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STATEMENT IN SUPPORT OF LEGISLATOR DISCLOSURE PROPOSALS CONTAINED IN NEW PART Q OF THE 2015-2016 PUBLIC PROTECTION AND GENERAL GOVERNMENT BUDGET

BACKGROUND

In a 2010 report, the New York City Bar Association, through its Committees on Government Ethics, Professional Responsibility and State Affairs, argued that New York's lawmakers should be required to disclose sources and amounts of outside income, including the identity of paying clients, and provide a description of the services rendered.[1] The report concluded that there is no basis for excluding lawyers from the public scrutiny to which legislators should be held, and that an independent system could be developed so that claims of attorney-client privilege could be vetted in those limited circumstances where the public's interest in disclosure is outweighed by a client's interest in secrecy.

In order to honor existing attorney-client relationships, we cautioned that the law should (i) apply prospectively, *i.e.* only to new clients and new matters for existing clients as of the law's effective date, and (ii) direct that attorney-legislators inform clients in writing of their disclosure obligations. We further cautioned that there might be limited circumstances when the public interest in disclosure should yield to a client's interest in confidentiality with regard to a particular matter. So, for example, when family or criminal matters that have not been revealed in the public records are involved, such matters could be shielded from disclosure. In addition, we believed that exceptions should be made in the special circumstance where disclosure of the fact of representation itself is privileged, or where disclosure is likely to be embarrassing or detrimental to the client. We recommended that an independent commission be established to grant these exceptions upon application of the filer.

Following our 2010 report, New York enacted the Public Integrity Reform Act of 2011, which increased certain financial disclosures and established the Joint Commission on Public Ethics (JCOPE), but the reforms did not go far enough. The City Bar supported the new law while also expressing its preference for a "still broader disclosure regime" as way to fully restore the public's confidence in state government.

[1] State Affairs Committee, Government Ethics Committee, Professional Responsibility Committee, "Reforming New York State's Financial Disclosure Requirements for Attorney Legislators", Jan. 2010, *available at* http://www.nycbar.org/pdf/report/uploads/20071850-ReformingNYSFinancialDisclosureRequirements.pdf

THE ENHANCED FINANCIAL DISCLOSURE REQUIREMENTS CONTAINED IN NEW PART Q OF THE PPGG BUDGET

When examined on the merits, this proposal goes a long way towards shedding more light on the outside work and compensation of legislators. With respect to lawyer-legislators, we believe the proposal strikes the appropriate balance between transparency and the ethical parameters of a true attorney-client relationship. We highlight some of the most meaningful provisions below.

First, a legislator-filer who practices law would be required to "describe the services rendered to which compensation was paid including a general description of the principal subject areas of matters undertaken by such individual or principal duties performed." Under current law, the filer is required to give only a "general description of the principal subject areas of matters undertaken by such individual" which, based upon a review of several recent filings, yielded only the most general of answers.

Second, if the legislator-filer personally provides services to any person or entity, or works as a member or employee of a partnership or corporation that provides such services, the filer would be required to identify each client to whom the filer personally provided services and the services actually provided, and from whom the filer or firm was paid in excess of $5,000. The filer would also be required to identify each client who was referred to the firm by the filer, and from whom the filer or firm was paid in excess of $5,000.[2]

Third, where the filer renders services directly to the client, the filer would be required to describe each matter that was the subject of the representation, and payment received.

Fourth, for payments received from clients originated by the filer for whom the filer did not perform services, the filer would be required to identify the client and the payment so received. The filer would also need to indicate whether such services were rendered in connection with a state contract over $50,000, state grant over $25,000, legislative grant or non-ministerial matter before a state agency.

Fifth, there is a catchall provision: for all other clients by whom the filer was paid in excess of $5,000, the filer would be required to disclose the name of each such client and the services actually rendered for which money was received.

Pre-existing exemptions remain for those clients receiving representation with respect to the investigation or prosecution by law enforcement authorities, bankruptcy or domestic relations matters. New exemptions are added for surrogate court and estate planning work. As under current law, where disclosure of a client's identity is likely to cause harm, the reporting individual may request an exemption from JCOPE.

[2] The current law provides a $10,000 threshold. The meaning of "referred to the firm" remains unchanged from current law and means representation in connection with a state contract over $50,000, state grant over $25,000, legislative grant, or non-ministerial matter before a state agency. In order to have prospective application, § 2(b) of the bill would have to be amended to change "2012" to "2016".

Members of the legislature would be barred from receiving any compensation in connection with any proposed or pending bill or resolution, nor may a legislator refer any client in connection with lobbying on behalf of any proposed or pending bill to any entity with which such legislator has a business relationship either as a member or employee.

Relatedly, Public Officers Law section 3(1-a) would be amended to penalize an individual "who has failed to disclose such information required under subdivision four or section seventy-three-a of this chapter". Failure to disclose would be treated the same as conviction for a misdemeanor, *i.e.*, such individual would be barred from holding civil office for a period of five years from the date of conviction. While we agree that individuals should be penalized for failing to make mandated financial disclosures, this section raises questions and deserves further scrutiny. For instance, the bar to holding office is triggered by the "date of conviction" but there would be no such date in the instance of failure to file financial disclosures. What would the trigger date be? And how would the equivalent of a "conviction" be determined? Given the seriousness of this penalty, we recommend it be tabled for further public debate and discussion.

We recognize that some individuals and groups are questioning whether New York should convert to a full-time legislature or significantly restrict outside income rather than rely on enhanced disclosure requirements. At this point in time, we do not agree. As we stated in 2010, "[w]ith proper disclosure, legislators should be free to run legitimate businesses, nonprofit organizations and law and consulting practices that are unrelated to their government service. New York should be able to solve its ethical problems without becoming the first jurisdiction to mandate full-time legislative service."[3]

PROPOSED CHANGE TO THE DEFINITION OF "INDEPENDENT EXPENDITURE"

Finally, we are concerned about the potential overbreadth of the amended definition of "independent expenditure" to include any written communication via, for instance, letterhead or other published statements which, within 60 days before a general or special election or 30 days before a primary election, includes or references a clearly identified candidate. This definition would seem to encompass countless scenarios where an organization simply refers to an incumbent candidate's name in a publication without any trace of the type of electioneering sought to be regulated by the election law. We recommend that this definitional change be given further study.

[3] State Affairs Committee, Government Ethics Committee, "Reforming New York State's Ethics Laws the Right Way", Feb. 2010, at 50, *available at* http://www.nycbar.org/pdf/report/uploads/20071860-ReformingNYSEthicsLawstheRightWay.pdf. In this separate report on ethics reform, we noted that if the reforms being contemplated at that time proved ineffective, then "in time it may be worth considering tougher restrictions along the lines of federal law" referring to the cap on outside income equivalent to 15% of the congressional salary and a ban on employment involving fiduciary relationships, which includes the practice of law. We adhere to that position today. If, ultimately the ethics reforms being focused on this session prove to be ineffective in the long run, then it may be time to consider enacting the types of restrictions that are applied to members of Congress.

THE IMPORTANCE OF STRENGTHENING JCOPE AS PART OF THE REFORM PACKAGE

Enhancing disclosure requirements will be meaningless if filers do not believe that failure to comply will lead to enforcement measures. Immediate steps must be taken to strengthen JCOPE.

JCOPE is not perfect, and has some significant structural flaws that impact its independence, but we recognize that its creation was an important first step towards cleaning up Albany. Still, there is much more to be done, as demonstrated by JCOPE's most recent report recommending changes to improve its own enforcement powers.[4] Indeed, our 2014 report "Hope for JCOPE"[5] included a detailed list of recommendations that could be undertaken *immediately* – without legislation – in order to strengthen JCOPE. We also made legislative recommendations aimed at increasing JCOPE's independence, including eliminating the political party component of the special vote requirement for enforcement decisions and adding appointments by the Chief Judge, the Attorney General and the Comptroller.

Making changes to strengthen JCOPE as part of the current reform package would signal to the public both the Governor's and the Legislature's true commitment to ethics reform. If JCOPE is given the teeth it needs to truly and independently enforce the ethics law, that would be a vitally important step. JCOPE should be supported by all branches of government, with a structure that guarantees the needed independence and vigor and with adequate resources to guarantee actual enforcement.

Moreover, the Governor must immediately appoint, jointly with the legislative leaders, the statutorily-mandated long-overdue commission to review JCOPE and the LEC, which we believe should result in reform proposals beyond what has already been proposed.[6] The appointment of the review commission would serve to recognize that structural improvements in the State's enforcement agency and other changes beyond those currently being recommended are essential to building a strong ethical culture in New York State Government.

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[4] "Report from the New York State Joint Commission on Public Ethics", Feb. 2015, *available at* http://www.jcope.ny.gov/pubs/POL/JCOPE%20Third%20Year%20Report%20FINAL.pdf.

[5] New York City Bar Association, Common Cause/New York, "Hope for JCOPE", March 14, 2014, *available at* http://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf.

[6] Government Ethics Committee Letter to Governor Cuomo and Legislative Leaders, July 9, 2014, *available at* http://www2.nycbar.org/pdf/report/uploads/JCOPELECReviewPanelLettertoGovernorSIGNED7.9.14.pdf.