STATE OF NEW YORK
JOINT COMMISSION ON PUBLIC ETHICS

Advisory Opinion No. 15-0X: Whether an elected official may solicit and accept campaign contributions or other forms of support for his political campaign from a subject of the official's enforcement powers

INTRODUCTION

In Advisory Opinion No. 98-12, a predecessor agency of the New York State Joint Commission on Public Ethics ("Commission") determined that the participation of State officers and employees in political campaigns is subject to certain restrictions based on Public Officers Law §74, which obligates State officers and employees to avoid a conflict of interest or the appearance of a conflict in the performance of their State duties. In a footnote, the Opinion excluded statewide elected officials running for re-election from the effect of the ruling, noting that such officials occupy a "unique position," as they simultaneously hold elected office and engage in political activities. (Advisory Opinion No. 98-12, n.2 ¶1) It also observed that such officials' fundraising activities are subject to the State Election Law, but included no discussion of any applicable provision of that law.

The Commission issues this Advisory Opinion upon a reconsideration of the section of Advisory Opinion No. 98-12 which excluded elected statewide elected officials from the larger holding of that Opinion, in order to properly reflect and effectuate the purposes of Public Officers Law §74. Pursuant to its authority under Executive Law §94, the Commission renders its opinion that:

1. Public Officers Law §74 applies to statewide elected officials and members of the legislature in the conduct of their campaign activities. Specifically, an elected official running for re-election may not directly solicit or accept monetary or in-kind campaign contributions from any person or entity which is the subject of the enforcement powers of the elected official or the office of the official, as described herein; and

2. The solicitation or acceptance by an elected official of other, non-monetary, forms of political support must be subjected to a Section 74 analysis on a case-by-case basis in order to avoid a conflict of interest or the appearance of a conflict.

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DISCUSSION

Public Officers Law §74

The State Code of Ethics, which is contained in Public Officers Law §74, prohibits State officers or employees and members or employees of the legislature, from engaging in activity that creates a conflict of interest, or the appearance of a conflict, with respect to their public responsibilities. The general rule regarding conflicts of interest is set forth in Public Officers Law §74(2):

> 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.

Public Officers Law §74(3) provides more specific standards of conduct. Of relevance to this inquiry are the following:

> (d) No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.
>
> (f) An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.
>
> (h) An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts in violation of his trust.

These provisions address not only actual conflicts of interests, but also conduct that creates the impression that a conflict exists, in order to promote the public's trust and confidence in government.

Advisory Opinion No. 98-12

The New York State Ethics Commission ("Ethics Commission") issued Advisory Opinion No. 98-12 in 1998, in response to a State employee who asked whether he could permissibly work on the political campaign of a candidate for elected office and whether any restrictions applied to the State employee's involvement in political activities. The Opinion noted, first, that no fundamental principle prohibits a State employee from engaging in political activities, but a State employee who works on behalf of a candidate or in any other political endeavor must abide the requirements of Public Officers Law §74.[1]

Specifically, Advisory Opinion No. 98-12 held that Public Officers Law §74 prohibits a State employee from soliciting funds for a political campaign under certain circumstances:

> [A State] employee may not solicit funds from any individual or business entity (1) which currently has matters before him or before the units he supervises, (2)

[1] The entirety of the ruling in Advisory Opinion No. 98-12 was "based only on Public Officers Law §74." (Advisory Opinion No. 98-12, n.2 ¶3).

> which he has substantial reason to believe will have matters before him or such units in the foreseeable future, or (3) which had matters before him or such units in the last twelve months.

The underlying principle arising out of Public Officers Law §74 is the prohibition of solicitations which are targeted to individuals or entities under the active jurisdiction of the unit in which the employee works. Therefore, a State employee may participate or allow his name to be used in an *untargeted* mass mailing, even if some of the letters could reach individuals or business entities from which he otherwise could not solicit funds, unless the employee has actual knowledge that the solicitation will be sent to a prohibited source, in which case the activity is prohibited.

Advisory Opinion No. 98-12 also addressed a scenario where an entity, having made a contribution to a State employee, *subsequently* becomes involved in a matter that is before the employee:

> If an entity properly solicited by [a State employee] makes a contribution and then has a matter before him or a unit he supervises, [the State employee] should recuse himself if the matter arises within one year of the contribution, although the length of the period may vary depending upon the circumstances.

As noted, statewide elected officials were excluded from the restrictions outlined in Advisory Opinion No. 98-12:[2]

> This opinion is applicable to State officers and employees *but not to statewide elected officials running for re-election*. Such officials are in a unique position, as they both hold elected office and are simultaneously engaged in political activities**.** *Their fundraising activities are subject to the Election Law*. (Emphases added.)

The Commission now revisits this aspect of the holding in Advisory Opinion No. 98-12.

Advisory Opinion No. 95-38

The reasoning adopted in Advisory Opinion No. 95-38 is instructive. In that Opinion, the Ethics Commission examined whether the Department of Environmental Conservation ("DEC") may, consistent with Public Officers Law §74, accept gifts of money and equipment from individuals and organizations which are engaged in activities that are subject to regulation by the DEC. The Ethics Commission held that accepting such gifts from individuals or organizations from regulated entities is permissible, and, in general, the agency may also accept gifts from persons or entities which are *potentially* subject to the agency's jurisdiction and from organizations which have members regulated by the agency whose activities are subject to its jurisdiction.

However, the Ethics Commission held that the DEC may *not* accept donations from individuals or entities under investigation by or in active litigation adverse to the agency because "in such adversarial situations the Department's impartiality is especially important." This distinction is

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[2] Advisory Opinion No. 98-12 is silent as to members of the State legislature because the Ethics Commission, unlike the current Commission, had no jurisdiction over legislators.

useful in the matter at hand because, as explained below, it provides a meaningful mechanism for categorizing acceptable and unacceptable campaign solicitations and contributions.

Public Officers Law §74 Applies to Elected Officials
While They are Engaged in Political Fundraising

The Public Officers Law requires that public officials avoid even the appearance that they can be unduly influenced in the performance of their duties. Preventing such circumstances is a primary objective of Public Officers Law §74. Elected officials' power is never more potent than in the exercise of their investigative and prosecutorial authority, and thus under those circumstances concern for the appearance of improper influence is particularly acute. Decisions regarding the exercise of such enforcement powers should, of course, be based solely on the facts and the law. Thus, elected officials must strive to avoid the appearance that contributions to their election campaigns have any bearing whatsoever on those decisions. However, the footnote in Advisory Opinion No. 98-12 can be read to exclude elected officials from the constraints of Public Officers Law §74 while they are engaged in campaign activities, thereby insulating them from liability for conflicts of interest in the exercise of enforcement powers. Therefore, the Commission now reverses the holding of footnote 2 in Advisory Opinion No. 98-12, and concludes that Public Officers Law §74 applies to elected officials when they are engaged in campaign fundraising activities. An official who knowingly and intentionally violates Public Officers Law §74 while engaged in campaign fundraising should be held accountable.

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It is true, as suggested in Advisory Opinion No. 98-12, that elected officials "wear two hats" when they concurrently serve the public in their official capacity while also seeking political support. This is not, however, a valid reason to disregard the standards of Public Officers Law §74. The ethical standards of conduct carry greater, not lesser importance, when an elected official solicits members of the public for political support.

The Commission is mindful that the legislature and the board of elections have jurisdiction over the political activities of holders of State public office. However, the Commission, as the guardian of public ethics in New York State and the entity charged with investigating violations of Public Officers Law §74,[3] necessarily shares jurisdiction in such matters. It is the duty of the Commission to uphold the public interest in avoiding even the appearance that an elected official can or will use the powers of his office to influence prospective campaign donors, or that an elected official can be influenced in his official actions by the prospect of a campaign contribution.

Restrictions on an Elected Official Soliciting
or Accepting Campaign Contributions

[3] The Commission has sole jurisdiction to investigate such violations, but only the legislative ethics commission may impose penalties on members and employees of the legislature. *See* Executive Law §§94(13)(a), 14-a; Legislative Law §80(9).

Public Officers Law §74 prohibits a state elected official[4] from directly soliciting or accepting a monetary or in-kind campaign contribution from a person or entity which is the active subject of enforcement powersof the official or the official's office, in which the elected official, or the official's immediate state staff, are personally and substantially involved. Additionally, the elected official may not invite a subject of his or his office's enforcement powers to campaign events.

For purposes of this rule, the term "enforcement powers" refers to the authority to investigate and prosecute alleged violations of law. Enforcement powers include, but are not necessarily limited to the powers to issue subpoenas, audit the books and records of a person or entity, compel testimony, execute search warrants, and to initiate litigation or an adjudicatory proceeding on behalf of the public. It does not include the mere authority to regulate, supervise or license some activity.

The term "subject" includes the subject's relative as defined in Public Officers Law §73(1)(m), as well as the owner(s) of a corporation or business, the officer(s) of a corporation or business, or any person who has the requisite financial interest in the subject entity as provided in Public Officers Law §73(1)(l). "Subject" shall not include the subject's attorney, unless the attorney is also an officer of the corporation or business.

Untargeted Mass Mailings are Permissible Unless The Elected Official Knows That a Prohibited Source Will Receive a Solicitation

Indirect solicitations such as untargeted mass mailings[6] conducted by an elected official's campaign are permissible, to the extent the elected official has no actual knowledge that a solicitation will be sent to a prohibited source. An elected official bears responsibility for the actions of his staff when he becomes aware that a prohibited source will be or has been solicited via a mass mailing. An elected official who learns that a contribution has been received from a prohibited source must ensure that the contribution is returned.[7]

When a Contributor Subsequently Becomes a Subject of Enforcement Powers or Adverse Litigation

If, within twelve months after a person or entity has contributed to an elected official's campaign, that person or entity subsequently becomes a subject of the enforcement powers of the official or the official's office, the official must recuse himself from any participation in the matter. Recusal shall not be necessary where the contribution was the result of an indirect

[4] See Executive Law §94(16).

[6] In determining what constitutes a permissible mass mailing, the Commission looks to the federal definition, found at 5 C.F.R. 2635.808, which describes this activity as: "[The] solicitation of funds through the media or through either oral remarks, or the contemporaneous dispatch of like items of mass-produced correspondence, if such remarks or correspondence are addressed to a group consisting of many persons, unless it is known to the employee that the solicitation is targeted at subordinates or at persons who are prohibited sources . . . ."

[7] This analysis also applies to unsolicited contributions.

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solicitation or was unsolicited. Additionally, within twelve months following the final resolution of an enforcement action or litigation an elected official may not knowingly solicit or accept contributions from the subject.

Application of Public Officers Law §74
to Other Forms of Political Support

The solicitation or acceptance of other forms of political support may also violate Section 74. Such activities must be considered on a case-by-case basis to avoid an actual or apparent conflict of interest.

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CONCLUSION

Public Officers Law §74 imposes restrictions on elected officials' campaign activities, and elected officials must observe the restrictions set forth in this Opinion.