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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 Standing Committee on Ethics**

June 2, 2009



ALBANY LAW SCHOOL

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Albany, NY 12208
www.albanylaw.edu

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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. I write in the area of government ethics and I frequently teach CLE courses and conduct training in the area of public sector ethics.

First, I would like to thank Senator Sampson and the members of this Committee for so quickly organizing a series of hearings on the subject of ethics reform in New York. 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. 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.

The first state ethics law in New York was adopted 55 years ago in 1954 following a report of the Lockwood Committee. The Committee was established in reaction to a string of allegations of unethical conduct taken by government and political officers in regard to harness racing. At the request of Governor Dewey, the Special Legislative Committee on Ethics and Integrity was established by legislative resolution. The Committee consisted of 12 members: 4 appointed by the Governor, 4 from the Senate (the Majority and Minority Leaders and two other Senators) and 4 from the Assembly (the Speaker, the Minority Leader and two other Assembly members). At the

time the Legislature correctly acknowledged that, "The 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 still the subject of public attention resulting from conflicts of interest of its members, and in 1964 Cloyd Laporte, Chairman of the NYC Board of Ethics was appointed Chairman of the Special Committee on Ethics. This committee held hearings and proposed a code of ethics for legislators. In response to a series of scandals in New York City, in 1986 Governor Cuomo and Mayor Koch established the State-City Commission on Government Integrity, often referred to as the Sovern Commission. This Commission recommended the appointment of a non-partisan commission to investigate corruption at the state and local levels, leading to the appointment by Executive Order in 1987 of the New York State Commission on Government Integrity. This Commission, established under the Moreland Act, conducted investigations and issued twenty reports. Among the conclusions of its 1990 Report, the Commission noted that New York's laws fall woefully short in guarding against political abuses in an alarming number of areas. 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, establishing the State Ethics Commission and the Temporary Commission on Local Government Ethics.

A 1991 Report of the Temporary State Commission on Local Government Ethics recommended significant reforms to Article 18 of the General Municipal Law, another woefully inadequate statute, dealing 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 and technical assistance on ethics issues for local governments. The New York State Bar Association's Municipal Law Section, among other groups, has repeatedly called for attention to this glaring gap. In more recent memory, it seems as though ethics reform is a staple part of the platform of governors and legislative leaders. Dozens of bills have been introduced over the last twenty years 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. Under Governor Pataki, a law was enacted to regulate improper influence on the granting of government contracts. Governor Spitzer was responsible for abolishing the Ethics Commission and the Temporary State Commission on Lobbying, and replacing them with the Commission on Public Integrity, which has combined jurisdiction over the executive branch and over the regulation of lobbyists. A number of other reforms were enacted as part of the Public Employee Ethics Reform Act of 2007 including revisions to the gift provisions of the Public Officers Law (which, by the way, as written has caused more confusion than clarity), a ban on most honoraria, prohibitions on nepotism, equal applicability of the two-year revolving door provision to both the executive and legislative branches of government, prohibitions related to appearing in taxpayer-funded advertisements, and an expanded definition of public official for purposes of the lobbying law. This new Act was not subject to public vetting in the form of a commission or task force; nor were public hearings held to garner input.

In response to another set of alleged scandals, Governor Paterson has announced a proposal to reform the ethics laws once again. The proposed legislation would replace the existing Commission on Public Integrity with an Ethics Commission, and it would create an Ethics Designating Commission to recruit and attract qualified individuals to serve on the Commission. This new proposed commission would have jurisdiction over both the executive and legislative branches, and it would take over enforcement of campaign finance laws.

The Senate has also introduced a number of bills, the subject of today's hearing, which address, among other things, the creation of a new Commission on Governmental Ethics. One of the criteria for appointment set forth in this proposal is that commission members "shall be individuals with extensive knowledge or experience in the field of government ethics." This language is too limiting. I don't know what "extensive knowledge or experience" is intended to mean, but I submit that most people who would likely fall into this category would either be ineligible to serve under the terms of the proposal (because many former government officials are now associated with lobbying or political consulting firms), or they may not have credibility due to prior government connections resulting in at least the appearance of being an insider as far as the public is concerned. I would recommend rethinking this to provide that members should be people 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. These people, however, may not fit the criteria in the proposed bill.

While I understand the significance of having a chair and vice chair jointly agree on a candidate for executive director of the commission, this is a bad idea in reality since the potential is there from the start that the two individuals may not reach an agreement. It would probably be better to have the commission as a whole vote by majority vote of the members present at the meeting on the appointment of an executive director. The Chair and/or Vice Chair may be authorized to submit a candidate for commission consideration.

During last month's Warren Anderson Legislative Breakfast Program sponsored by the Government Law Center, significant issues were raised with respect to due process rights of individuals subject to investigation by the Commission. I would suggest revisiting the proposed revisions to ensure that the process is appropriate and fair. I note that providing a transcript of testimony to individuals under investigation at their request as provided for in this new proposal is a positive step forward in this regard. I have a concern with respect to the provision subjecting the new ethics Commission to legislative oversight. It is critically important that the Commission be able to maintain its independence and not be subject to manifest oversight by either the Legislature or the Governor. I have no problem with the next provision requiring a legislative committee to hold hearings on the annual report and recommendations of the Commission to the extent that the recommendations referred to mean needed legislative reforms.

In the proposal dealing with financial disclosure, random audits are appropriate, and I am under the impression that this has been the practice at the Commission for some time. With respect to the section dealing with reports of business dealings with

lobbyists, to fully understand the reach of these provisions, it would be helpful to include definitions. For example, I am uncertain what would qualify as doing business with a lobbyist or having business dealings with a lobbyist. Does this mean that there is a financial transaction involved? Does this mean that conversations resulting in agreements but no monetary exchanges qualify? At the end of the paragraph, it seems to imply compensation and expenses, but should this be broader?

In general the proposal to address the use of campaign funds for personal use is a good idea. Again, there are a number of drafting issues that leave perhaps too much open for interpretation, which will undoubtedly lead to criticism in the media and a negative spin on allegations of individuals misinterpreting the law or finding loopholes. For example, I am not sure how to quantify a purpose that results in personal benefits to the candidate or officeholder. Also, the term "normal living expenses" is subjective. It is not entirely clear whether members can use these funds to supplement their per diems when at the Capitol. What is meant by "tuition payments"? Is this for higher education for the individual? What about for attending continuing education courses that may be related to their job? With respect to the prohibition on the use of funds to cover legal fees, it should be made clear that funds cannot pay legal fees for any other candidate or public official subject to an investigation.

These bills, in addition to the one addressing pay to play, all contain good ideas, but they are not individually or collectively representative of the type of comprehensive overhaul needed today. Based on the past record of predecessor legislative bodies, there will be public skepticism that if the Legislature adopts one or more of these reforms this month, the issue of ethics reform will not be addressed in the next

Legislative Session. I suggest that it would be more prudent for the Legislature to take the time that it needs to 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.

Resist the pressure to once again put a quick-fix band-aid on what keeps turning up as weaknesses in New York’s government ethics laws. Rather, given the fact that we are coming to the traditional close of the Legislative Session, the most appropriate course of action would be to appoint a blue ribbon commission, with access to staff, to provide the Legislature 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. In the event the Legislature believes it is in the best interests of the public to take other immediate actions that include the items in the bills posted for comment at today's hearing, I urge you to, in the same bill(s), add language establishing a Blue Ribbon Commission, and indicating a commitment on the part of the Legislature to address these issues in greater depth in 2010.

Thank you for the opportunity to share these thoughts. The Government Law Center of Albany Law School remains willing and able to assist with further development of legislative proposals in this critically important subject area.