from holding a public position in the future.
7. Amend the current gifts restriction from prohibiting the receipt of gifts of nominal value to prohibiting gifts of a fixed monetary amount, such as ten dollars.
8. Require that all opinions issued by the commission, whether formal or informal, are binding on the commission.
9. Amend the statute governing the Inspector General to assure due process rights to those subject to investigation, including the rights to receive notice of an investigation, to respond to allegations, to review certain testimony and to have a response included in a final report.
10. Create penalties to be imposed on an official of an investigative agency who violates the confidentiality provisions applicable to that agency.

Honest Services Fraud

1. Amend the Penal Law to make both the giving and receiving of a gift above a fixed amount a class E felony where the gift is given or received "because of that person's official position." The recommended amount to trigger this provision is $3,000.

2. Amend the Penal Law to make self dealing a crime when a public servant receives an undisclosed benefit in excess of $5,000 when engaged in conduct in connection with the award of a contract, grant or other effort on the part of the person giving the benefit to obtain public business.
3. Amend the bribery statutes to make clear that it applies if there is an intent to influence in offering or receiving the bribe, thereby overturning a Court of Appeals decision that requires more.

Disclosure

1. For political contributions, the name of the employer of a contributor should be added to the information that is publicly disclosed.
2. An elected public official should be required to disclose when he or she does business with a lobbyist. A non-elected official should be required to make similar disclosure when he or she has been lobbied by a lobbyist, or when the agency for which the official works has been lobbied, if the official knows of that lobbying.
3. Require that indirect sources of income above a threshold amount be disclosed, and that professionals, including attorneys, disclose their clients when this threshold is reached, except that attorneys need not disclose when disclosure would cause the client harm or be detrimental to the representation.

Local Government Ethics

1. Replace Article 18 of the General Municipal Law with a comprehensive conflicts of interest law addressing specific areas where conflicts may arise and providing for disclosure and effective administration and enforcement.
2. Require that every city, town, village and school district create an independent board of ethics to interpret and administer Article 18 and any local code of ethics. Each board should be required to issue opinions, provide training for officers and employees under its jurisdiction, administer financial disclosure and, in municipalities with a population of 10,000 or more, have enforcement powers.

3. Confidentiality requirements should be imposed on local ethics boards to encourage officers and employees to seek advice and bring possible wrongdoing to the attention of the board, as well as to protect public officers and employees accused of having violated the law, but who are found not to have violated the law. The application of the Open Meetings Law and the Freedom of Information Law should be limited so as to achieve the same objectives.
4. The State should be required to provide guidance to local boards to assist them in conducting internal investigations.
5. The Commission on Public Integrity should offer training to municipal officials on the State's Lobbying Act, which is applicable to municipalities with a population in excess of 50,000.

Introduction

New York has suffered the ignominy of ethics scandals that have toppled statewide elected officials, high-level appointed officials and elected representatives in both houses of the state Legislature. The breadth of these scandals and the regularity with which they seem to occur has resulted in a dramatic loss of public confidence in government. This perceived lack of transparency and accountability is exacerbated by a lack of disclosure, loose ethics rules of limited applicability and a disjointed enforcement regime.

Corruption cannot be addressed one prosecution at a time. Rather, sweeping changes in disclosure requirements, criminal laws and enforcement protocols, balanced against appropriate due process and confidentiality concerns, must precede any serious effort to reform our state government. Further, the reports of corruption at the local government level warrant an examination and modernization of the state ethics laws addressing municipal ethics, last substantively amended in 1987. This report represents the New York State Bar Association's latest contribution to that effort.

The Association has had a long-standing interest in the area of public sector ethics. The inaugural issue of the *Government Law & Policy Journal*, first published in 1999 by the Association's Committee on Attorneys in Public Service, focused on government ethics in New York. The Association published a comprehensive book on public sector ethics in 2002; it has published a variety of articles on the topic in other Association publications; and it has offered numerous related CLE programs. Its Municipal Law Section, which offers ethics advice to municipalities, has been active in trying to modernize the currently applicable law. The Association has also proposed a Code of Conduct for Administrative Law Judges who work in State Government.

In January 2010, NYSBA President Michael Getnick appointed a special committee to examine the appropriate role and interests of the Association with respect to government ethics. The special committee proposed, and the Executive Committee adopted, guiding principles to provide a framework for future NYSBA work and analysis in this area (*see* Appendix A). These guiding principles address: independence, transparency, due process, and the participation of lawyers in government.

In June 2010, NYSBA President Stephen Younger expanded the special committee into a Task Force on Government Ethics, increasing the membership and focusing its work on four major subject areas: disclosure, honest services, due process and enforcement, and municipal ethics. In total, 28 people were appointed to the Task Force. The members have diverse backgrounds including both public and private sector practice areas, bring prosecution and defense perspectives, and have experience at the local, state and federal levels of government; many have expertise in various aspects of ethics regulation and enforcement. Former United States Attorney for the Southern District of New York, Michael J. Garcia, and Albany Law School Professor Patricia Salkin served as Task Force co-chairs. (*See* Appendix B for a complete listing of all Task Force members.) The Task Force has been aided by student research assistants from Albany Law School and Buffalo Law School.

The Task Force as a whole and its four subcommittees have held dozens of meetings. Outreach was conducted to relevant government agencies to solicit their input. (Correspondence received is included as Appendix C.) Additionally, at the request of various organizations concerned with the topic, the Task Force reached out to share preliminary information about its work and to garner feedback. In November 2010, an informational report was presented to both the Executive Committee and to the House of Delegates.

This report contains the recommendations of the Task Force. All of its members have signed the report, although not every member necessarily agrees with every recommendation.

History

The first generally applicable state ethics law in New York was adopted 56 years ago, in 1954, following a report by what was known as the Lockwood Committee. This committee was established in reaction to a string of allegations of unethical conduct by government and political officers involved in the harness racing industry. At the request of Governor Dewey, a Special Legislative Committee on Ethics and Integrity was established by legislative resolution. At the time, the Legislature correctly acknowledged that "[t]he people are entitled to expect from their public servants a set of standards above the morals of the marketplace."

Ten years later, the Legislature found itself again the subject of public attention because of conflicts of interest of its members. In 1964 Cloyd Laporte, then Chairman of the New York City Board of Ethics, was appointed Chairman of the statewide Special Committee on Ethics. This committee held hearings and proposed a code of ethics for legislators. This code was never adopted.

In 1986, in response to a series of scandals in New York City, Governor Cuomo and Mayor Koch established the State-City Commission on Government Integrity, headed by Michael Sovern of Columbia University. This commission recommended the appointment of a non-partisan commission to investigate corruption at the state and local levels, which led in 1987 to the appointment, by Executive Order, of the New York State Commission on Government Integrity, chaired by John Feerick of Fordham University. This commission, established under the Moreland Act, conducted investigations and issued 20 reports. Among the conclusions of its 1990 report, the commission noted that, in an alarming number of areas, New York's laws fell woefully short in guarding against political abuses. The commission also expressed the belief that New York had not demonstrated a real commitment to government ethics reforms.

This report had followed the enactment of a controversial ethics reform bill in 1987, known as the Ethics in Government Act. This Act established the State Ethics Commission, which had jurisdiction over the executive branch, and the Legislative Ethics Committee, which had jurisdiction over the legislative branch, to interpret and enforce the state's ethics laws, as well as to oversee financial disclosure by high-level state officials – a new requirement imposed by the Act.

The 1987 Act also created the Temporary Commission on Local Government Ethics. Four years later, in 1991, this commission recommended significant reforms to Article 18 of the General Municipal Law, which dealt with local government ethics. These reforms were never adopted, and the Commission sunset, leaving no state-level agency charged with studying or reforming statutes aimed at municipal ethics and no state agency specifically tasked with providing education, training or technical assistance on ethics issues for local governments. The New York State Bar Association's Municipal Law Section, among other groups, has repeatedly called attention to this gap in ethics oversight.

In more recent times, it seems as though calling for additional ethics reform has been a staple in the platforms of governors and legislative leaders. Dozens of bills introduced over the last 20 years have aimed at addressing many government ethics issues including conflicts of interest, campaign finance reform, pay to play, lobbying reform and gifts.

Governors Pataki and Spitzer both advanced legislative proposals designed to address government ethics issues. Under Governor Pataki, a law was enacted to regulate improper influence on the granting of government contracts. In 2007, Governor Spitzer succeeded in combining the State Ethics Commission and the Temporary State Commission on Lobbying, replacing them with the Commission on Public Integrity, which had combined jurisdiction over ethics in the executive branch and the regulation of lobbyists. A number of other reforms enacted as part of the Public Employee Ethics Reform Act of 2007 include revisions to the gift provisions of the Public Officers Law, a ban on most honoraria, prohibitions on nepotism, equal applicability to both the executive and legislative branches of government of the two-year revolving door provision, prohibitions related to appearing in taxpayer-funded advertisements, and an expanded definition of "public official" for purposes of the lobbying law.

In 2010, in response to another set of scandals, a governor once again announced a proposal to reform the ethics laws. Governor Paterson proposed legislation to replace the Commission on Public Integrity with a new commission, which would have jurisdiction over both the executive and legislative branches and which would take over enforcement of campaign finance laws. The Governor also proposed creating an Ethics Designating Commission to recruit and attract qualified individuals to serve on the new commission. The New York State Senate advanced its own series of similar reforms; however, no law was enacted

In 2010, local government also came under scrutiny and Comptroller Thomas DiNapoli proposed revising the General Municipal Law and making other changes to improve municipal ethics. The bill, which was more limited than the proposals presented in this report by the Task Force, was not enacted.

REPORT OF THE SUBCOMMITTEE ON DISCLOSURE

Introduction

The Task Force has been charged with answering the question, "What is the proper level of disclosure for attorneys in public service?" To answer, further questions must be asked: What is the purpose of public service? What can fairly be required of public servants? Should disclosure rules be different for attorneys than for other public servants? In the pursuit of the answers to these questions, we have reviewed and discussed the New York City Bar Report on attorney-client disclosure,[1] the bill passed by the Legislature (S.6457) in the 2010 session and its subsequent veto by Governor Paterson,[2] other bills pending in the 2010 session of the State Legislature, several public disclosure laws across the country,[3] existing State disclosure laws and annual financial disclosure statements submitted by legislators.[4] As members of a task force within the State Bar Association, we are also cognizant of the direction from the House of Delegates that "disclosure rules should not be unduly burdensome, so that compliance would discourage attorneys from participating in government" and that "[e]thics laws provide transparency in government including disclosure of business and professional interests."[5] The rules of disclosure should not, to the extent practicable, discourage public service by any honest, qualified person.

Background

Although the purpose is easily enunciated, stating what can fairly be expected of public servants requires greater elaboration. There is agreement on the basic principles of public service:

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1 Ass'n of the Bar of the City of New York, *Reforming New York State's Financial Disclosure Requirements for Attorney-Legislators*, (2010), available at http://www.nycbar.org/pdf/report/valuads/2007/850-reformingnysfinancialrequirements .pdf. Our report does not differentiate among attorneys in public service, whatever their position. The City Bar report focused on attorneys serving as State legislators. Because of these different approaches, we made somewhat different recommendations but with the same objective.

2 *See* Veto Message # 1 of 2010.

3 See *Ethics: Personal Financial Disclosure for Legislators: Client Identification Requirements*, Center for Ethics in Government (2006), http://www.ncsl.org/default.aspx/tab.

4 The Task Force viewed the 2010 financial disclosure documents submitted to the Legislative Ethics Commission by Speaker Silver, Assembly Majority Leader Ron Canestrari, Minority Leader Brian Kolb, and Members of Assembly Herman D. Farrell, Jr., Joseph R. Lentol, Helen E. Weinstein, William A. Barclay, Jonathan L. Bing, Michael N. Gianaris, Hakeem Jeffries, Senate President Pro Tem John Sampson, and Senate Majority Leader Pedro Espada, Jr.

5 *See* N.Y. State Bar Association Report of the Special Committee on Government Ethics (2010).

public servants are expected to act in the public interest; public servants are expected to act honestly; public servants are expected *not* to profit from their office. These principles are reflected in a number of statutes. Most succinctly, they are set forth in section 74 of the Public Officers Law, titled "Code of Ethics." "No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest." (Pub. Off. Law § 74(2).) They are also reflected in the restrictions on post-government service employment, such as the prohibition on appearing before the covered person's former agency. (Pub. Off. Law § 73(8). *See generally* Pub. Off. Law § 73.) Public officials are not expected to act out of self-interest.[6]

As the Code of Ethics shows, the State's public officials, at least in theory, are expected to act as neutral arbiters among competing special interests.[7] In point of fact, elected public officials often represent, quite deliberately, specific interests. Legislators, for example, commonly state that they represent the interests of their districts, which may mean that a legislator puts the interests of his or her district over the interests of the State as a whole or that a legislator will be particularly sensitive to the concerns of a major employer within the his or her district. There also may be political concerns. Commentators often write of the need for elected officials to "play to their base," that is, to take positions that would please the elected officials' core political supporters. Appointees very often hold their positions because of whom they represent or because of their ties to a particular interest. The statutes creating the many task forces, commissions and other appointive bodies often require appointment of individuals with specific stakes in the matters to be considered.[8] Even when statutes do not mandate such representation, appointees with particular interests may be needed. For example,

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6 Similar principles are also reflected in other areas of non-governmental public service. For example, the Not-For-Profit Corporation Law imposes the duties of loyalty, care and obedience. The trustee is charged with acting in the best interests of the corporation. There is also the well-recognized prohibition on private emolument.

7 *See* Federalist 51.

8 *See, e.g.*, Task Force on Retired Race Horses, Racing & Wagering Law § 909, Toxic Pesticide Control Board, Public Health Law § 1603.

Former Governor Paterson's panel to assist the State with implementation of federal health care reform includes: representatives of hospitals, long-term care providers, insureds, insurers, unions, the disabled, and many other interested parties.[9] The ties that appointees bring may pose conflicts, but those appointees are necessarily sought for their point of view.

Disclosure

These obligations, these competing interests, create a public interest in disclosure by public officials. The public has an interest in knowing whether a public official is profiting from office; the public has an interest in knowing whether a public official has interests with or ties to particular special interests; and the public has an interest in knowing those financial interests that can affect a public official's actions.

The need for disclosure has long been recognized. Public Officers Law § 73-a requires that elected officials,[10] certain political party officials, policymakers, and individuals in the executive branch of government whose incomes exceed a certain threshold, complete and file annual financial disclosure statements. Candidates for elective office have long been required to file political contribution and expenditure reports. (*See* New York Election Law § 14-102.) Lobbyists have long been required to file reports of their clients, fees, and, in recent years, the subject matter of their lobbying and the individuals lobbied. (*See* Legislative Law § 1-H.)[11] Since the law already recognizes a need for public disclosure, the question then becomes whether current law is adequate to meet the public's legitimate interest in discerning the public officials' interests and motivations. We believe the public interest would be served by greater disclosure regarding campaign contributions, ties to lobbyists, and public officials' business interests.

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9 Press Release, August 31, 2010, Governor Paterson Names Advisory Committee to Help Health Care Reform Cabinet.

10 *See* Chapter 813 of the Laws of 1987. *See also* Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*. 11 Pace L. Rev. 243, 245 (1991).

11 The judiciary is also subject to disclosure requirements. Since 1990, the Ethics Commission for the Unified Court System has been responsible for the distribution, collection, review and maintenance of the financial disclosure statements required to be filed annually by approximately 5,000 judges, justices and other employees of the court system, pursuant to the Rules of the Chief Judge, 22 NYCRR Part 40, the provisions of which largely mirror Pub. Off. Law §73-a. Effective September, 2006, certain candidates for public election to judicial office are also required to file financial disclosure statements, pursuant to the Rules of the Chief Administrator of the Courts, 22 NYCRR Part 100.

Political Contributions

Political contributions clearly create the potential for conflicts of interest and accordingly require greater public disclosure.[12] Current law requires disclosure of the names of contributors and the amount contributed if it is more than $99.[13] Disclosure should be expanded to include the identification and public reporting of a contributor's employer. This would better enable the public to identify those instances when a company's or firm's employees may be acting in concert to support a particular candidate and to judge whether those contributions are influencing an elected official's or candidate's decisions. Disclosure of a contributor's employer would also serve another purpose. The campaign finance law requires that contributions be made and disclosed in the name of the actual donor.[14] Listing donors' employers will aid enforcement of this provision.

Lobbying and Public Officials

The public also has an interest in knowing when an elected official does business with a lobbyist or a lobbyist's clients. If an elected official does business with a lobbyist,[15] that should be explicitly disclosed by the elected official. More difficult is the circumstance where a non-elected official does business with a lobbyist. The non-elected official may have no contact with the lobbyist as lobbyist – if the lobbyist does not lobby the official or the official's agency, the relationship does not require disclosure by the official. Where the non-elected official has been lobbied, the non-elected official must disclose the business relationship.[16] Where the official's agency has been lobbied, the

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12 We do not comment on the rules regarding campaign finance other than those regarding public disclosure. The Task Force's charge was limited to a review of the financial disclosure rules as they apply to attorneys in State public service.

13 Election Law § 14-102(1).

14 Election Law § 14-120.

15 The current statutory structure requires the disclosure of many sorts of business interests. *See* Pub. Off. Law § 73-a. In many instances, those disclosures should cover when an elected official does business with a lobbyist. We believe, however, that when a lobbyist does business with an elected official that should be stated as a separate category of disclosure. The disclosure should include all those items otherwise covered by current disclosure rules: payments from lobbyists, partnerships and investments with lobbyists, etc.

16 Apart from disclosure, if a non-elected official does business with a lobbyist, that may be a basis for recusal. *See, e.g.*, Pub. Off. Law § 74(e).

business relationship should be disclosed if the non-elected official knows of the lobbying. In all these circumstances, the rules regarding reporting by lobbyists would continue to apply.[17]

Disclosure of business relationships with a lobbyist's clients also must be considered. This presents a number of issues. The first is practical – thousands of entities retain lobbyists.[18] Public officials, whether elected or appointed, cannot reasonably be expected to know the identities of all a lobbyist's clients. In addition, many instances of business relationships are quite routine. For example, insurers frequently retain lobbyists, and public officials may purchase life insurance or other products that are routinely available to the public generally. Yet, even routine transactions, at least in some circumstances, can merit disclosure. Publicly-traded stocks are routinely traded and owned, yet disclosure of ownership is required. That a relationship is routine is not enough to exempt that relationship from disclosure, but a monetary exchange is not enough to require disclosure. Certainly, not every commercial interaction requires disclosure; there is little or no legitimate public interest in where a public official shops for groceries or purchases shoes. Given the ubiquity of represented entities, and the practical problem of knowing them all, the focus of disclosure should be on the transaction rather than on whether the relationship is with an entity that has engaged a lobbyist. For this reason, we do not propose a further expansion of the lobbying disclosure laws for these transactions. Instead, disclosure should focus on the financial transaction, and be reported through those rules,[19] to which we now turn our attention.

Sources of Income

The Public Officers Law requires the disclosure of "sources of income" from financial relationships.[20] As currently structured, the law requires the reporting of direct sources of income. For example, the law requires the reporting of income from "compensated employment," "contractual

17 Legislative Law § 1-H.

18 According to the 2009 Annual Report of the State Commission on Public Integrity, in 2009, 5,887 lobbyists representing 3,449 clients registered. In 2008, 6,624 lobbyists representing 4,145 clients registered.

19 *See* Pub. Off. Law § 73-a.

20 *See* Pub. Off. Law § 73-a(3), (13).

arrangements", and "partnerships."[21] Experience has shown, however, that "sources of income" have been expressed too narrowly, as the law does not trace beyond the direct source of the income. "Income from a business or profession . . . shall be reported with the source identified . . . by the name of the entity and not by the name of the individual customers, clients or tenants."[22] By excluding "the name of the individual customers, clients or tenants," current law excludes what can be most informative. Those customers, clients, and tenants may be as much able to influence the public official as the public official's employer.

Source of income disclosure should be broadened to include both direct and indirect sources of income. The identity of and income derived from "customers, clients, or tenants" can be revealing. Financial relationships need not be direct in order to have the potential to influence. For example, the business relationship may exist between Company X and Company Y, but the compensation of a required filer/employee of Company Y may depend upon that business relationship – for example, where the required filer/employee of Company Y is a salesperson, who receives a commission because of a sale to Company X. If the required filer/employee derives income above the reporting threshold in a calendar year because of the business Company X does with his employer, that customer should be disclosed as a source of income.

By requiring that disclosure of sources of income reach down to the second layer, to the source of the business's income, the number of reported financial relationships will increase exponentially. In many circumstances, maybe even the usual circumstance, the subjects of that disclosure, those "customers, clients and tenants" would have no involvement with government any different from that of the public at large, and they would be surprised to learn that their personal dealings are subject to disclosure. For those reasons, the reporting threshold for indirect sources of income should be higher than for direct sources. Current law requires that direct sources of income greater than $1,000 be disclosed.[23] Given the much greater scope of disclosure we are proposing, we recommend that the

21 *Id. See also* Pub. Off. Law § 73(6). "List below the nature and source of any income . . . from EACH SOURCE . . ." (capitalization in original).

22 *Id.*

23 *Id.*

threshold for disclosure of indirect sources of income should be $10,000.[24] This is the amount used in California and we believe is suitable for our state, as well.[25]

In suggesting this reporting standard, the Task Force casts no aspersions on public officials' private business relationships; indeed, public officials may have substantial and appropriate outside interests. As has been noted, the State of New York has numerous task forces, commissions, public benefit corporations and public authorities, and the members of those boards, commissions and task forces are principally engaged in other endeavors. Those entities could not function without their public appointees, many of whom serve without pay.[26] Too, New York has a part-time legislature, and many legislators and legislative staffers are employed outside the Legislature or are business owners or practicing professionals.[27]

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24 We are cognizant that there may be difficulties in identifying indirect sources of income. The standard is most easily applied where compensation is tied directly to a customer or client, but business owners can also calculate the percentage of income that has been derived from any particular customer or client. Percentage of revenue has been suggested as an alternative to a threshold amount certain, but the use of a percentage of revenue would have a disparate impact. If the reporting threshold were one percent of revenue, the reporting threshold would be $1 million for the member of a $100-million-dollar firm, but $3,000 for the member of a $300,000 firm. Combining the two methods would have the same disparate impact. For the smaller firm, the threshold would be $10,000, but, for the larger firm, the number would rise with its revenue, yet always be above $10,000.

Another alternative to a fixed-dollar threshold would be to identify those customers and clients with whom the disclosing public official has had substantial involvement. This alternative has a number of difficulties, including administrative application. Substantial involvement could be tied to hours, but not all businesses, or even all professionals, track their members'/owners'/employees' efforts by hours. If substantial involvement were tied to dollars, the standard in effect becomes an income standard. If substantial involvement were a more subjective test, enforcement could prove difficult unless the definition were such that virtually every customer/client with whom the disclosing public official had involvement were to be disclosed. The funeral director would be required to list every individual it had buried, the insurance agent every insured it had placed, the accountant the taxpayer on every tax return prepared, the propane salesman the purchaser of every grill sold. Surely, this is too intrusive, and would likely discourage the honest private citizen from government involvement.

25 Cal. Gov't Code §§ 87200–87210 (Deering 2010).

26 *See* N.Y.S. Ethics Commission Advisory Opinions 94-11, 98-07, discussing the applicability of Pub. Off. Law § 74 to unpaid and per diem members of boards, commissions, etc.

27 Our committee has not considered the impact a full-time legislature would have on disclosure The structure of state government is beyond the scope of our committee's charge. Although it has been suggested that full-time legislators would be barred from outside employment, that would not lessen the need for disclosure, as members would likely continue to have outside financial interests. Certainly, the experience of a full-time legislature at the national level has not

Attorneys and Disclosure

This leads to the question of whether the exemption from disclosure of a licensed professional's clients should continue, and, specifically, to what extent should attorneys holding public office disclose their clients from the private practice of law. Current law requires attorneys, as others, to disclose their income from their employers or if members of a firm, from the firm, but specifically states that licensed professionals, including attorneys, are not to disclose their clients.[28] If indirect sources of income are to be disclosed, as the Task Force believes they should be, the question then becomes whether the professional exemption should remain.

There has been much discussion regarding whether attorneys should be compelled to disclose the identity of clients.[29] Much of that discussion, we think, has failed to reflect the particular sensitivity of the attorney-client relationship. It is a relationship based upon confidentiality. "The lawyer's duty of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship." (NY Rules of Professional Conduct Rule 1.6, Comment 2.) Although the identity of an attorney's clients is not *per se* privileged,[30] it is not something that attorneys routinely disclose. In certain circumstances, disclosure cannot be made without client consent. (*See* NY Rules of Professional Conduct Rule 1.6.) Confidential information "consists of information gained during or relating to the representation of a client, whatever its source, that is . . . (b) likely to be embarrassing or detrimental to the client if disclosed." (NY Rules of Professional Conduct, Rule 1.6(a)(3)(b).)

In some circumstances, the disclosure of the attorney-client relationship is absolutely detrimental to the client. For example, an individual subject to a non-public law enforcement

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led to the elimination of potential conflicts of interests, or lessened the need for disclosure. Whatever the merits of a full-time legislature, eliminating the need for disclosure is not among them.

28 Pub. Off. Law § 73-a(3), (8)(a), (13).

29 The City Bar Association has issued a report specifically addressed to state legislators who are attorneys. *See* Reforming N.Y. State's Financial Disclosure Requirements for Attorney-Legislators. New York City Bar Association Report. January 2010.

30 *In re Kaplan*, 8 N.Y.2d 214, 217–18 (1960) (citing *People ex rel. Vogelstein v. Warden of County Jail*, 150 Misc. 714, 717 (N.Y. Co. 1934).

investigation, such as a criminal or professional discipline investigation,[31] could suffer reputational harm if it were revealed that the individual had engaged an attorney known to handle such matters. Disclosure of the representation would be suggestive of the investigation. Certain clients of a divorce lawyer may hope to resolve their marital issues outside the public eye or may not want their spouse to learn that they have engaged an attorney. The clients of a bankruptcy lawyer could be harmed if their financial difficulties, or their attempt at a workout, were known prior to a bankruptcy filing. Attorneys active in Family Court may find that they are prohibited from disclosing their clients' identities.

It has been suggested that attorneys' professional duty to their clients[32] actually increases the public's interest in identification of those clients. The obligation of attorneys to their clients does create the possibility of conflict when attorneys accept public obligations, but that does not mean that the disclosure of clients is always necessary.

Attorneys are already subject to conflict of interest rules. Those rules continue to apply to the attorney in public service and directly address the circumstance where an attorney's obligation to a private client may conflict with the attorney's obligation to public office.[33] Moreover, State law contains

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31 The Public Officers Law places limits on the ability of state employees, legislators and legislative employees to appear before administrative agencies. *See* Pub. Off. Law § 73(7)(a). This limitation does not apply to officers and employees of state departments, boards, bureaus, divisions, commissions, councils and public authorities who receive no compensation or are compensated on a per diem basis. Pub. Off. Law § 73(1)(i),(iii),(iv).

32 *See, e.g.*, NY Rules of Professional Conduct Preamble (2) (duty "to act with loyalty during the representation): Rule 1.1(c): "A lawyer shall not intentionally (1) fail to seek the objectives of the client through reasonably available means permitted by law. . . ."

33 *See* NY Rules of Professional Conduct Rule 1.11(f):

> A lawyer who holds public office shall not:
>
> (1) use the public position to obtain, or attempt to obtain, a special advantage in legislative matters for the lawyer or for a client under circumstances where the lawyer knows or it is obvious that such action is not in the public interest;

Many public boards, etc, have rules that require disclosure and recusal when a member may have a conflict of interest. *See, e.g.,* Code of Ethical Conduct for members of the Dormitory Authority of the State of New York.

several explicit prohibitions against public officers, including attorneys, using their office for their client's benefit.[34]

Nevertheless, attorneys are not immune from outside influences. The need for transparency in government requires a balancing of the obligation of client confidentiality against the need for disclosure of a public official's financial relationships. To strike that balance, the Task Force recommends that professionals,[35] including attorneys, be subject to the same disclosure requirements as other individuals.

This balancing, however, also requires a recognition of the uniqueness of the attorney-client relationship. Because confidentiality is at the core of the attorney-client relationship, there will be circumstances where the need for client confidentiality outweighs the need for public disclosure. The need for public disclosure is outweighed where the disclosure of the client's identity would cause the client harm. As discussed above, harm is likely to occur where the client is under civil or criminal investigation, for some domestic relation clients, and for pre-filing bankruptcy clients. In these circumstances, disclosure should not be required. Once a public filing has been made relative to the client's matter, the exemption from disclosure must come to an end. Where matters are confidential by statute or regulation, such as certain Family Court proceedings or professional discipline matters, those clients should not be subject to disclosure until such time as the confidentiality mandate has ended.[36] There may be other matters, not listed here, where the disclosure of a client's identity would be harmful to that client.[37] In those circumstances, the attorney should be able to file a statement with the

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34 *See, e.g.*, Pub. Off. Law § 73(3), (4), (5), (7), (12), (13), (14) and (15). As this portion of the report is addressed to disclosure rules, we do not opine here on the adequacy of those and other provisions. The need for addressing the adequacy of enforcement standards is addressed in Part 1 of this report.

35 Healthcare professionals are likely prohibited by HIPAA from disclosing the identity of patients. Patient identity may be protected health care information not subject to disclosure. *See* 45 CFR 160.163.

36 Numerous statutes from other states protect attorney-legislators from disclosing the identity of clients in financial filings due to client-confidentiality statutes. *See* 65 Pa. Cons. Stat. § 1105, Disclosure Statements Required to be Filed; Va. Code Ann. § 30-111 (2010); Or. Rev. Stat. 244.050.

37 There are also circumstances when there is little, if any, public interest in the identity of an attorney's clients. In many circumstances, the nature of the attorney's practice, not the identity of the clients, is the legitimate public concern. Nevertheless, we do not suggest that that client identity be withheld on that basis.

appropriate ethics office, without disclosing the client name, stating the circumstances that require that the client not be identified. The attorney's judgment should not be subject to review, but the statement itself must be truthful, and a false statement should be subject to sanction. The attorney's statement, like other disclosure documents, should be publicly available. This should prevent abuse because the public will be able to consider whether the public official has given legitimate reasons for non-disclosure.[38]

Attorneys also should not be subject to the requirement that income derived from a particular representation be stated by income category. Disclosure that the attorney has received income above the reporting threshold from the client is sufficient, and lessens the intrusion into the attorney-client relationship.

The Task Force makes this proposal mindful that this standard may be so burdensome that it will discourage attorneys in private practice from also undertaking public service. The standard should be open to review and, if found to have significantly discouraged attorneys from public service, its effect should be weighed and the standard revisited. Likewise, the exemption process may need to be revisited based upon the volume of filings and the reasons for exemption provided in order to evaluate whether it is being too broadly construed. The public is well-served by the participation of attorneys in government.[39] Attorneys understand the law, our common law and constitutional principles; they are exposed to a broad range of business, governmental, and societal interests. The training and experience required by the legal profession make attorneys well-suited for government service. Their expertise should not be lost to public service whenever that service can be given with appropriate deference to the public's right to a minimum level of transparency into potential conflicts.

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38 A truthful statement of the circumstances also deters the possibility that a public official/attorney would be engaged to improperly influence government action. The attorney's judgment would not be subject to review, but the attorney's actions would be.

39 We note that the percentage of attorney-legislators in state legislative bodies has steadily declined from 22.3% in 1976 to 15.2% in 2007. *See StateStats: Working Full-Time in State Legislatures*. National Conference of State Legislatures. (2009), http://www.ncsl.org/default.aspx?tabid=17922).

REPORT OF THE SUBCOMMITTEE ON

ENFORCEMENT AND DUE PROCESS

Structure of Agencies

Under the current model of regulatory agencies that provide advice, enforcement, and training in the field of New York government ethics, there seems to be a degree of confusion about which entity is properly suited to investigate alleged ethical violations by public servants, government contractors, and lobbyists. For example, a single allegation can trigger action by multiple agencies – each asserting jurisdiction and seeking to investigate the matter. When multiple enforcement agencies investigate a single violation the lack of coordination and cooperation can prevent a sound, rational inquiry from taking place. The resulting confusion wastes resources and the inefficiencies in the end may allow a corrupt part to escape scrutiny or punishment.

Targets of such investigations may be required to defend themselves before multiple agencies on multiple fronts for a single perceived act or omission. As a result, subjects of an inquiry may be subjected to investigations from different entities with different rules for discovery, different standards of confidentiality and different schedules, which leads to the possibility of infringement on due process protections normally granted to those under investigation. At the same time, the tax-paying public is not well served by duplicative, uncoordinated investigations from multiple regulatory agencies.

Furthermore, there have been numerous calls for a single, unified ethics agency that would have jurisdiction over both the executive and legislative branches of government.

History of the Ethics Enforcement Structure

Ethics enforcement in New York State has evolved a great deal in the last 25 years; prior to 1987, such enforcement was very limited. The structure of modern enforcement was established by the Ethics in Government Act of 1987,[40] which created the State Ethics Commission ("Ethics Commission"),[41] the Legislative Ethics Committee,[42] the Temporary State Commission on Local Government Ethics ("Local Ethics Commission"),[43] and the Temporary State Commission on Lobbying

40 1987 N.Y. Laws 3022.

41 1987 N.Y. Laws 3041.

42 1987 N.Y. Laws 3046.

43 1987 N.Y. Laws 3068.

("Lobbying Commission").[44] After 20 years – and some notable accomplishments by these agencies along the way – this model was replaced by a new structure created pursuant to the Public Employees Ethics Reform Act of 2007 ("PEERA").[45] PEERA brought forth significant change to the structure of ethics investigation and enforcement at the state level.

One of the most prominent provisions of PEERA was the creation of the Commission on Public Integrity ("CPI"),[46] the result of a merger between the Ethics Commission and Lobbying Commission. The intent was to create an overarching agency for ethics and lobbying regulation. The Office of Attorney General Andrew M. Cuomo recommended the passage of PEERA because it increased penalties for violations, tightened restrictions on gifts and post-employment activities (the "revolving door"), prohibited honoraria to public officials, and prohibited running for public office while on the government payroll, among other enumerated positive changes.[47] This marked a significant change in the landscape of ethics enforcement, with the CPI inheriting an expanded jurisdiction to investigate public officials and state employees, as well as lobbyists and their clients.[48]

Modern Structure of Ethics Enforcement

Currently, ethics enforcement is primarily overseen by five different state and local investigatory bodies, in addition to specific enforcement actions taken by federal prosecutors. The state bodies include the CPI, the Legislative Ethics Commission ("LEC"), the Office of the State Inspector General ("Inspector General" or "IG"), the Office of the Attorney General ("Attorney General"), and the 62 district attorneys across the state. Of these five, the CPI, LEC, and Inspector General are the agencies that most often exercise jurisdiction over issues of alleged unethical conduct. What follows is a brief discussion of these entities, their authorizing legislation, their structures and their chartered jurisdictions. This discussion is intended to illustrate the potentially overlapping authority among the agencies.

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44 1987 N.Y. Laws 3075.

45 2007 N.Y. Laws 159.

46 *Id.*

47 N.Y. Governor's Bill Jacket, A.B. 3736-A, at 23 (2007).

48 *Compare* 1987 N.Y. Laws 3041 *with* 2007 N.Y. Laws 159.

Commission on Public Integrity

As noted above, the CPI, created in 2007 under PEERA, is charged with investigating possible ethics violations under various sections of the Public Officers Law, Legislative Law and the Civil Service Law, enforcing punishments where violations are found, and educating covered persons on these laws. The CPI is an investigative and regulatory oversight body that also has the goal of preserving accountability.[49]

The CPI has jurisdiction over numerous state officials and employees and is considerably larger than the LEC, its companion agency in the Legislature.[50] The CPI has jurisdiction over statewide elected officials, state officers and employees (including those at public authorities), candidates (and former candidates) for statewide elected office, political party chairpersons, lobbyists (both former and present) and their clients.[51]

The CPI is empowered to provide advisory opinions, conduct investigations, and impose penalties for violations of the state's ethics laws for covered individuals.[52] These ethics statutes are contained within sections 73, 73-a, and 74 of the Public Officers Law, section 107 of the Civil Service Law, and Article 1-a of the Legislative Law.[53]

Section 73 of the Public Officers Law, titled "Business or professional activities by state officers and employees and party officers," contains many of the ethics rules that the CPI is entrusted with enforcing.[54] Under section 73, the CPI has jurisdiction over matters such as conflicts of interest; soliciting, accepting or receiving gifts or honoraria; receiving compensation for a matter before the government employee's agency; receiving compensation for rendering services against the state in a matter before that employee's agency; post state-employment restrictions; and nepotism, among

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49 *See id.*

50 § 94(1).

51 *Id.*

52 See N.Y. Exec. Law § 94 .

53 § 94(12), (13), (15).

54 N.Y. Pub. Off. Law § 73 (McKinney 2010).

others.[55] The CPI may investigate possible violations under this law and impose penalties if violations are found to have occurred.[56] It also has the authority to investigate and punish willful violations of the financial disclosure law, as outlined in section 73-a of the Public Officers Law.

The CPI is entrusted to enforce the state Code of Ethics, found in section 74 of the Public Officers Law, and has exclusive jurisdiction to investigate and punish violations.[57] The Code of Ethics prohibits covered individuals from engaging in activity that results in conflicts of interest, misuse of public office, or accepting employment that will either impair their judgment in their official duties or require disclosure of confidential information, among other prohibitions.[58]

The CPI has jurisdiction over violations of Article 1-a of the Legislative Law, commonly referred to as the "Lobbying Act."[59] The Lobbying Act, in conjunction with the PEERA amendments, provides the CPI with the power and jurisdiction to regulate private-sector lobbyists. More specifically, the Lobbying Act gives the CPI authority over the registration of, reports by, and conduct of lobbyists.[60]

Lastly, the jurisdiction of the CPI's investigative and enforcement authority is supported by section 107 of the Civil Service Law, titled "Prohibition against certain political activities; improper influence." Section 107, which has been regulated by the CPI as a result of the PEERA legislation, forbids the following activities: the use of an individual's political affiliation "as a test for fitness for holding office," the use of one's authority to induce another to make political contributions or subscriptions, or the use of influence or authority for compensation.

The CPI commands an expansive reach over state officers and employees in the executive branch as well as lobbyists and their clients, but today lacks jurisdiction over the legislative branch. Retooling and refocusing a regulator with such expansive jurisdiction could streamline ethics education

55 *Id.*; N.Y. Exec Law § 94(13).

56 §§ 94(12), 94(13).

57 N.Y. Exec. Law §§ 94(12).

58 N.Y. Pub. Off. Law § 74.

59 N.Y. Legis. Law § 1-b (McKinney 2010).

60 *Id.* §§ 1-h, 1-j, 1-k, 1-m; N.Y. Exec. Law § 94(13).

and enforcement, while avoiding duplicative investigations, which have been a problem under the current structure.

For example, the scandal that became known as "Troopergate" occurred when then Governor Eliot Spitzer allegedly used state police to smear the reputation of Senate Majority Leader Joe Bruno[61] and run a "political interference" campaign on elected public officials.[62] In the aftermath of the scandal, multiple investigations were conducted by numerous agencies, including the CPI, the Attorney General, the Albany County District Attorney, and the Inspector General.[63] These multiple, and at times concurrent, investigations illustrate the extent to which regulators in New York have the ability to engage in duplicative investigations concerning a single allegation or complaint. In fact, the State Commission of Investigation ("SCI") initiated a probe to investigate the investigators.[64] SCI Chairman Alfred Learner stated that the commission was "concerned that the multiplicity of investigations has been somewhat dysfunctional."[65]

Legislative Ethics Commission

Today, the LEC has a role similar to that of the CPI. Like the CPI, the LEC is responsible for investigating violations and enforcing the state's ethics laws as they pertain to the legislative branch. Further, the LEC has the statutory power to promulgate regulations on limited matters, assist the legislature with creating rules and regulations, including those concerning the conduct of covered individuals,[66] and it is responsible for educating employees of the legislative branch about the state's ethics laws.[67] The LEC has jurisdiction over legislative employees,[68] members of the Legislature, and

61 Fred Siegel & Michael Goodwin, *Troopergate, New York-Style*, The Weekly Standard, Aug. 20, 2007, vol. 12, no. 27, *available at* http://www.weeklystandard.com/Content/Public/Articles/000/000/013/980cljul.asp.

62 Rick Karlan, *New Investigations Launched*, Times Union (Albany, NY), Apr. 2, 2008, 1, at 8.

63 *Id.*

64 *Id.*

65 *Id.*

66 N.Y. Legis. Law § 80(7).

67 Legis. Law § 80(14).

68 As defined in Pub. Off. Law § 73(1)(c). Legislative employees are officers or employees of the Legislature, not including members.

candidates for membership to the Legislature. Its jurisdiction includes both past and present holders of such office or candidates for such office.[69]

The LEC has express authority to enforce ethics statutes as they pertain to individuals under its purview.[70] Specifically, the LEC reviews financial disclosure statements[71] and conducts investigations of covered individuals for violations of sections 73, 73-a, and 74 of the Public Officers Law.[72] As previously discussed, these statutes concern such ethics violations as accepting gifts of more than nominal value, accepting honoraria, violating financial disclosure laws, or conflicts of interest. Much of what the LEC currently does parallels the work of the CPI.

Office of the Inspector General

The Inspector General differs in that it has no authority to interpret or enforce the ethics laws or independently punish anyone. Its role is purely investigatory.[73]

The Office of the State Inspector General is part of the executive branch. Originally created by Governor Mario Cuomo in 1987,[74] the Inspector General was subsequently reformed by Governor George Pataki in 1996 under Executive Order #39.[75] The Inspector General as it exists today is statutorily based in Article 4-A of the Executive Law as a result of the Public Authorities Accountability Act of 2005 ("PAAA").[76]

The Inspector General has jurisdiction over "all executive branch agencies, departments, divisions, officers, boards and commissions, public authorities, . . . and public benefit corporations, the heads of which are appointed by the governor and which do not have their own inspector general by

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69 Legis. Law § 80(1).

70 *See* Legis. Law §§ 80(10), (11); Exec. Law §§ 94(10)–(13-a).

71 Legis. Law § 80(7)(h).

72 Legis. Law § 80(7)(l).

73 N.Y. Exec. Law § 53(1).

74 *See* Executive Order #103, 9 NYCRR § 4.103 (1987).

75 9 NYCRR § 5.39 (1996).

76 2005 N.Y. Laws 3643–3644.

statute."[77] Unlike the agencies discussed above, the Inspector General's office may investigate any complaint concerning broadly defined "allegations of corruption, fraud, criminal activity, conflicts of interest, or abuse in any covered agency."[78] In regard to complaints of corruption, fraud, conflicts of interest or abuse,[79] the Inspector General has the duty to determine if action should be taken by an authoritative entity[80] and to recommend remedial action.[81] The Inspector General's power to investigate within the executive branch is not limited to specific ethics statutes and is ill-defined but wide-ranging.

The Inspector General has broad jurisdiction over both individuals and subject matter. Section 55 of the Executive Law requires covered agencies to report ethics violations to the Inspector General. This creates a system where there is overlap in investigations involving the Inspector General, the CPI, and/or the LEC of possible violations of the Public Officers Law. This is largely due to the fact that there is no statutory guidance on deferment. Should the IG, CPI and/or LEC have their jurisdiction triggered on a matter which they intend to investigate, no entity is compelled to defer investigation to another.

Office of the Attorney General

The fourth of these regulatory bodies is the Office of the Attorney General. Under the applicable statutory language, the Attorney General's criminal jurisdiction is triggered only upon the request of the Governor or an agency concerned with state ethics enforcement.[82] Thus, the Attorney General has the potential to join an investigation (as occurred in Troopergate), but this potential must be realized through the affirmative action of another entity.

The 62 District Attorneys of New York

New York State has 62 different District Attorney Offices, one District Attorney Office for each county of the state. These district attorneys have the power to investigate and "conduct all

77 Exec. Law § 51.

78 Exec. Law § 53(1).

79 *See* Exec. Law § 53.

80 Exec. Law § 53(3).

81 Exec. Law § 53(6).

82 *See* N.Y. Exec. Law § 63(3).

prosecutions for crimes and offenses cognizable by the courts of the county for which he or she shall have been elected or appointed."[83] In addition, the CPI may refer an ethics violation to a prosecutor for prosecution as a misdemeanor, which in the past has led to ethics-based prosecutions.

Proposed Structure

As noted above, the CPI was created in 2007 by merging the former State Ethics Commission with the former Temporary Commission on Lobbying. Since the Ethics Commission had oversight over the executive branch, its five commissioners were appointed by the Governor, with one on nomination of the Attorney General and another on nomination of the Comptroller. However, the Lobbying Commission was created under the Legislative Law and all of its Commissioners were appointed by the Legislative leaders. When the two were combined, the number of commissioners appointed was fundamentally maintained. As a result, the CPI has 13 commissioners. In a letter to the Task Force, the CPI advised that the current board is "unwieldy." (see Appendix C)

The Task Force proposes restructuring the CPI into a unified ethics commission for the state of New York. The Task Force is mindful of policy arguments regarding separation of powers, but according to a November 2010 study by the National Conference of State Legislature, the majority of states today have some type of unified ethics commission with jurisdiction over both legislative and executive branch ethics.[84] The Task Force proposes that the new unified ethics commission consist of seven to nine members, with each commissioner serving a staggered term. The Chair would be appointed by the Governor and be subject to Senate confirmation. Of the other members, two would be appointed by the Governor from differing political parties; one by the Attorney General; one by the Comptroller, and the remaining members by the legislative leaders.

Currently, the CPI and the LEC have roles that go well beyond their enforcement authorities. For example, the two agencies provide advice to the more than 250,000 public employees. The CPI and LEC also perform the important function of issuing advisory opinions, collecting and managing more than 25,000 financial disclosure statements, and ensuring transparency through periodic reporting by

83 N.Y. County Law § 700 (McKinney 2010).

84 *See* http://www.ncsl.org/default.aspx?tabid=15361.

lobbyists and their clients. This wide-ranging responsibility has raised some questions about the wisdom of having the same agency that is dispensing confidential advice also charged with investigating the population it is advising.

To address these concerns, the Task Force recommends under the new ethics commission structure, that two distinct bureaus would exist that would both report to an Executive Director. The first could be titled the "Bureau for Advice and Education." This bureau would receive requests for and proffer advisory opinions, and would receive and review financial disclosure statements as well as lobbyist reports. The second bureau could be called the "Bureau for Enforcement," which would be concerned only with the investigation of ethics violations. Compartmentalizing these functions and erecting some barrier separating them would enhance the proactive and deterrent objectives of ethics compliance by lessening any chilling effect on those who would seek advice and, conversely, giving greater focus to the enforcement component in rooting out unethical activity.

With respect to the Office of Inspector General, it is recommended that section 52, subsection 3 of the Executive Law should be amended to require the IG to report directly to the Governor (except when the Governor is being investigated) instead of the current model where the IG reports to the Secretary to the Governor. The IG should have a term of five years, be subject to confirmation by the Senate, with removal only upon "good cause." While a single agency with jurisdiction over the executive, legislative, and judicial branches of government may seem to be the best approach, we acknowledge the very real challenges such an approach might face given the very different roles of the branches of government.

Additional Statutory Amendments to Accompany Proposed Structure

In addition to the structural changes proposed above, the Task Force proposes an additional statutory change. The investigations of the CPI and the IG should both be subject to a stay when there is an ongoing criminal probe by law enforcement authorities. This would reduce overlap and ensure due process protections when multiple investigatory agencies have concurrent jurisdiction. Some time limitation on that stay may be appropriate so as to prevent ethics probes from being unduly delayed.

Penalties and Enforcement Statutes

Civil Penalties, Analysis and Recommendations

New York has a strong penalty structure of monetary penalties that should be maintained. However, the Task Force proposes adding to these penalties the suspension, expulsion, or future bar from public office of officials and employees who are found to have committed serious violations of the state's ethics laws. The proposed penalty should, of course, be proportionate to the violation; some violations should require only suspension, while the most serious violations should lead to expulsion from public office/employment as well as a future bar from holding public office/employment.

Clarification of Existing Provisions

The Task Force proposes the amendment of subsection 5, section 73 of the Public Officers Law, also known as the gift prohibition. The current statute gives an individual no definite meaning of the value of a prohibited gift. The term "nominal value" has proven troublesome and should be stricken, replaced with a fixed monetary value, such as ten dollars, to bring clarity to the prohibition.

The Task Force proposes an additional clarifying amendment to subsection 15 of section 94 of the Executive Law. Subsection 15 provides the CPI with the power to issue "advisory opinions" interpreting the state's ethics laws. If a state official or employee is acting in good faith and includes all material facts, that official or employee should be able to rely on the CPI's opinion as a defense in any civil or criminal proceeding.[85] Under existing law, the agency is bound only by its formal advisory opinions. The Task Force proposes that the same rule should apply to the CPI's informal opinions.[86]

Procedural and Due Process Protections

Currently, investigations conducted by the Inspector General are not governed by *any* requirements that a target or witness be provided notice of the ongoing investigation. In fact, a target may not even be aware of an investigation until the Inspector General releases a public report. In the world we live in today, with its 24-hours news cycle and innumerable different means of disseminating information, an entire life's work and reputation in public service may be irreversibly damaged in an

85 N.Y. Exec. Law § 94(15).

86 *Id.*

instant. In comparison, section 94(12)(a) of the Executive Law, which governs procedure for the CPI, requires that agency to "notify the individual in writing, describe the possible or alleged violation of such laws, and provide the person with a fifteen day period in which to submit a written response."[87] The Task Force recommends that a notice requirement similar to the one found in section 94(12)(a) should apply to all ethics investigations, including those of the Inspector General.

Another problem with investigations conducted by the Inspector General is the lack of a full and fair opportunity to respond. As noted above, the CPI provides a target with the right to respond to allegations within 15 days of receiving written notice by the agency.[88] In contrast, no law requires that the Inspector General's office allow a response prior to the public release of a report or even after a report has been released. As a result, an individual named in a report has no opportunity to challenge the statements made by the Inspector General. Even if the Inspector General does allow for a response, there is no requirement that a target's or witness's response be included or attached in full to the publicly released report. Compare this, for example, with the State Comptroller's practice of including, in full, a response by a subject in any publicly released report.[89]

Because of these weaknesses in the law, public servants have only limited procedural protections. Article 4-A of the Executive law should require that these protections be afforded.

Confidentiality Protections

On May 13, 2009, Inspector General Joseph Fisch released a scathing 174-page report, condemning the actions of both the Commission on Public Integrity and its (now-former) Executive Director.[90] In the report, the Inspector General alleged that the Executive Director inappropriately

87 N.Y. Exec. Law § 12(a).

88 *Id.*

89 For a recent example, see Office of the New York State Comptroller, Town of Rotterdam Industrial Development Agency: Internal Controls Over Selected Financial Operations, pp. 21–22 (June 28, 2010), *available at* http://www.osc.state.ny.us/localgov/audits/others/2010/rotterdam-ida.pdf.

90 *See* Office of Inspector General, Investigation of an Allegation That Herbert Teitelbaum, Executive Director of the Commission on Public Integrity, Inappropriately Disclosed Confidential Commission Information Related to its Troopergate Investigation (2009).

disclosed confidential information during an investigation being conducted by the CPI.[91] Further, the Inspector General alleged the CPI failed to investigate this disclosure on three different occasions.[92] For purposes of this discussion, the Inspector General's report raises two important issues. First, if the allegations are true, the public trust has been breached by one of the entities designed to protect it. Second, the report, and the subsequent lack of investigation into an illegal disclosure of confidential information, seems to highlight the weaknesses tin New York's confidentiality protections.

For the CPI, the largest of the ethics investigatory bodies, two provisions address "leaks" that may occur in investigations. The first is part of Executive Law section 94(12)(a), the statute that grants CPI its investigatory powers. It states, "[a]ll of the foregoing proceedings shall be confidential." The statute is otherwise silent as to the scope of this mandate and the penalties to be imposed on individuals who violate the provision.

The second provision is in section 74 of Public Officers Law, one of the many broad mandates included in the "Code of Ethics" governing all state employees. It states, "[n]o officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties."[93] Like the Executive Law, section 74 fails to include a penalty for violators of the section. The use by the drafters of the verb "should" – as opposed to "shall" – and the lack of a statutory penalty may make subsection 3(c) of section 74 a mild suggestion rather than a cornerstone of confidentiality; it is ripe for amendment.

Confidentiality should be ensured throughout the entire investigative process, from commencement until the subject has had the ability to fully exercise his or her due process rights. There should be a bright-line presumption of confidentiality at all times in the actions of an investigatory body. Penalties are needed to support the confidentiality requirement.

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91 *Id.*

92 *Id.*

93 N.Y. Pub. Off. Law § 74(3)(c).

REPORT OF THE SUBCOMMITEE ON

HONEST SERVICES FRAUD

A New York Honest Services Fraud Law

The Task Force considered whether New York's Penal Law should be amended to include a provision that would allow state prosecutors to bring charges for "honest service frauds" engaged in by public officials. The issue took on added importance – and complexity – when in June 2010, the United States Supreme Court decided *Skilling v. United States* (130 S. Ct. 2896 (2010)), narrowing the scope of the federal honest services fraud provision (18 U.S.C. § 1346). Several issues need to be addressed in the post-*Skilling* landscape: (1) Are there political corruption cases that should be subject to criminal prosecution but can no longer be prosecuted now that *Skilling* has limited section 1346's scope? (2) Can an honest service fraud statute (or statutes) be drafted that would survive the void-for-vagueness challenge that caused the Supreme Court to limit section 1346? And, (3) is there a place for state (as opposed to federal) prosecutions of honest service frauds?

The Task Force believes that the answer to each of these questions is "yes" and, accordingly, proposes model legislation to address the gap that exists in the criminal law after *Skilling*.

Background

The federal mail and wire fraud statutes were enacted in the 19th century to punish those who engage in schemes to defraud and use the mail or interstate wire services to further their unlawful endeavors. (*See generally*, Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771 (1980).) By 1982, every federal circuit had held that the statutes reached schemes intended to deprive a victim of its right to "honest services," not only schemes intended to obtain property. The quintessential honest services fraud was a public corruption case in which an official accepted a kickback from a company, in return for which that official awarded the company a public contract. (*See United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)("[m]ost often these cases . . . involved bribery of public officials").) Even if the company did not receive the contract on favorable terms – *i.e.*, even if the contract price and scope were the same as they would have been in the absence of the kickback – the municipality was still deprived of the public official's unconflicted services. That is to say, the municipality may not have suffered an identifiable *tangible* harm, but it suffered the *intangible* harm of having a decision-maker with divided loyalty.

In *McNally v. United States* (483 U.S. 350 (1987)), the United States Supreme Court stopped the development of the honest services theory of fraud in its tracks. The Court held that the mail and wire fraud statutes were "limited in scope to the protection of property rights." (*Id.* at 360.) And it wrote: "If Congress desires to go further, it must speak more clearly than it has." (*Id.*)

One year later, Congress enacted 18 U.S.C. § 1346. Section 1346 provides that "[f]or the purposes of this chapter [the mail fraud and wire fraud statutes], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." While Congress reacted swiftly to *McNally*, it did not speak with the hoped-for clarity. For the next decade, the federal circuits struggled to give meaning to section 1346. Some courts held that an honest services prosecution must be based on a violation of state law. (*See*, *e.g.*, *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997).) Others held that the defendant must act in pursuit of private gain. (*See*, *e.g.*, *United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998).) As the Second Circuit observed, "the circuits that have reinstated pre-*McNally* law [have] recognize[d] that *ad hoc* parameters are needed to give [§ 1346] shape." (*United States v. Handakas*, 286 F.3d 92, 109 (2d Cir. 2002).)

In June 2010, in *Skilling v. United States* (130 S. Ct. 2896 (2010)), the Supreme Court took up the issue. *Skilling*'s holding is clear: "§1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." (*Id.* at 2905.) In so holding, the Court expressly rejected the government's effort to bring "undisclosed self dealing" within section 1346's scope. The Court wrote this:

> If Congress were to take up the enterprise of criminalizing "undisclosed self-dealing by a public official or private employee," Brief for United States 43, it would have to employ standards of sufficient definiteness and specificity to overcome due process concerns. The Government proposes a standard that prohibits the "taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty," so long as the employee acts with a specific intent to deceive and the undisclosed conduct could

> influence the victim to change its behavior. *Id.*, at 43–44. *See also id.*, at 40–41. That information, however, leaves many questions unanswered. How direct or significant does the conflicting financial interest have to be? To what extent does the official action have to further that interest in order to amount to fraud? To whom should the disclosure be made and what information should it convey? These questions and others call for particular care in attempting to formulate an adequate criminal prohibition in this context.

Id. at 2933 n.44.

The Post-*Skilling* Gap

Skilling has created a gap in the criminal law. Political corruption cases that warrant criminal prosecution can no longer be prosecuted now that *Skilling* has limited section 1346's scope to its "bribe-and-kickback core." Primarily, the unreachable cases fall into two categories: *first*, cases in which a public official engages in "self dealing," as discussed in footnote 44 of *Skilling*; and *second*, cases in which a public official takes a substantial gift from a constituent who has business before the official but in which there is no provable *quid pro quo*.

The first category is exemplified by cases in which an executive branch official steers a contract to an entity in which he or she has a hidden interest. One such case is *United States v. Bush* (522 F.2d 641 (7th Cir. 1975)). There, the defendant, the Press Secretary to the Mayor of Chicago, helped steer a city contract for display advertising at O'Hare International Airport to a company in which he had an undisclosed interest. He "used his official position within the mayor's inner circle to exert the substantial influence which he had on those who were responsible for negotiating the contract . . . without advising them that he was vitally interested in [it]." (*Id.* at 647.) He thereby "deprived the city of his honest and faithful services." (*Id.* at 648. *See also United States v. Silvano*, 812 F.2d 754 (1st

Cir. 1987)(affirming conviction of a city budget director who did not disclose plan to "secretly enrich [a friend] at the expense of the City").)[94]

The second category of cases is exemplified by the charges in *United States v. Bruno*. According to the Indictment, the defendant, a powerful New York State legislator, took $440,000 from entities controlled by a businessman who was "pursuing interests requiring official action by New York State officials, including [the] defendant." (Ind. ¶53.) Although the monies were paid as consulting fees, the defendant allegedly "did not perform legitimate work commensurate with the payments from [the businessman] . . . and, as a result, the payments were, in whole or in part, gifts." (Ind. ¶51.)[95] After *Skilling*, absent a provable *quid pro quo*, such a gift case cannot be prosecuted under section 1346.

The Task Force believes that *state* prosecutors should be able to prosecute corruption cases that come within these two categories. It places emphasis on the word "state" for a simple reason. A state should have strong and clear laws to combat political corruption and should not be dependent on federal law or federal prosecutors to vindicate its interest in honest government. Consequently, the Task Force is offering model statutes to achieve this objective.

Unlawful Gratuity Statute

The Task Force concluded that it would be helpful to draft a model unlawful gratuity statute to cover conduct like that alleged in *Bruno*, using as guidance existing state and federal law.

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94 In post-*Skilling* testimony before the United States Senate Committee on the Judiciary, Lanny A. Brewer, of the Department of Justice, gave this example:

> [C]orrupt officials and those who corrupt them can be very ingenious, and, as we all know, not all corruption takes the form of bribery. For example, if a Mayor were to solicit tens of thousands of dollars in bribes in return for giving out city contracts to unqualified bidders, that mayor could be charged with bribery. But if the same Mayor decides that he wants to make even more money through the abuse of his official position, he might secretly create his own company, and use the authority and power of his office to funnel City contracts to that company. Although this second kind of scheme is corrupt, and undermines public confidence in the integrity of their government, it is not bribery. Accordingly, after *Skilling*, it is no longer covered by the honest services fraud statute or any other federal statute.

Testimony of Lana A. Brewer, Assistant Attorney General, 9/28/2010.

95 Bruno was convicted of two counts of honest services fraud, but the validity of those convictions is in doubt after *Skilling*. *See Conviction in Bruno Case Is in Doubt After Ruling*, N.Y. Times, June 25, 2010 at A26.

Existing New York State Law

Existing New York law includes the crimes of (i) rewarding and receiving a reward for official misconduct and (ii) giving and receiving unlawful gratuities. The former punishes the giving (or receiving) of a benefit to (or by) a public servant "for having violated his duty as a public servant." It is a class E felony.[96] (*See* Penal Law §§ 200.20, 200.25.) The latter punishes the giving (or receiving) of an unlawful gratuity to (or by) a public servant "for having engaged in official conduct which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation." It is a class A misdemeanor. (*See* Penal Law §§ 200.30, 200.35.)

The Task Force believes that more is needed. The statutes that now cover rewarding and receiving a reward for official misconduct are bribery-like provisions that "are directed at rewards to a public servant for having *previously* violated his official duties." (Donnino, *Practice Commentaries*, McKinney's Penal Law art. 200 (emphasis added).) Because the provisions require proof of a violation of the public servant's duty, they are not pure anti-gift giving or receiving statutes. The unlawful gratuity statutes punish the giving or acceptance of "a 'tip' for official action already taken." (Greenberg *et al.*, *New York Criminal Law*, § 21:8.) Their principal shortcoming is that a violation is only a misdemeanor, regardless of the size of the "tip." In short, if one believes that the gift-receiving conduct alleged in *Bruno*, if proven, warrants firm punishment, then these provisions fall short of the mark.

Existing Federal Law

The relevant federal law provision is 18 U.S.C. § 201(c), which provides:

> (c) Whoever-
>
> (1) otherwise than as provided by law for the proper discharge of official duty-

96 If the public servant has "violated his duty as a public servant in the investigation, arrest, detention, prosecution or incarceration of a person for the commission or alleged commission of a class A felony defined in article two hundred twenty of the penal law [*i.e.*, a class A narcotics felony], the crime is a class C felony." Penal Law §§ 200.22, 200.27.

> (A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or
>
> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person[.]

The United States Supreme Court considered the meaning of 18 U.S.C. § 201(c) in *United States v. Sun-Diamond Growers of California* (526 U.S. 398 (1999)). There, the Court reviewed a case in which a trade association for growers gave the Secretary of Agriculture gifts totaling $5,900 at a time when there were two matters before him in which the association's members "had an interest in favorable treatment." At the trial of the trade association for unlawful gift giving, the court instructed the jury that it was unnecessary for the government to prove a direct nexus between the value conferred on the Secretary and any official act performed or to be performed by him. As long as the gift was given "because of the Secretary's official position" that was enough.

The Supreme Court disagreed and held that the jury instruction misstated the law:

> In our view, this interpretation does not fit comfortably with the statutory text, which prohibits only gratuities given or received "for or because of *any official act* performed or to be performed" (emphasis added). It seems to us that this means "for or because of some particular official act of whatever identity." . . . Why go through the trouble of requiring that the gift be made "for or because of any official act performed or to be performed by such public official," . . . when, if

> the Government's interpretation were correct, it would have sufficed to say "for or because of such official's ability to favor the donor in executing the functions of his office"? The insistence upon an "official act," carefully defined, seems pregnant with the requirement that some particular official act be identified and proved.
>
> *Id*. at 406.

The Court also noted that a broader interpretation of section 201(c) would criminalize "token gifts to the President based on his official position and not linked to any identifiable act – such as the replica jerseys given by championship sports teams each year during ceremonial White House visits." (*Id.* at 406–07.)

As is the case with existing state law, *Sun-Diamond Growers* has informed how the Task Force has considered this issue. The Task Force proposes that New York enact an unlawful gratuity statute that does not require proof that the gratuity was given "for or because of" a particular official act. There will be cases in which it is difficult to prove such a nexus but where the gift giving (and receiving) would still be criminal because the size of the gift warrants it. The gifts alleged in *Bruno* are of such magnitude. Put simply, even if one cannot show that a substantial gift was given with an intent to reward a past favorable act or to make a future act more likely, a private person should not be giving a public official a large gift *because of his official position*, and a public official should not be accepting such a gift.

A Proposed Statute

Having considered existing state and federal law, the Task Force is proposing an unlawful gratuity statute:

Illegal Gratuity Giving

> Anyone who otherwise than as provided by law for the proper discharge of official duty directly or indirectly gives offers or promises any benefit with a value in excess of $3,000 to any public official or

person selected to be a public official because of that person's official position is guilty of a class E felony.

Illegal Gratuity Receiving

Anyone who being a public official or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly seeks, receives or agrees to receive any benefit with a value in excess of $3,000 because of that person's official position is guilty of a class E felony.

Several points bear mentioning. *First*, the choice of a threshold dollar amount is inevitably arbitrary. Some may think that $3,000 is too high. The intent is to criminalize *as a felony* only serious cases. Other cases, involving lesser sums, can be handled under state and local ethics rules. In New York State, for example, a state official may not "directly or indirectly, solicit, accept or receive any gift having a value of seventy five dollars or more . . . under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could be expected to influence him, in the performance of his official duties . . . ." (N.Y. Public Officers Law § 73(5).) A knowing and intentional violation of the provision can result in civil penalties or be punishable as a Class A misdemeanor. (N.Y. Public Officers Law § 73(18).)[97] Conversely, some may believe that if the gift is large (*e.g.*, the $440,000 sum alleged in *Bruno*), then the crime should be treated more seriously than a class E felony. Such judgments are better made in the legislative process than by the Task Force.

Second, there is the issue of value. Under existing larceny law, thefts can be aggregated if they occur "pursuant to a single intent and one general fraudulent plan." (*People v. Cox*, 286 N.Y. 137, 145 (1941) (permitting prosecution of defendant for theft of approximately $1,500 in nickels over an 11-month period because all of the takings were pursuant to a single intent and general plan).) "Separate

97 The Task Force considered amending Pub. Off. Law § 73(5) to make the receiving of gifts having a value of more than $10,000 a felony. There are two problems with such an approach. First, some of the language of Pub. Off. Law § 73(5) may be too vague for a criminal prohibition – *e.g.*, gifts that "could be expected to influence him." Second, Pub. Off. Law § 73(5) reaches only state officials. If one believes that prosecutors should be able to bring charges against local officials for accepting substantial gifts, then a new state illegal gift receiving (and giving) statute is required.

and unrelated thefts from different persons . . . cannot be combined." (*People v. Buckley*, 75 N.Y.2d 843, 846 (1990).) The same principle would apply here. If one person gives a public official three gifts totaling $4,000, the gift giver would be subject to prosecution under the proposed statute, as would the recipient.

Third, the courts can be expected to consider the "net value" of the gift, just as they do in larceny prosecutions. (*See*, *e.g.*, *People v. Powell*, 22 A.D.2d 959 (2d Dept. 1964) (where contractor falsely represented that drain pipes were properly connected to a dry well, prosecution must show "that the house purchased by complainants, as burdened by the illegal drain connection, had a value which was less than the amount they had paid for it"; the "difference would be the value of the property which was the subject of the larceny alleged").) Similarly, to borrow an example from *Bruno*, if a legislator sold a horse worth $5,000 to a constituent for $50,000, the law should look at the transaction as a $45,000 gift.

Fourth, by employing the term "benefit," the intent is to reach instances where a private person confers a gift on a public official's designee – *e.g.*, the official's relative or close friend. (*See* Penal Law §10.00(17).) As long as the gift is given "to the desire or consent" of the public official, it is an advantage or gain to that official.

Fifth, the inclusion of the phrase "former public official," which is part of section 201(c), is unnecessary. The fact that a person is no longer a public official would not immunize him or her from prosecution for accepting or agreeing to accept later illegal gratuities while in office.

Self-Dealing

The Task Force also proposes a model anti-self-dealing statute:

> A person is guilty of self dealing when, being a public servant, he engages in conduct in his official capacity in connection with the award of a contract or grant or other effort to obtain or retain public business that is intended to confer an undisclosed benefit on himself and thereby obtains or attempts to obtain a benefit for himself with a value in excess of $5,000. A benefit is disclosed if its existence is made

> known prior to the alleged wrongful conduct to either (i) the relevant state or local ethics commission or (ii) the official responsible for the public servant's appointment to his position, provided that person is not a participant in the alleged wrongful conduct.

As the Supreme Court noted in *Skilling*, drafting a self-dealing statute "of sufficient definiteness and specificity to overcome due process concerns" is no easy task. (130 S. Ct. at 2933 n.44.) A $5,000 threshold removes those cases where the conflicting financial interest is small, and criminal intent may therefore be questionable. Similarly, by tying the prohibition to the contract or grant-giving process, the intent is to steer clear of instances where a legislator votes for a law of general application from which he or she personally might benefit. Thus, a legislator who votes in favor of a highway construction bill is not engaged in unlawful self-dealing, even if one of the new highways will reduce that legislator's travel time. Perhaps the most difficult question involves disclosure. In the words of the *Skilling* opinion, "[t]o whom should the disclosure be made and what information should it convey?" (*Id.*) The model statute answers that question (1) by indicating that the disclosure must pre-date the alleged wrongful conduct and (2) by providing a "safe harbor." If a public official discloses his or her conflict of interest to either (1) the relevant state or local ethics commission or (2) the official responsible for the public servant's appointment to his or her position, provided that person is not a participant in the alleged wrongful conduct, then no prosecution would lie.

The self-dealing proposal is set forth as a model. It is offered with the understanding that there will be efforts to refine its concepts or sharpen its language.

Bribery

Any proposal to fill the post-*Skilling* gap should also include New York's bribery statute. The statute now reads as follows:

> A person is guilty of bribery in the third degree when he confers, or offers or agrees to confer, any benefit upon a public servant upon an agreement or understanding that such public servant's vote, opinion,

> judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.

See Penal Law § 200.00 *et seq*.

The rub here is the decision of the New York Court of Appeals in *People v. Bac Tran* (80 N.Y.2d 170 (1992)). There, the Court held that the bribery statute required "something qualitatively and quantitatively higher than the . . . simple 'intent to influence.'" (*Id.* at 176.) Thus, "if a benefit is offered with only the hope that a public servant would be influenced thereby, then the crime of bribe giving is not committed." (*Id.* at 177.) "A mere 'hope' and a statutory 'understanding,'" the Court wrote, "are miles apart." (*Id.*) *Bac Tran* may be sound as a matter of statutory interpretation, but it leaves New York with a bribery statute that is often difficult to enforce. In his dissent in *Bac Tran*, Judge Simon put it well:

> The gist of the crime of bribery is the wrong done to the people by the corruption in the public service. Indeed, it is irrelevant that the result the bribe-giver seeks is lawful and proper. It is the effort to bypass the orderly processes of government to secure an impermissible advantage that is criminal. That being so, the purpose of the bribery statutes is satisfied if the bribe-giver intends his act to influence a public servant's conduct.

Id. at 181 (Simon, J., dissenting).

The Task Force believes that the *mens rea* element of the bribery statute should be modified to require only an intent to influence.

Conclusion

Skilling affords New York an opportunity to reexamine its laws relating to public corruption. Certain principles seem indisputable. First, New Yorkers have a right to honest public servants; one should hold public office to advance the public interest not one's own. Second, not every ethical lapse should be treated as a crime. Ethical standards are often aspirational, whereas the criminal law should

be reserved for conduct that is broadly condemned. Third, as *Skilling* reminds us, criminal laws must be clear; vague laws "encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson*, 461 U.S. 352, 357 (1983).) The model proposals set forth are consistent with these principles. They would give state prosecutors much-needed tools to prosecute political corruption in cases that involve seriously culpable conduct.

REPORT OF THE SUBCOMMITTEE ON LOCAL GOVERNMENT ETHICS

Introduction

New York State's law governing municipal ethics, set forth in Article 18 of the General Municipal Law, was enacted almost 50 years ago. For almost 20 years it has been severely criticized as both overbroad and underinclusive and has been seen as fatally flawed from its inception.

Article 18 opted for a heavy-handed prohibition on having an interest in a contract with one's municipality, a violation of which is a misdemeanor, while leaving entirely to local initiative the adoption of a broader code of ethics. As a result, smaller, rural municipalities have suffered under the prohibited interest provision because of the scarcity of suppliers of goods and services in such communities. At the same time, faced with the political and legal obstacles that arise in enacting a *comprehensive and effective* local ethics code, only a small percentage of municipalities have done so.

Consequently, in all but a few municipalities, there are no prohibitions against, for example, municipal officials misusing their office or municipal resources for private gain, appearing before their own municipality on behalf of a private party, or communicating with their former municipal agency on behalf of a private employer the day after they leave municipal service, on a matter they had worked on personally and substantially. In addition, with the exception of criminal prosecution of the prohibited interest, land use disclosure provisions and civil fines for violations of the financial disclosure law, Article 18 neither requires nor authorizes the enforcement of ethics provisions.

The Temporary New York State Commission on Local Government Ethics proposed an entirely new Article 18 in 1991, which, though it garnered broad-based support across the state, died in committee in the state Legislature. The commission's bill was resurrected in 1999 at the urging of the State Bar Association, but that bill also died in the Legislature. A radical revision of New York State's ethics law for municipalities is long overdue.

Recommendation 1. A new Article 18 of the General Municipal Law (Conflicts of Interest).

> **Article 18 should be replaced by a comprehensive conflicts of interest law for all municipalities (as defined in current Gen. Mun. Law § 810(4)), a law that would address the broad range of**

possible conflicts of interest, including, for example, misuse of office, misuse of municipal resources, gifts, moonlighting, and revolving door, that would prohibit private citizens from inducing conflicts of interest violations by municipal officials, that would correct the deficiencies in the current financial disclosure requirements, and that would provide for effective administration and enforcement.

With the exception of the 1987 addition of financial disclosure requirements for some municipalities, Article 18 adheres to its original scheme: to prohibit certain interests of municipal officials in municipal contracts while leaving entirely to each municipality the regulation of unethical conduct. As noted above, few municipalities are able to adopt a comprehensive local ethics law. As a result, most conflicts of interest go entirely unregulated. For example, as the Attorney General's Office has indicated, Article 18 permits municipal officials directly to hire their spouses for a municipal position. And the gifts provision in Article 18 provides virtually no guidance for municipal officials.

At the same time, apart from prohibited interest in a contract, which is a crime, and non-compliance with the financial disclosure requirements, Article 18 fails to provide for enforcement of ethics codes – indeed, the Office of the State Comptroller has taken the position that municipalities lack the power to provide for such enforcement. Furthermore, although Article 18 mandates that every county, city, town, village, school district, and fire district (but none of the rest of the thousands of municipalities) adopt an ethics code, ethics boards are entirely optional. As a result, advice is rarely available as to whether a proposed interest or conduct by a municipal official violates Article 18 or the local ethics code. Article 18's reliance upon (the entirely optional) county ethics boards to provide such advice has proven a dismal failure. There are dozens if not hundreds of municipalities within each county and few county ethics boards (in those counties that have such boards) will, or are in a position to, provide such advice or to interpret dozens of local ethics codes. In addition, the financial disclosure requirements of Article 18 bear no relation to any conflicts of interest provisions, even though the

purpose of such requirements is to reveal potential conflicts of interest and thus avoid unethical conduct.

In revising Article 18, however, one must never assume that a provision that works for state officials will also work for municipal officials. Municipal government differs significantly from state government, not only in regard to size, nature, structure, and subject matter jurisdiction but also because municipal governments depend heavily on volunteers, may be geographically isolated, and not infrequently lack ready access to full-time legal counsel. An appreciation of these differences must inform the crafting of any state law that regulates ethics at the local level.

In addition to including a comprehensive code of ethics, a new Article 18 would, among other things:

- Replace sections 800 through 804 of the General Municipal Law, commonly known as the interest in contract provisions, with a strong disclosure and recusal requirement;
- Replace the current vague gift rule with one providing clear guidance – for example, prohibiting the solicitation of any gifts, or the receipt of gifts above a specified minimal amount, from persons making applications to the municipality and persons seeking or under contract with the municipality;
- Include a clear statement of law prohibiting the use of municipal resources for personal or private purposes;
- Place certain restrictions on private citizens, including a prohibition on causing a municipal officer or employee to violate the conflicts of interest code, applicant disclosure, and a prohibition on a private firm representing anyone for compensation before the municipal agency of an official who is also an employee or owner of the firm; and
- Require a minimum level of financial disclosure in those municipalities for which it is mandated.

Each of these proposals is discussed below. Recommendations for the administrative provisions of a new Article 18 are discussed in Recommendations 2 and 3.

Current Sections 800–804 and Use of Office for Private Gain.

Sections 800–804 of Article 18 are unclear, complex, and, therefore, difficult to apply. But more important, they are an ill-conceived statutory scheme. Under the provisions, if any official has authority to exercise power with respect to a contract with his or her municipality and would receive a private pecuniary benefit from the contract, the contract is void and cannot be ratified; and the official has committed a misdemeanor. To make matters worse, the powers encompassed within the prohibition are exceedingly broad. They include the negotiation, preparation, authorization, or approval of a contract or approval of payment under the contract; the auditing of bills or claims under the contract; and the appointment of an officer or employee who has any of these powers. Recusal is not a permitted remedy under the statutory scheme. Further, any official is deemed to have an interest in a contract of his or her spouse, minor children, dependents (except an employment contract), outside employer or business, and any corporation in which the official owns or controls 5% or more of the stock.

The interest in contract provisions create hardships for the numerous small municipalities in the state. Many are desperately in need of people to serve in government and, therefore, should not be prevented from appointing or electing owners and employees of businesses in the community. Although goods and services from these businesses may be required by the municipality, recusal is a perfectly adequate remedy. Remarkably, competitive bidding is not listed as an exception to the statutory prohibition. The exception of $750 worth of goods or services during the entire fiscal year leaves the majority of purchases and procurement of services subject to the statutory prohibition.

Conversely, these provisions leave a void; they do not cover the many applications made to municipalities, such as those made under land use planning requirements. The prohibited contract provisions of Article 18 should be replaced with a strong and comprehensive recusal requirement covering not just contracts but also applications and any other authorizations and actions sought from an officer or employee of the municipality who exercises power with respect to the contract, application, authorization, or action. Article 18 should be revised to also include a comprehensive and sensible code of ethics.

Gifts.

Article 18 currently provides with respect to solicitation and receipt of gifts by municipal officials that

> [n]o municipal officer or employee shall: a. directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part[.]

This provides virtually no guidance for municipal officials, leading one upstate county court to hold the provision unconstitutionally vague (*People v. Moore*, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975)), even though other courts have applied the "reasonably be inferred" language in an analogous provision for state officials (Public Officers Law § 73(5)(a)). Most municipal officials have limited access to legal advice, so they should not be made to guess at what "reasonably be inferred" means.

A new gifts provision should set forth a bright-line rule that prohibits solicitation of any gifts, or receipt of gifts in excess of a specified amount, from persons doing business with the municipality. That would offer officials far greater guidance, reassurance, and comfort. The statute should also specify basic exceptions to the gifts prohibition, such as gifts having no substantial resale value given in recognition of accomplishments or gifts accepted as gifts to the municipality or gifts from relatives. Finally, the gifts provision should reflect, to the extent possible, the restrictions on gifts to public officials by lobbyists so that the restrictions on the giver and the receiver mirror each other.

Use of Municipal Resources for Personal or Private Purposes.

Article 18 of the General Municipal Law is silent regarding the use of municipal resources for personal or private purposes. Municipal officers and employees should almost never use municipal

resources for non-governmental purposes. At present, legal guidance is only available in Article VIII, § 1 of the New York State Constitution, which reads, in part, "[n]o county, city, town, village or school district shall give or loan any money or property to or in aid of any individual, or private corporation or association, or private undertaking . . . ." This provision, which is less than clear to the layperson, should be clarified, expanded, and included in Article 18 of the General Municipal Law. This will provide the guidance needed by municipal officers and employees with respect to use of municipal resources for other than official purposes.

Accordingly, Article 18 of the General Municipal Law should be revised to set forth a clear statement prohibiting the misuse of municipal resources by municipal officers and employees for personal or private purposes, except in instances where such use is available to the public generally and on the same terms as a member of the public or as provided by written municipal policy for the use by the municipal officer or employee in the conduct of official duties or in *de minimis* amounts at virtually no cost to the municipality, such as calling one's babysitter, doctor, or spouse on the office telephone.

Ethics Provisions for Those Interacting With Municipal Government.

Under current state law, absent outright bribery, the occasional dishonest private citizen or company that induces a municipal official to violate ethics laws runs no risk of penalty. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. Quite possibly, the official will lose his or her job as a result; but, absent outright bribery, the bank will lose nothing. Yet private citizens, vendors, developers, and providers must take some responsibility for municipal officials complying with ethics laws. The failure of current Article 18 to penalize private individuals and companies that induce a municipal official to violate ethics laws is unacceptable.

Article 18 should therefore be amended to prohibit anyone, including a private person or entity, from inducing an official to violate the Article; to provide for debarment of any person or entity that violates that prohibition; to expand General Municipal Law § 809 to require all applicants (not just land use applicants) before the municipality to disclose the interest of any municipal official in the applicant or application, to the extent known to the applicant; and to restrict representative appearances by the

private employer or business of an official before that official's agency. Thus, for example, the law partner of a zoning board member should not be permitted to appear before the ZBA on behalf of a private client, although the partner could appear on behalf of the law firm itself.

Annual Financial Disclosure Requirements by Municipal Officers and Employees.

One of the hallmarks of an effective ethics law is the transparency afforded by sensible financial disclosure requirements. But the financial disclosure requirements set forth in sections 810–813 of the General Municipal Law contain so many defects that they need to be entirely rewritten. First, section 811, which applies to almost all municipalities mandated to have financial disclosure, fails to specify exactly who must file and what the minimum scope of the financial disclosure form is for those municipalities. Second, the form in section 812 and even the Temporary State Commission's minimal form under section 811 are unduly burdensome and unnecessarily intrusive for most municipalities, discouraging good persons from serving in municipal government. Third, a financial disclosure form should serve as a check to municipal officers or employees on potential or actual conflicts of interest, alerting them and the public to where the official's potential conflicts lie, and thus helping to avoid unethical conduct. Neither of those forms bears any relation to any code of ethics. Fourth, both forms require disclosure of categories of amounts, which are irrelevant if the form is tied to a code of ethics. For example, if a code of ethics permits an official to act on a matter where the action benefits a corporation in which the official owns less than 5% or $10,000 worth of debt or equity, then such minimal ownership should not be disclosed on the financial disclosure form because it cannot constitute a conflict of interest. Fifth, public disclosure of the names or even the existence of family members raises security concerns for some officials and, again, is irrelevant; only the interest is relevant, not who holds it. For example, if an official's wife owns a hardware store, the official should publicly disclose the name of the hardware store, but disclosure of whether that store is owned by the official or a family member or his or her business partner is irrelevant to any code of ethics and thus should not be publicly disclosed.

The financial disclosure form required by Article 18 should be amended to incorporate three guiding principles: The form

- must be tied directly to the code of ethics in a new Article 18;
- must include only those questions that may reveal a potential or significant violation of the ethics code; and
- must be short and simple.

The Task Force recommends that mandatory financial disclosure continue to apply only to counties, cities, towns, and villages with a population of 50,000 or more. Lowering that threshold runs a significant risk of driving qualified persons, particularly volunteers and those who serve for only nominal compensation, out of local government.

Recommendation 2.

Independent Boards of Ethics to Effectively Interpret, Administer, and Enforce Article 18.

Article 18 should mandate that every county, city, town, village, and school district create an independent ethics board to interpret and administer Article 18 and any local code of ethics in that municipality. Ethics training should be mandatory for the members of a municipal ethics board, which, in turn, must be required to "get the message out" by providing training and education on those laws to all officials of the municipality. In addition, Article 18 must mandate that ethics boards provide prompt advice on whether proposed interests or conduct are permissible under Article 18 and any local ethics code; in that regard, the law should clearly specify that such advice may be requested only by the affected person or by his or her superior. The law should also specify the duties of the local ethics board with respect to financial disclosure. With respect to enforcement, Article 18 should provide for investigation, enforcement, and imposition of penalties by the local ethics board in every county

and in every city, town, and village with a population of 10,000 or more for violations of Article 18 and the local ethics code, if any. Cities, towns, and villages with a population under 10,000 should be empowered, but not mandated, to authorize such duties and responsibilities for their local ethics board.

Independent Ethics Boards.

Although Article 18 currently mandates that counties, cities, towns, villages, school districts, and fire districts adopt codes of ethics – and that counties, cities, towns, and villages having a population of 50,000 or more implement a financial disclosure program – it does not require that these, or any other, municipalities establish an ethics board to interpret and administer the Article or local ethics codes. Section 808(2) contemplates that county ethics boards, if they exist, will render advisory opinions to officials of municipalities within the county under Article 18 and the municipality's local ethics code, unless the municipality has its own local ethics board. But few county ethics boards will in fact do so. Indeed, doing so would require a county ethics board to interpret dozens of local ethics codes. Westchester County, for example, has 48 cities, towns, and villages, more than 50 fire districts, and almost 50 local school districts, all of which must have local codes of ethics but only a few of which have local ethics boards, thus requiring the Westchester County Ethics Board to interpret almost 150 local ethics codes, an impossible task. At the same time, the principles of home rule dictate that municipal ethics not be subject to control by the state.

Article 18 should be revised to require every county, city, town, village, and school district to establish a board of ethics. Other municipalities could, but need not, establish a local ethics board. Any municipality could also enact a local ethics code consistent with the code of ethics in Article 18, but only if the municipality established an ethics board to administer that local code. In lieu of creating its own ethics board, any municipality, including any political subdivision, could create a joint ethics board with one or more other municipalities or contract out all or any portion of the ethics board's authority to another municipality's ethics board. For example, a village that feels comfortable with its ethics board

issuing advice on Article 18 but not with the ethics board enforcing violations of the law could contract enforcement of Article 18 to the town or county ethics board.

The independence of ethics boards, both in reality and perception, is critical. An ethics board that lacks independence will lack credibility and perhaps fairness, if not in fact then in appearance. There is an understandable tendency for a municipal administration to exercise direct or indirect influence over its appointed boards and commissions. For example, a municipal attorney or other official appointed to a board may feel that he or she is in the best position to call meetings, set the agenda, or guide the board in its deliberations. But, even with the best of intentions, an ethics board dominated by administration insiders cannot exercise independent judgment and oversight.

To ensure both the reality and the perception that the board can and does operate independently, members should be appointed for fixed, staggered terms and removable only for cause and only after a due process hearing. The law should require that vacancies be filled and holdover members replaced or reappointed promptly. The membership should be bipartisan or multi-partisan. Consideration should be given to requiring that ethics board members be appointed upon nomination by a nominating committee. Officers and employees of the municipality should be prohibited from serving on the ethics board, lest the apparent presence of a "mole" on the ethics board discourage municipal officers and employees from seeking advice or filing a complaint, for fear that their action will be reported to their superior, who might retaliate. In addition, ethics board members should be prohibited from holding any political party office, running for any elective office, participating in any election campaign, appearing on behalf of any person before any agency of the municipality, lobbying any agency of the municipality, or entering into a contract with the municipality.

Ethics board members should select their own chair. Meetings should be called by the chair or by a majority of the members. Since few municipalities will have sufficient resources to provide a staff for the ethics board, the board will need clerical assistance from municipal staff, who must, by law, be prohibited from revealing ethics board business to anyone outside the ethics board. Similarly, few municipalities will have sufficient resources to provide separate legal counsel for the ethics board. But, having the municipal attorney advise the ethics board raises, again, the specter of a "mole" on the

board. Article 18 should therefore require that municipalities provide separate counsel on a case-by-case basis upon request of the ethics board and perhaps should also require that the municipality provide a budget sufficient for the ethics board to meet its mandate.

Finally, Article 18 should empower and require local ethics boards to issue advisory opinions, provide training in Article 18 and the local ethics code, if any, administer financial disclosure, if any, and otherwise administer Article 18 and any local code of ethics in that municipality. Ethics boards in larger political subdivisions should also be required to enforce Article 18 and the local ethics code, if any. Each of these duties is discussed below.

Mandatory Ethics Training and Education for Ethics Board Members and Other Officers and Employees of the Municipality.

Recent amendments to the Town Law and Village Law make training mandatory for the members of zoning boards (*see* Town Law § 267(7-a), Village Law § 7-712(7-a)) and planning boards (*see* Town Law § 271(7-a), Village Law § 7-718(7-a)). Generally, these statutes require four hours of training per year in programs approved by the governing authority. Failure to complete the required training precludes reappointment, although official board actions are not rendered invalid by reason of a member's failure to complete the required training. Article 18 should contain similar training requirements for members of all local ethics boards. Such training could be provided by the municipal associations and the State Bar Association and would include training not only on Article 18 but also on the adoption and implementation of procedures and rules for running a local ethics board.

A municipal ethics program is designed to help officers and employees avoid inadvertent ethical violations, and it is essential that the board actively promote awareness among such officials of their ethical obligations and encourage them to seek ethics advice when questions arise. However, 45 years of experience has shown that many local ethics boards rarely or never meet and are completely ignored by their respective municipalities. Municipal ethics boards themselves must be required to "get the message out."

Ethics codes tend to be drafted by lawyers, written in legalese, and unintelligible to the common reader. Yet the municipal work force is composed mostly of non-lawyers, all of whom must adhere to the code of ethics and few of whom have ready access to legal counsel to give them advice on

what is and is not permitted by the applicable ethics laws. Therefore, every municipality should be required to prepare and distribute a plain language guide to government ethics – no more than two or three pages in length – to assist municipal officers and employees in avoiding actual or potential conflicts of interest, to advise them of the availability of free, confidential ethics advice from the board of ethics, and to warn them of the penalties for noncompliance.

Ethics training is an important means of getting the message out and should be required by Article 18. Training may be live, by video, or on-line. Consideration should be given to mandating that the Department of State, which already conducts training sessions on Article 18, create such training materials, including a video and interactive on-line training program, on the requirements of Article 18.

Ethics Advice for Municipal Officials and Specification of Who May Request Such Advice.

Provision of ethics advice constitutes one of the most important functions of an ethics board because such advice heads off ethics violations. Article 18 must require that every ethics board provide advice on whether proposed conduct by a public official, or other person subject to Article 18 or the local ethics law, is or is not permissible. Further, ethics advice is intended to provide a shield against unwarranted criticism of honest officers and employees, not a sword for use by political or personal foes. For this reason, a local municipal ethics board should be authorized to give advice only to officers and employees, or other persons subject to Article 18 or the local ethics law, inquiring as to their own proposed conduct or the proposed conduct of a subordinate. An ethics board should issue written advice on the ethics law only in response to written requests for advice and only in actual "cases and controversies."

Moreover, advice should be given only as to proposed future conduct not as to past conduct, which must be handled as an enforcement matter. Advisory opinions seek to provide advice and guidance to municipal officers and employees who are uncertain about the application of the ethics law to their situation; such opinions should not be used to condone past conduct. In addition, enforcement requires investigation to determine the facts, while advice is based on facts stated by the requester. Few ethics boards have the resources to investigate advice requests – that is, to determine if the facts stated are complete and accurate.

Article 18 should clearly specify all of these requirements.

Administration of Financial Disclosure.

Article 18 currently permits the governing body of a municipality to regulate financial disclosure in those municipalities in which such disclosure is either mandated by state law or enacted by local law. (*See* 1987 N.Y. Laws ch. 813, ch. 26(c).) To prevent financial disclosure from becoming a political issue, Article 18 should clearly specify that only the local board of ethics may regulate such disclosure. The law should also clearly specify the powers and duties of such local ethics boards in that regard: to distribute and collect the financial disclosure forms; to review each one for completeness and possible conflicts of interest; and to enforce and penalize (with a specified maximum civil penalty) any official who fails to file a required financial disclosure report, files the report late, fails to report required information, or misstates required information. Standards should be set forth for exactly which information on the report is available to the public and which is not, and for granting filers' requests that certain information on their report not be disclosed to the public.

Depending upon the number of officers and employees required to file financial disclosure statements, the board of ethics may not have the resources to adequately discharge its responsibility to review the reports without the assistance of staff assigned by the municipality to handle the daily administrative and clerical duties that such a program entails. As discussed above, Article 18 should provide for such assistance, with the requisite confidentiality restrictions.

Enforcement of the Ethics Law.

Article 18 should provide for investigation, prosecution, and imposition of penalties by the local ethics board in every county and in every city, town, and village with a population of 10,000 or more for violations of Article 18 and any local ethics code. Cities, towns, and villages with a population under 10,000 should be empowered to authorize such duties and responsibilities for their local ethics board.

Enforcement offers the single most potent educational tool for ethics training. Currently, Article 18 contains no civil enforcement provisions, except in the financial disclosure context. That defect must be remedied. Particular enforcement practices, to the extent they exist at all, vary widely from one

municipality to another, based on the ethics board's mandate as set forth in the local code of ethics. At the same time, enforcement of ethics laws by local ethics boards presents a significant challenge in small municipalities, which often lack the resources required for effective enforcement; and many cities, towns, and villages in New York State are small. For example, more than one-third of the 932 towns in the state have a population of less than 2,000.

To balance these competing realities, Article 18 should mandate and empower local ethics boards in all but the smallest local governments to enforce Article 18 and the local ethics code, if any. Small cities, towns, and villages should be authorized to give their ethics boards such enforcement duties and responsibilities if the municipal board determines that such enforcement jurisdiction is necessary in that municipality and that the ethics board can handle it. Although this would result in there being no civil ethics enforcement in most small municipalities, in fact such municipalities, because of their size, experience relatively few ethics scandals. If one arises, then the municipality's governing body can, by local law, simply grant enforcement powers to the already existing ethics board for future cases.

In municipalities where the ethics board does have enforcement power, either as required by Article 18 or as authorized by the local governing body, the law should specify the due process mechanism for conducting investigations of potential violations, for enforcement proceedings those violations before the ethics board, and for penalizing such violations. The types and limits of the penalties must also be clearly stated, and local ethics boards should be required to adopt due process rules of procedure for investigating complaints and conducting enforcement actions – before a complaint is received or an investigation is required.

Unlike a request for ethics advice, an ethics complaint can normally be filed by anyone – even anonymously – or the board may initiate an investigation on its own. The law must grant ethics boards investigative authority and subpoena power. As discussed above, a municipality that does not wish to give its own local ethics board such power may contract with another ethics board, such as the county ethics board, to enforce Article 18 in that municipality, although absent a local ethics board with full advisory and enforcement power, a municipality should not be permitted to enact a local ethics code.

The law should also provide for referral to the appropriate law enforcement agency if the facts alleged by the complainant or uncovered by the ethics board raise the suspicion that a crime may have been committed. To avoid interfering with a law enforcement investigation or criminal prosecution, ethics boards could be required to refrain from acting on a matter under active investigation or prosecution by a law enforcement agency.

Recommendation 3. Confidentiality.

> **Article 18 should provide for the confidentiality of ethics advice and enforcement by the local ethics boards, which should be exempt from the Open Meetings Law and FOIL except for specified types of documents.**

Confidentiality advances the purposes of the municipal ethics program because it encourages officers and employees to seek advice before acting. Officers and employees are more likely to seek ethics advice when their inquiries are confidential, and municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of the inquiring parties. Public advisory opinions must omit the name of the inquiring officer or employee and any other facts that would identify that party. Confidentiality encourages persons to come forward with complaints about possible unethical conduct and protects public officials from unjustified accusations, and complaints. All enforcement documents and proceedings should be confidential unless and until the ethics board has made a final finding of a violation of law or until the official has admitted to such a violation in a settlement.

Without the knowledge that their communications with the ethics board are absolutely confidential, officials will hesitate to seek advice or file complaints. For this reason, except for specified documents, the records of the Commission on Public Integrity, like the records of the former Temporary State Commission on Local Government Ethics, are exempt from FOIL; and the meetings of the Commission on Public Integrity, like the meetings of the Temporary State Commission, are exempt from the Open Meetings Law (Executive Law § 94(17); General Municipal Law § 813(18)). As the argument for confidentiality likewise holds, local ethics boards, their documents and meetings

should be exempt from disclosure, except as expressly provided in Article 18 (for example, waivers of any provision of the ethics law, ethics board orders or settlements finding a violation, and most of the information contained in annual financial disclosure reports).

Recommendation 4. Internal investigations.

As local governments are increasingly facing the need to conduct internal investigations of agency/departmental/ employee actions, the state should be required to provide guidance regarding proper process and procedure in such matters.

Currently, aside from the guidance provided by municipal ethics boards, which, where they exist at all, have varying levels of authority and experience, no clear guidance exists for municipalities that need to conduct an internal investigation when there are serious allegations of improprieties or illegalities. While a few large cities, such as New York City, Yonkers, and Rochester, have an Inspector General or a Department of Investigation, most municipalities do not.

State law should mandate that the appropriate state agency, such as the Office of the Attorney General, provide model regulations and guidance to municipalities in the following areas by identifying:

- what actions/allegations of actions by employees (or elected officials) should require that an outside agency be brought in to investigate;
- what additional steps need to be taken if an elected official or agency head is the person being investigated;
- when it is appropriate to use the municipality's own police force and when the sheriff or state police should be brought in for such an investigation; and
- what level of allegation should require notification to the District Attorney and/or the Attorney General and/or the FBI.

In addition, state law should require that the appropriate state agency, such as the Office of the Attorney General, provide municipalities with procedural models and training as to how to properly

conduct an internal investigation. Issues to be addressed, in addition to the general procedures discussed above, include:

- what is confidential information and what is public information relative to the media and FOIL;
- what is the proper role of the municipal attorney; and
- what are the municipal attorney's ethical constraints that may require the hiring of outside counsel.

Recommendation 5. Lobbying Law for Local Government Officials.

> **Clarity and training need to be provided to local government officials as to the effects of state lobbying laws on municipal officials in their official capacity as lobbyists, in their capacity as those being lobbied, and as attendees/speakers at functions.**

In regard to the requirements of state lobbying laws, many municipal officials, particularly those who serve in a part-time capacity, have little or no clear guidance on permissible and impermissible conduct relative to both their own official actions and the actions of others when approaching the officials in their official capacity. Attempts to obtain opinions from state agencies on such matters have not been a successful at addressing such concerns; and even if guidance is provided, the answer is simply provided to one official, when what is needed is to educate all to whom it applies.

There are three main areas where there needs to be clearer guidance from the Commission on Public Integrity, the state agency currently charged with enforcing lobbying regulation at the municipal level. The CPI should provide clear advisory opinions on these and other topics:

- Municipal officials and their employees and contractors have many interactions in relation to other local and state agencies/legislators which may or may not be restricted under currently existing lobbying laws. Clearer guidance needs to be given as to which individuals must register, what those who are and are not registered may do, and what constitutes improper conduct relative to gifts, meals, entertainment, and the like.
- Likewise, those municipal officials who cannot be lobbied themselves need a clearer understanding as to what contact individuals, including potential contractors to the

municipality, may have and may not have with them. Again, knowledge of what rules apply to municipal staff members is equally important. Often municipal officials will be frustrated with an apparent inability to have any discussions with someone who could potentially do business with the municipality. In other words, what constitutes merely a general discussion of services available from an independent contractor and what constitutes lobbying to win a specific contract?

- The provisions that prevent reimbursement for state or municipal officials (in municipalities over 50,000) have seriously impaired the ability to obtain speakers and presenters without risking an ethical violation. This restriction needs to be revisited, and, to the extent it is retained, clear rules need to be spelled out as to where exactly the line is drawn.

APPENDIX A

Guiding Principles of Government Ethics

To promote integrity in government and to best adhere to notions of public trust, the New York State Bar Association believes that the following principles should guide the development and implementation of ethics laws at the state and local levels of government.

Independence – Those responsible for the implementation, investigation and enforcement of ethics laws and regulations must be independent from those who create the body, make appointments thereto, and are responsible for funding the entity. In addition, any such entity must be independent from those over which it has jurisdiction.

Transparency – Ethics laws must provide for transparency in government including disclosure of business and professional interests. In addition, with proper redaction, opinions, guidance and policies rendered by any ethics oversight entity should be immediately available to the public.

Due Process – Ethics laws should provide clear procedural rules for administration, investigation and enforcement of the substantive provisions of the law. The procedures should be fair and should safeguard constitutional notions of due process.

Full Participation of Lawyers in Government – Lawyers, who are bound by the Rules of Professional Conduct, should be able to fully participate in government service. State statutes and regulations should respect and protect those exceptional circumstances when a lawyer may not make full disclosure because to do so would betray a client confidence. In addition, disclosure rules should not be unduly burdensome, so that compliance would discourage attorneys from participating in government.

APPENDIX B

NEW YORK STATE BAR ASSOCIATION
TASK FORCE ON GOVERNMENT ETHICS

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APPENDIX C

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August 20, 2010

Karl J. Sleight, Esq.
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677 Broadway, Suite 1101
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Dear Mr. Sleight:

I write in response to your letter dated July 23, 2010 seeking comments for the New York State Bar Association's Task Force on Government Ethics. As you know, I have great interest in the issue of ethics reform in New York and, in fact, am contemplating proposing legislation relevant to my office. I thank you for contacting my office in this regard, and, should I seek to propose legislation, would welcome the comments and hopefully support of your Task Force.

Very truly yours,

Joseph Fisch
State Inspector General

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August 30, 2010

VIA ELECTRONIC MAIL
and FIRST CLASS MAIL

Karl J. Sleight, Esq.
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Dear Mr. Sleight:

On behalf of the Commission on Public Integrity ("Commission"), I thank you and the New York State Bar Association's Task Force on Government Ethics for the opportunity to comment on the important work of this group, specifically the subcommittee on Due Process and Enforcement.

I continue to adhere to the views I expressed in the public statement I issued on June 11, 2009, a month after becoming Chairman. The Commission has performed admirably under adverse circumstances. There should be an open dialogue to achieve meaningful ethics reform.

Inadequate Financial Resources

The most critical problem the Commission currently faces is money. Simply put, the fiscal resources allocated to the Commission are not sufficient given its broad jurisdiction. Despite the State's overall fiscal problem, the imbalance between the Commission's funding and its responsibilities could and should be ameliorated by charging a percentage of the $200 million is annually spent on lobbying. If such a fee were imposed to fund the Commission's lobbying-related activities, the Commission's current budget allocation would be adequate to fund the Commission's ethics-related activities

Unwieldy Size

The professionalism and dedication of the current members have enabled the Commission to function well despite its size. I continue to believe, however, that a thirteen-member Commission is unwieldy.

Full-Time Paid Commissioners

While the State continues to benefit from the willingness of highly skilled and dedicated citizens to serve as volunteer members of the Commission, it is reasonable to consider whether the State might be better served by having paid Commissioners.

Erroneous Perception of Gubernatorial Control

The process for selecting Commission members set forth in Executive Law §94(2) gives the appearance of undue gubernatorial control, since the Governor appoints seven of the Commission's thirteen members, including the Chairman. In fact, no single appointing authority has appointed a majority of the Commission's current members.[1] Even if all the current vacancies were to be filled immediately, that would still be the case. Moreover, in my experience, the party affiliations or the appointing authorities of Commission members has played no role in the Commission's decisions. Indeed, the decisions that have gained news media and public attention have been unanimous. To eliminate the inaccurate perception that the Commission is politically controlled by the Governor, a different process of selecting and appointing Commission members should be considered.

Open Dialogue Needed To Achieve Meaningful Ethics Reform

With respect to addressing these and other concerns, as I also said in my June 11, 2009 public statement, State officers and employees, the regulated community, good government groups, ethics and government scholars and the general public should conduct an open dialogue concerning ethics reform, free of backroom deals and political horse-trading. Thus, I would urge the subcommittee to develop a variety of concepts for discussion and debate.

With respect to agency structure, such alternatives could include appointment of commissioners by a neutral, non-partisan body, salaried appointments, and gubernatorial appointments requiring Senate confirmation.

Regarding jurisdiction, while many have supported a single agency with authority to enforce ethics laws for both the executive and legislative branches as a means of ensuring consistency in the interpretation and application of the law, that is by no means the only model that should be considered. Many states centralize enforcement of a variety of government oversight functions

[1] Because of resignations and deaths, there are four vacancies on the Commission and, thus, only nine current members.

including ethics, lobbying, elections and open meeting laws. Especially given the State's current fiscal climate, such consolidation may be ripe for consideration.

Finally, you have indicated that your subcommittee will also consider the confidentiality of ethics investigations. As you well know, current law limits the Commission's ability to discuss whether an investigation has commenced, the reasons an investigation has been closed or the reasons an investigation was not opened. While there is a rational basis for protecting an individual from spurious allegations, or protecting a whistleblower, because of these restrictions, the public may be left with an erroneous perception that the Commission has done nothing or has acted inappropriately or failed to act for an inappropriate reason in a particular matter. Such misperceptions undermine public confidence in an enforcement agency such as the Commission. Thus, I would urge the subcommittee to consider a proposal that would, at a minimum, allow the Commission to publically discuss why it did not either open an inquiry or decided not to charge an individual after undertaking an inquiry.

I look forward to the Task Force's report and thank you once again for inviting my comments. Please feel free to contact me or Barry Ginsberg, the Commission's Executive Director, if you believe either of us can be of further assistance to this critically important endeavor.

Very truly yours,

Michael G. Cherkasky /BF

Michael G. Cherkasky
Chairman

DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

October 15, 2010

Karl J. Sleight, Esq.
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RE: TASK FORCE ON GOVERNMENT ETHICS

Dear Mr. Sleight:

Thank you for the opportunity to weigh in on behalf of the District Attorneys Association of the State of New York ("DAASNY") regarding the work of the New York State Bar Association's Task Force on Government Ethics. By way of background, DAASNY was founded more than 100 years ago to bring District Attorneys in New York State and their legal staffs together to discuss matters of mutual interest, and where appropriate to promote public policies that aim to enhance the effective enforcement of the law.

You suggested that DAASNY might be helpful if it weighed in on the issue of state-local interagency effectiveness in dealing with ethics and corruption matters with a criminal element, with a particular emphasis on our view of the structure of the Office of the New York State Inspector General ("IG's office").[1] Because DAASNY is committed to rooting out corruption at all levels of government, we believe that a few observations about the IG's office could be relevant to your task.

As you know, the IG's office was originally created by Executive Order by Governor Mario Cuomo, and later expanded using the same mechanism by Governor George Pataki. In January 2006, sections 51 through 55 (Article 4-A) of the Executive Law were enacted, making the IG's office now a creature of statute. The IG's office is responsible for investigating and rooting out "corruption, fraud, criminal activity, conflicts of interest or abuse" in covered agencies (essentially the entire executive branch and some public authorities and public benefit corporations). It has no jurisdiction over the legislative or judicial branches.

Independence of the IG's Office

The structure of the IG statute has created an issue that has arisen at various times in various administrations, that of a perceived lack of independence between the IG and the leadership of the Executive Branch that he or she is charged with investigating. Whether this perception is accurate or not, it could have the effect

[1] DAASNY takes no position on the work or the independence of the current Inspector General or any of his predecessors, and nothing in this letter should be read to imply otherwise. Rather, this letter is only concerned with ways that the structure of the office might be improved.

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of impairing the effectiveness of the IG's office, and we believe that three simple changes to the Executive Law could improve the perception of independence, and thereby increase the effectiveness of the IG's office.

First, the Inspector General should report directly to the Governor. Currently, he reports to the Secretary to the Governor, who is charged with supervisor of the entire executive chamber. This is problematic, and because of this structure, in recent years IGs have recused themselves from certain investigations involving the executive chamber. To avoid this, the IG should, much like the New York State Medicaid Inspector General, report directly to the Governor.

Second, the Inspector General should serve for a five-year term. Under current law, the IG's term of office is treated very much like an agency commissioner's, in that he essentially serves at the pleasure of the Governor. I believe that the Governor's power to terminate without cause can have a powerful chilling effect on the willingness of the IG's office to take on tough investigations that could at a minimum be embarrassing to the administration. A better system would give IGs a term of five years – much like the current term of the members of the Commission on Public Integrity – during which they could only be removed for cause. Such a system would greatly increase their independence and enhance New Yorkers' confidence in the policing of the Executive Branch.

Finally, we believe that the IG should be nominated by the Governor and confirmed by the Senate, much like other agency heads, judges, and the Medicaid Inspector General. Giving the Senate a role would serve as a democratic check against the Governor's choice by giving a voice to the people's elected representatives in determining who will be responsible for rooting out waste, fraud and abuse.

Reports Issued by the IG's Office

We also believe that there is some room for reform in the process that leads to the IG's office issuing reports. Although the IG has the responsibility under Executive Law 53(4) to "prepare and release to the public written reports of such investigations, as appropriate," the law is silent as to what is "appropriate" and what form such reports should take. This is relevant to criminal matters in two ways.

First, the IG's reports often state "findings" and "conclusions" that the IG makes at the end of his or her investigations, often concerning named individuals. This may be an appropriate way to report on the outcome of an investigation, but in the absence of an adversary proceeding, it would be useful to have additional safeguards built into the law. In that way, where witnesses or subjects of investigations disagree with the IG, they would have a formal way to register such disagreement and even, perhaps, to have it resolved by a neutral party.

A useful comparison may be made to the system of grand jury reports in section 190.85 of the Criminal Procedure Law, which allows such reports to be issued "concerning misconduct, nonfeasance or neglect in public office by a public servant."

There, before a grand jury report may be made public, a court must find that the report is supported by a preponderance of the evidence. Even then, anyone named in the report has a right to be heard by the judge before the report is released.

To be sure, grand jury reports are creatures of the criminal justice system, where such procedural safeguards are a more natural fit. But the findings in IG reports may damage reputations in the same way, and as such should be deserving of some procedural protections. At the current time, only the IG's unreviewable discretion determines what reports issue and what their content is.

Second, in criminal matters that have not yet been adjudicated, it is preferable for such reports to be deferred until the conclusion of a criminal matter. Currently, nothing requires the IG to make a confidential referral to a District Attorney before making a public one, although, to be sure, the IG's office often does make confidential referrals. But because criminal investigations and prosecutions often take unpredictable turns, it is important that the framework of the IG's office require that the District Attorney's office be included once criminality becomes apparent. We do not quarrel with the IG's obligation to report "where appropriate," but believe that it would be prudent in criminal matters for such reports to be made with significant input from the appropriate District Attorney.

Inspector General for the Legislature

In an ideal world, the IG would not only have jurisdiction over the Executive Branch, but also over the Legislative Branch of New York government, where currently there is no inspector general function. This circumstance has led, by default, to policing of ethics matters that turn criminal by outside prosecutorial agencies, which is never ideal in the first instance. Rather, we have found that a strong inspector general function in partnership with prosecutors only where appropriate is the best way to be vigilant about waste, fraud, and abuse.

I recognize that a proposal for a unified Inspector General would run into both political realities and separation of powers concerns that should not be set aside lightly. For that reason, I suggest that the Legislature establish a Legislative Inspector General, with jurisdiction over the Senate and the Assembly, their staffs, and those doing business with the Legislative branch. Doing so would go a long way to enhancing New Yorkers' faith in their government.

Thank you for the opportunity to comment on the Task Force's work. If you have any questions, please do not hesitate to contact me.

Sincerely,

Derek P. Champagne
President

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COMMISSION ON PUBLIC INTEGRITY

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January 25, 2011

Via Electronic Mail and
First Class Mail

Patricia E. Salkin, Esq.
Associate Dean and
Director of Government Law Center
Albany Law School
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Albany, NY 12208-3494

Re: Draft Report of New York State Bar Association Task Force on Government Ethics

Dear Dean Salkin:

The Commission on Public Integrity ("Commission") appreciates and thanks you for the opportunity to review and comment upon the draft Report of the New York State Bar Association ("Association") Task Force on Government Ethics ("report"), which the Association's House of Delegates will consider at its meeting on January 28, 2011. The Commission also thanks the members of the Task Force and the Association for their important contribution to the ongoing conversation about how to improve the ethical climate in our State government. The Commission would welcome the opportunity to discuss these and any other related matters with you or any other member of the Task Force or the Association.[1]

Discussion

1. **Restructure Commission on Public Integrity**: The Task Force recognizes that the Commission has demonstrated that it is well-suited to provide effective, independent oversight of the legislature as well as the executive branch and believes that having one body administer and enforce the ethics and lobbying laws for both branches would be effective and efficient. The Commission could not continue to be effective, however, if its jurisdiction were expanded without also providing it with increased resources. In this regard, we note

[1] As noted in the report, the Commission's Chair submitted a letter to the Task Force, which is attached to the report. In providing the Commission's comments regarding the report, we have tried to avoid repeating points the Chair's letter to the Task Force addressed or those that are, at least, implicit in the Commission's 2011 legislative proposals, which are available on the Commission's website.

that, although a plan to increase Commission staff by 50% was approved in 2007, because of the State's fiscal constraints, in fact, the Commission's budget allocation and staff have decreased by 25% since the Commission was created.

2. **Separating Commission Staff Into Separate Bureaus**: The report suggests that Commission staff should be separated into separate bureaus, with enforcement staff segregated from staff who perform the Commission's other activities, with all staff reporting to the Executive Director. Such segregation of the Commission staff into separate bureaus is not feasible given the Commission's current size and composition and, in any event, is unnecessary. The Commission's current practice, reflected in its regulations (*e.g.*, 19 NYCRR Part 941.11), is to maintain separation between those involved in a particular enforcement proceeding from other Commission staff. Also, the Commission's general policy and practice is not to initiate enforcement proceedings against a person regarding a matter with respect to which the person has sought the Commission's guidance in good faith if, in making the request, the person has been honest and candid.

3. **Stay Commission Enforcement For Pending Criminal Actions**: In general, government entities, including the Commission, coordinate with one another to avoid unnecessary duplication. Overlapping jurisdiction generally has not caused undue problems or resulted in undue burdens for any of the parties in interest, including, but not limited to, the subjects or targets of Commission investigations. Decisions on how best to coordinate should continue to be made by the affected agencies on a case-by-case basis in the public interest.

4. **Increased Penalties**: New York's currently authorized financial penalties for those found to have knowingly and intentionally violated the Public Officers Law are among the highest in the country. Harsher penalties, which the report recommends, may result in greater compliance.

5. **Penalties for Unlawful Disclosure of Confidential Information**: The report recommends the establishment of penalties for unlawfully disclosing confidential information. Current law authorizes such penalties. Public Officers Law §74(3)(c) prohibits a State officer or employee from disclosing "confidential information acquired by him in the course of his official duties [and from] using such information to further his personal interests." A State officer or employee found to have knowingly and intentionally violated this provision "may be fined, suspended or removed from office or employment . . . ." Public Officers Law §74(4). In addition, such a State officer or employee "shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation." *Id.* With respect to those under its jurisdiction, the Commission is authorized to impose these penalties or refer a violation to the person's appointing authority for disciplinary action. Executive Law §94(13).

   The effectiveness of section 74(3)(c) is undermined by its lack of a definition of the word "confidential" for these purposes. In addition, the statute does not, on its face, allow for circumstances in which disclosure of confidential information is appropriate, for example, in order to make a referral to another law enforcement agency or to conduct an investigative interview effectively. Finally, after he or she leaves State service, a former State officer or employee should be required to maintain the confidentiality of information acquired in the

course of performing his or her State duties and be subject to a penalty if he or she makes an unlawful disclosure.[2]

6. **Reliance on Informal Opinions**: The report recommends that a person who requests and receives an informal opinion should not be subject to an enforcement action provided he or she made the request in good faith, was honest and candid in making the request and followed the Commission's guidance. In fact, that is the Commission's current policy and practice; every informal opinion the Commission issues states that it provides the protection the report recommends.

Conclusion

In the interest of full disclosure, the Commission notes that the Association and several of the Task Force members are subject to the Commission's jurisdiction or provide representation in non-public Commission matters. The Association is a lobbying client whose reports filed with the Commission disclose several in-house and retained lobbyists. Certain Task Force members are lobbyists or are employed by organizations that are lobbyists and/or lobbying clients. In addition, certain Task Force members have represented and/or are currently representing clients in non-public Commission matters. Since an important premise of our State's ethics and lobbying laws is that there should be disclosure of facts that the may reasonably be considered relevant in evaluating possible or apparent conflicts of interests, it would be ironic if the Association did not consider disclosure of such circumstances in the final report.

The Commission strives not only to enforce and administer New York's ethics law, but also to improve those laws. While there has been a great deal of healthy public debate about the proper structure of an effective ethics agency, there has been too little public discussion of the kind the report undertakes, about the effectiveness of our current ethics laws themselves and how to improve them.

We look forward to working with the Association and others to improve the ethical climate in State government.

Very truly yours,

Barry Ginsberg
Executive Director
and General Counsel

✓ cc: Richard Rifkin, Esq. (*via* electronic mail and First Class Mail)

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[2] Executive Law §94(12)(c) affords the Commission continuing jurisdiction over a former State officer or employee who may have committed a violation while in State service, provided the Commission sends such an individual a so-called fifteen-day letter pursuant to subsection (a) within one year after he or she leaves State service. Thus, this provision does not address the Commission's concern regarding disclosure of confidential information after leaving State service.