NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON GOVERNMENT ETHICS

TESTIMONY BEFORE THE NEW YORK CITY CONFLICTS OF INTEREST BOARD FEBRUARY 3, 2006 ON LOBBYING OF PUBLIC SERVANTS BY THEIR FORMER CAMPAIGN CONSULTANTS

I am Robert Newman and I am pleased to present the following testimony on behalf of the New York City Bar Association's Committee on Government Ethics. The Committee believes that the question of whether a campaign consultant is "associated with" a public official he has helped elect, thereby implicating the City's conflict-of-interest law, is an important question that deserves the attention of this Board, and we are happy to participate in the Board's examination of the question.

Recent years have seen more and more campaign consultants also working as lobbyists and, on occasion, lobbying officials they helped to elect. For example, The New York Times reported that a political consultant to the Mayor returned, as soon as the campaign ended, to a partnership in a firm that represents private clients before City government. A chief campaign consultant for the City Comptroller later began work for a major firm that invests in municipal bonds, and a lobbyist/consulting firm regularly lobbies the City Council, after helping elect 12 of its members.

The City Bar agrees with Robert Stern of the Center for Governmental Studies that it creates a significant "perception problem" when a campaign consultant represents a private client before a legislator or other elected official for whom the consultant worked. As the San Francisco Board of Supervisors stated in 2004, explaining its decision to prohibit campaign consultants and their employees from lobbying current and former clients who are City officers, "...the appearance of corruption in the form of campaign consultants exploiting their influence with City officials on behalf of private interests may erode public confidence in the fairness and impartiality of City governmental decisions."

We recognize that regulators must tread carefully in this area, in part because both campaign activities and lobbying are protected by the First Amendment. It is certainly unnecessary, and unrealistic, to prohibit any official interaction between an elected official and all vendors to his campaign, just as it is unnecessary and unrealistic to prohibit such interaction between the official and all contributors to his campaign. Campaigns incur expenses for printing, postage, phones, office supplies, and paraphernalia such as buttons, posters and the like. Most serious campaigns pay for services such as legal services to get on the ballot. Many campaigns also pay individuals for "street work" such as literature distribution, sign posting, get-out-the-vote work, and occasionally, signature-gathering. Many rent office space, at least for a short time, and rent space for campaign events. Accounting

services may be purchased to assist in compliance with campaign finance laws, if volunteers are not able to perform this task. Certain forms of insurance may be necessary. When these or other services are provided by ordinary business people or professionals at market rate they do not pose ethics issues.

The concern, rather, is with professional "political consultants." These consultants, who may be free-lancers or principals of substantial firms, typically provide strategic advice and planning, and campaign management services. They write and compose the campaign's literature and advertisements. They frequently will be responsible for a campaign's media effort, and may get a commission on ads placed by the campaign. Some campaigns may engage different consultants for different services, such as polling, speechwriting, and advertising, while others may contract with a single firm for all of these services. Consultants meet frequently with the candidate, or her salaried campaign manager, and are often critical to the success of the campaign.

We do not mean to suggest that there is anything untoward about the work of political consultants. To the contrary, their services are an indispensable and important part of large-scale modern campaigns. It is simply that because, in truth, the "business" of most New York City elected officials is politics, we think it is reasonable to consider a consultant who has played a major role in helping an official win his current term of office as a person who is "associated" with an elected official within the meaning of Chapter 68 of the Charter, just as if the official had a "business relationship" with the consultant. In an effort to select those of an official's relationships which are so close that the official may and should be barred from using his office to benefit the person in question, the drafters of the Charter did not limit themselves to those relationships, such as business partner, where the official was, by definition, "self-dealing" when dealing with the other person. The drafters included siblings, for example, as a relationship that is so close that the apparent conflict is clear, even though an official and his sibling may well be completely independent of each other financially. The relationship between an official and her consultant may likewise be so close that the official should not be permitted to use her position to obtain an "advantage, direct or indirect," for the consultant. It is quite likely that the candidate may feel that she would not hold her office, with all its perquisites, were it not for the consultant's services. That this sense of indebtedness will not exist in all cases does not lessen the seriousness of the potential conflict.

In its questions #4-7, attached to the letter soliciting testimony, the Board has inquired into the nature of a "campaign committee," and the nature of the committee's legal relationship with the candidate and with campaign vendors including consultants. Others have pointed out that the committee is a separate legal entity, and that generally the candidate is not personally liable for the debts of the campaign committee. This is a correct statement of the law, but it should not be seen as a reason not to regulate or as an insuperable obstacle to regulation. As a start, it may be noted that because the candidate is not liable for the

committee's debts, a provider of campaign services, especially, one who does not personally know the candidate and is not intending to make a disguised loan or contribution, may often ask the candidate to personally guarantee the agreement. A consultant may enter into a contract directly with the candidate, although the committee will formally pay the consultant. More importantly, the candidate controls a sole-candidate committee as a practical matter. A committee may have a long list of "members" listed on its letterhead, but they do not operate the campaign. Legally, a committee is required by the Election Law only to have a treasurer and a depository, and it may be fairly assumed that the treasurer, at least, owes a fiduciary duty to the candidate. While the treasurer, or paid campaign staffers, may make routine expenditures on the campaign's behalf, something as significant as the selection of a primary consultant, and the negotiation of the consultant contract, almost inevitably will involve the candidate himself.

Neither does the fact that campaign funds may not be used for the candidate's personal benefit, see Election Law § 14-130, constitute a reason why regulation in this area should be considered unnecessary. Because consultant contracts are not always spelled out in writing, and may be vague in their terms, the field is ripe for the kind of difficult-to-prove abuse, involving the conditioning of political support upon the candidate's engaging "favored" consultants, or involving bribes to political leaders disguised as consulting contracts, that figures in the ongoing investigation of the Brooklyn Democratic county organization. We agree, though, that other laws are in place to address openly corrupt practices. The Board's concern, and ours, lies with the appearance of undue influence when one person wears two hats, that of lobbyist and consultant. The benefit received by the public servant from campaign expenses is the benefit of holding office. In New York City at least, this is not insignificant.

Approaching the heart of the issue the Board is facing, and specifically addressing questions #9-10 posed by the Board, the nature of communications between public servants and "paid representatives of parties on whose behalf the representative is communicating with the public servant," i.e., lobbyists, is infinitely variable. Certain communications, like testimony at public hearings, are on-the-record and do not raise any concerns that could not adequately be dealt with by requiring some form of disclosure of the lobbyist's relationship with the public servant. Other contacts are more problematic. These include private meetings in the official's office, which may or may not be noted in an official log; letters to the public servant, which may be available under the Freedom of Information Law, but only if one knows what to ask for; and informal chats during campaign fundraising parties or social events. Recent state legislation placing restrictions on "contract lobbying" may go a long way to eliminate opportunities for lobbyists to exploit personal relationships to secure undue financial advantages for their clients, but this new law has just taken effect and is untested.

Although "contingent fees," under which lobbyists are paid based on their success in achieving their client's goals, are illegal under state law, one could not fairly assert that

success or failure is financially irrelevant to the lobbyist. Obviously, renewal of a lobbyist's retainer agreement, and the level of compensation specified, depend heavily on the client's perception of the lobbyist's influence and success. Thus, to the extent lobbyist/consultants are hired by private clients because of their perceived closeness to the official they helped elect, the lobbyist/consultant has an incentive to exploit this access regardless of the legal structure of the lobbyist/client contract.

Regulation in this field poses formidable challenges. First, it should not be over-inclusive. One must endeavor to draw a proper line between principal consultants and others who play so significant a role in electing a public official that the official is likely to feel indebted to them, and the much larger group of people who play lesser roles in a campaign. Likewise, if there are to be restrictions on officials' aiding *former* consultants and their clients, and we think there should, the restrictions should be limited in length. Second, we recognize that the Board has the authority under the Charter to regulate the conduct of public servants, but lacks authority to regulate lobbyists directly. This means that measures must be put in place to assure that officials do not inadvertently run afoul of new ethics rules: there must be clear guidelines spelling out what are the matters, involving a consultant acting as lobbyist, from which the official must recuse himself.

Nevertheless, we hope the Board will consider rule-making in this area. We would look forward to the opportunity to work with the Board in this delicate but important endeavor and, in particular, to providing our perspective on legal issues that may arise as the Board pursues its process.

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