



December 4, 2015

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Martin Levine
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NYS Joint Commission on Public Ethics
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Re: Proposed Advisory Opinion No. 15-0X

Dear Sir:

This firm is counsel to the New York Advocacy Association (the "NYAA"). In response to the Commission's invitation to submit comments in connection with proposed Advisory Opinion 15-0X, please see the enclosed.

Respectfully,

COZEN O'CONNOR


By: Kenneth K. Fisher

KKF:

Enclosure

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**POLICY STATEMENT
OF THE
NEW YORK ADVOCACY ASSOCIATION
TO THE
NYS JOINT COMMISSION ON PUBLIC ETHICS**

December 4, 2015

Regarding Proposed Advisory Opinion No. 15-0X

The New York Advocacy Association (“NYAA”), is an association of government relations professionals. We write in response to the Commission’s invitation to submit comments in connection with proposed Advisory Opinion No. 15-0X – Lobbying Act Reporting Obligations For a Party Compensated For Consulting Services in Connection with Lobbying Activity.

First, we oppose the issuance of this draft advisory opinion at all, for the reasons set forth below, but are at a minimum requesting that the Commission extend the comment period to allow for more thorough review and consideration by concerned stakeholders and affected parties. While a draft “guidance” with a similar holding on some aspects was issued by the Commission over the summer, neither analysis nor rationale was provided at that time, and its distribution did not receive the widespread media reporting that the draft advisory opinion has. Given the release just before Thanksgiving, and the relatively short comment period, we believe that the public interest would be better served by extending the deadline for comments until after the New Year.

Further, any action by the Commission regarding these topics should be by Rule, under the State’s statutory procedures for rulemaking. Given the constitutional protections offered to lobbying activities, and the strict scrutiny standard under which the laws in this area are viewed, it is critical in matters such as this that every phrase be carefully vetted, and that there be clear definition of terms. In this regard, we reference the draft advisory opinion’s use of the term “meaningful” which without definition is subject to arbitrary interpretation and is unconstitutionally vague. Under the proposed advisory opinion, the organization and consultant must determine whether a consultant’s input is “meaningful.” The term appears to capture any activities that are “more than mere editing” but less than “full decision-making authority.” For example, an organization’s counsel consulted for compensation regarding copyright or defamation could be deemed a lobbyist if counsel goes beyond mere “copyediting” by offering substantive input into the messaging, whether at the client’s initiative or not. The organization might conclude it is not, but without clear definitions, it might choose to forego legitimate advice, or a professional might choose not to give it for fear of falling under the statute.

Moreover, we question the Commission’s statutory authority to regulate by requiring disclosure of political advocacy to persons other than government decision makers. Should one engage a publicist to seek editorial support for a lobbying subject outcome, it is the independent judgment of the publication whether to publicly endorse that position, as evidenced by the fact that the media organization itself is exempt from the draft advisory opinion’s reach by its own terms. Similarly, forcing the public disclosure of an advisor who does not otherwise lobby could chill the willingness

of clients to freely consult with whomever they choose in formulating political speech for fear that such a person's reputation –and not the content of their advocacy- could be subject to controversy.

Consultant expenses are already disclosed subjects, so to public's interest in knowing the amount and recipient of the expenditures is satisfied, but there is not the same public interest in subjecting persons who only offer advice-and do not otherwise lobby-to regulation and cost. Contrariwise, the commission should encourage, and not burden, the free flow of ideas informing lobbying activity to assure robust governmental debate.

Finally, we deeply and strongly reject the use of the phrase "trading on relationships" in draft advisory opinion No.15-0X both on its own and as a basis for distinguishing between one type of contact and another. While the premise of the Lobbying Act is that the public is entitled to know when funds are expended to affect the thinking of public officials, this derogatory phrase neither recognizes that, as with any profession, experience itself has value or that a pre-existing relationship between a lobbyist and an official may not even have previously existed. By hiring an experienced government relations professional, a lobbying client is not, per se, "trading on relationships" any more than a staff member of JCOPE "traded" on a relationship if hired because of having previously worked for a Commissioner or a Commissioner if previously known to their appointing official. Hiring a lawyer who has argued many cases before a panel of judges is no more trading on that person's relationships than when the arguments are in the court of public opinion. The mere existence of a professional or even a social history between a consultant and a government official, standing alone, is not inappropriate and use of this phrase is not only demeaning but ill serves the public by undermining confidence in, or the willingness to use, professional lobbyists as inherently improper. Such a broad stroke—deeming every person covered by the statute—as "trading on relationships" is unfair to the hundreds of individuals and their clients under JCOPE's jurisdiction.

For all of the reasons set forth above, we believe that the draft advisory opinion should not be issued at all, certainly not with the limited comment period provided, and to the extent appropriate, should be considered only in the form of Rules. Please let us know if we can provide any additional information on this important subject.

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