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Prepared Testimony of Patricia E. Salkin
Raymond & Ella Smith Distinguished Professor of Law
Director, Government Law Center
Albany Law School
Before
New York State Assembly Standing Committee on
Governmental Operations
Assembly Standing Committee on Election Law
Assembly Standing Committee on Ethics and
Guidance

June 9, 2009



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Good morning. My name is Patricia Salkin. I am the Raymond & Ella Smith Distinguished Professor of Law at Albany Law School where I also serve as director of the Government Law Center. In addition, I am the current Chair of the Municipal Law Section of the New York State Bar Association. However, the remarks I offer to you today are entirely my own and do not represent those of the Bar Association or of Albany Law School. In addition to my professional affiliations, I have taught for many years a course on government ethics at Albany Law School, and I teach a course on planning ethics at the State University at Albany. I am the editor of a book entitled *Ethical Standards in the Public Sector*, now in the second edition, published by the American Bar Association (2008). I am also the co-editor of a book entitled *Ethics in Government, The Public Trust: a Two-Way Street*, published by the New York State Bar Association (2002). I served a term on the Steering Committee of the Council on Government Ethics Laws, a national professional organization for government agencies, organizations and individuals with responsibilities or interests in government ethics,

elections, campaign finance, lobby laws and freedom of information. In addition, for a number of years, I chaired the ethics committee for the American Bar Association's State and Local Government Law Section.

First, I would like to thank Assembly Members Destito, Millman and Magnarelli for cooperating and organizing this hearing on the subject of ethics reform in New York. I applaud your leadership, the leadership of the Governor and the leadership of the Senate, because it is going to take all of you, and then some, to address the challenges we are facing today. As I told a similar Senate panel last week, I fear that we are at an unfortunate tipping point in public confidence in our state government. Hardly a week goes by when the news headlines are not focusing on alleged misconduct in office by elected and appointed government officials. The misconduct, indiscretions, scandals and investigations are not just making local news here in Albany, but they are attracting statewide and national interest. The headlines are being captured by executive branch public officers, legislative branch public officers, and local government public officers.

For example, according to a 2004 report by the Center for Public Integrity, New York received a "C" grade for disclosure of legislator's outside ties. Specifically, based on 2002 data, the Center found that 41.8% of lawmakers sat on a legislative committee with authority over professional or business interests; 32.8% of lawmakers had financial ties to businesses or organizations that lobby state government; and 4% of lawmakers received income from a government agency other than the state legislature. In fact, yesterday in the mail I received a briefing form the National

Conference of State Legislatures entitled "Pay-to-Play: State Reforms," which begins with a sad commentary on the sorry state of affairs – it reads, "In early 2009, Apple approved sales of an iPhone application, 'Pay2Play,' a game where users acting as governor, must raise funds by buying and selling senate seats and government jobs to remain in office. The game – amusing to some and offensive to others – highlights the attention paid to ethics and campaign finance issues that has been percolating in the states." New York is certainly in the spotlight on these issues.

There is no doubt that New York must take a bold new approach to ethics reform in both the executive and the legislative branches of government and at the local government level as well. To accomplish the needed comprehensive and systemic reform, thorough and informed study must precede proposals rather than rash reactions to fix the immediate crisis of the week. For your information, I have attached to this testimony a complete copy of the testimony I gave last week, so I will not review the history of ethics reform efforts in New York nor will I go into detail about my comments on the four Senate ethics reform proposals. Rather, you have asked us to address a number of specific questions in the hearing announcement, and I will now focus on some of these.

The goal of any state ethics law should be to ensure public trust and integrity in government by providing a clearly understandable set of rules to guide the conduct and behavior of public officials. Adopting implementing regulations, issuing opinions and providing training and education are the most common duties of an ethics commission to accomplish this. Transparency is another important aspect of ensuring public trust and integrity. This is most often accomplished by independent commissions receiving

financial disclosure forms and reports of lobbying activities, and then making such information easily available to the public. Enforcement is another important aspect of the duties of ethics commissions. However, how we define enforcement is significant. You have asked about effective ways to distinguish between the educative, advisory and compliance functions of an ethics body and the investigative and prosecutorial functions. It is clear that an ethics commission needs to have credibility among the regulated community, as well as the public as a whole. Covered employees need to have a high confidence level in their ability to proactively contact the Commission for informal or formal advice. However, a commission must also be responsible to the people, and where credible information is brought to its attention that suggests actions have been taken in conflict with the ethics law, at least a preliminary review is warranted. Where criminal actions may be at issue, above and beyond the scope of the Public Officers' Law, referrals to other law enforcement agencies may be appropriate. In these cases, it is worth considering whether the agency receiving the referral should take over the entire investigation or just a part of it. If the functions are separated in these types of situations, it may eliminate some of the skepticism covered employees may feel about the ethics commission.

The Governor's proposal calls for, among other things, a five-member independent ethics commission with jurisdiction over both the executive and legislative branches. The Governor's position is that the Commission will be more independent because its members will be selected by a Designating Commission. This could work, and it is certainly an idea worth further inquiry. However, I subscribe to a view described by the Executive Director of the Ohio Ethics Commission. He said that basically, no

matter how a Commission is constituted, people can always find a way to question its independence, and the only mark of true independence is through the experience of watching the commission in action. I don't have a firm opinion today about how many people should be on the Commission, but I don't subscribe to the view that the fewer the people, the less likely there will be inappropriate leaks of confidential information. Rather, I would look to the types of people who should be appointed to the Commission. They should be individuals who have demonstrated integrity and experience in thinking through ethical dilemmas. Clergy, teachers/professors, lawyers (who are not connected to government), retired judges, administrators and human resource professionals are examples of potential applicants, as are, by the way, former journalists. What is critically important is that no one appointed to the Commission should have any business relationship with anyone who is subject to the jurisdiction of the Commission. The Arkansas Ethics Commission is often touted in the literature as a model. Its Commission consists of 5 members, 1 each appointed by the Governor, Attorney General, Lt. Governor, Speaker of the House and President Pro Tempore of the Senate. Members are limited to a five year term and they may not serve consecutive terms. Even more interesting, the Arkansas statute provides that in making appointments to the Commission, the appointing officials are to ensure that at least one appointee is a member of a minority race, at least one member is a woman, and at least one member is a member of a minority political party (and this person must have voted in the preferential primaries of the minority political party in at least two primaries in which he or she voted). Based on the questions that have recently arisen in this State over the process used for the appointment of judges to the Court of Appeals – specifically

focusing on whether the nominating commission appropriately considers diversity in its outreach, interviewing and recommendations, it seems to me that we ought to find a way to be specific if the Legislature and the Governor have specific ideas about diversity. In Colorado, the Chief Justice of the State high court makes one of the appointments to the ethics commission. In Florida, where the Governor has the majority of the nine appointments, the law provides that no more than 3 of the 5 members may be from the same political party, and they are subject to Senate confirmation. Further, one of the gubernatorial appointees must be a former local government official. The Senate and House each get two appointments under the Florida Law, but the two members appointed by each body must be from different political parties. Requiring different political party affiliation may further the perception of at least political independence of the commission members.

Currently ethics commissions in 33 states have jurisdiction over both the executive and legislative branches. New York is in the minority of the states which do not. While there is some merit to the separation of powers argument, I think the public will continue to lack confidence in the even implementation of ethics laws if it appears that there are different rules for the executive and legislative branches and/or uneven enforcement of ethics rules. I do believe it is a good idea to combine the executive and legislative ethics committees as well as the lobbying commission. With respect to the other functions, more information is needed in order to evaluate whether it is a good idea and whether there is a true commitment to adequately provide fiscal support to appropriately staff such responsibilities. My gut reaction is that in the short term, merging campaign finance oversight and open meetings law oversight is not a good

idea. I'd rather see a commission established that has reasonable jurisdiction and matching resources that can prove its credibility with the public, and then consider adding other responsibilities slowly. Starting with the executive branch, adding the legislative branch, and keeping lobbying oversight is a good initial plan. While it may be a good idea to give the Commission a greater role over procurement lobbying, needed resources are a concern. I am also not sure what types of problems have been documented with respect to the current system. I don't think it is a good idea to give a new commission jurisdiction over FOIL at this point in time. This is because the one ethics related entity in this State that is not broken, that is well respected and that stands as a national model, is the Committee on Open Government. I urge you to let it stand and continue to do the outstanding work it does. I also note that local government ethics is again left off of the ethics reform agenda. This area is long overdue for attention. I hope that this Chamber will address major reforms to Article 18 of the General Municipal Law.

It is more difficult to answer your question as to whether the current ethics commission structure is stronger or weaker than that which existed prior to 2007. There are clearly items in the existing amended law that are troublesome. For example, the replacement of the old \$75 gift limit with a "nominal value" standard that is undefined has not been helpful. This does not help those who strive to conduct themselves within the confines of the law, since the law lacks clarity. Even the Commission had difficulty coming up with a bright line test for what constitutes "nominal value," issuing a lengthy opinion attempting to provide guidance on this topic. In other respects, the current law may be stronger than what existed before. While the merger with the Lobbying

Commission was a forward step, it can't truly accomplish its potential without bringing the legislative ethics committee into the fold as well.

You asked about the strengths and weaknesses of the proposed Government Ethics Commission. A short memorandum of support accompanying the bill cannot do justice to the major overhauls advanced in this proposal. A more detailed briefing book would be appropriate, with comparative data from other states and with detailed analysis of structural issues in New York. As I suggested to the Senate last week, I urge this body to resist the pressure to continue New York's track record of basically putting temporary band aids on what seems to be a continuing problem with ethics agencies in this State. Given what appears to be an ongoing distraction from yesterday's events in the Senate, the fact that there are substantial ethics reform proposals being advanced by the Governor, by members of the Senate, and by members of this chamber, including the Speaker, I suggest that it would be more prudent for the Legislature to take the time that it needs to study and debate these options, and cooperatively assemble a comprehensive package of ethics reform measures that will address not just the "crisis of the week" but will rather thoughtfully integrate myriad issues that have been raised with respect to ethics reform at the state and local levels in New York over the decades, and put forth a holistic approach that will serve all of the people of this State well into the future. You have a singular opportunity to once again make the Empire State a national model when it comes to ethics legislation, regulation and implementation. It has been more than forty years since there was a blue ribbon commission on local government ethics in this State, and it has been more than 20 years since the Commission on Public Integrity was created in response

to ethics scandals in New York City. While I would like to see meaningful ethics reform this month, it is hard to imagine that it is truly realistic. The most appropriate course of action would be to appoint a blue ribbon commission, with access to staff, to provide the Legislature and the Governor with thoughtful comparisons and critiques of various approaches to regulating all aspects of public sector ethics and to make solid recommendations in the form of proposed legislation for a new government ethics regime in the State. It is my hope that such a commission would be charged with addressing many of the issues members of the Legislature and the Governor have already raised in their reform proposals, plus address other issues including local government ethics. The Commission should hold public hearings, conduct surveys, and engage in comparative research and analysis to, among other things, identify best practices to inform the development of their recommendations. Further, the Commission might be vested with the authority to conduct an independent audit of the current Commission on Public Integrity as another method of identifying issues ripe for legislative, statutory and administrative reform. Lastly, such Commission should be given a firm deadline of December 31, 2009 to submit its report to the Legislature and the Governor, and the Legislature should agree to immediately follow-up with hearings and the introduction of legislation to implement the recommendations.

Thank you for the opportunity to share these thoughts. The Government Law Center of Albany Law School is willing to assist the State in further study of these critically important topics.