



NEW YORK
CITY BAR

COMMITTEE ON GOVERNMENT ETHICS

BENTON J. CAMPBELL
CHAIR
42 W. 44TH STREET
NEW YORK, NEW YORK 10036
bencam@verizon.net

November 16, 2015

NYS Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207

Re: Proposed Advisory Opinion – Restrictions on Elected Officials Soliciting/Accepting Campaign Support from Enforcement Subjects

Dear Commissioners,

We are grateful for the opportunity to provide the following comments on the Commission’s proposed advisory opinion 15-0X. As we understand it, the proposed advisory opinion would make clear that, pursuant to the State Code of Ethics, Public Officers Law section 74, all state elected officials, including members of the Legislature, must refrain from soliciting or accepting campaign contributions from a person or entity that is either (a) the active subject of that official’s enforcement power, or (b) is engaged in adverse litigation with that official or his or her office. The proposed advisory opinion defines “enforcement power” as the power to investigate or prosecute alleged violations of law.¹ The power to regulate, supervise or license any activity is expressly excluded from the term “enforcement power.”

While we applaud the Commission’s recognition that elected officials are subject to Section 74 of the Public Officers Law in matters of campaign finance, we respectfully submit that the proposed opinion is too limited and we suggest that the Commission consider expanding its scope. The Commission’s predecessor entity, which had jurisdiction solely over public officers in the Executive Branch, determined that state employees could not solicit or accept contributions from persons or entities with “active matters” pending before them or their offices, but exempted state-wide elected officials from this prohibition. The proposed advisory opinion overturns that exemption, but only with regard to enforcement power or adverse litigation. Thus, for example, the Governor would remain free to solicit a contribution from a person or entity seeking a veto. Similarly, the Speaker of the Assembly and his staff² would be free to solicit a

¹ It appears that, under the proposed advisory opinion, “enforcement power” also includes the “audit power of the Comptroller.”

² The earlier guidance did not apply to legislative employees and the proposed advisory opinion does not purport to make them subject to the “matter” standard of that earlier guidance.

contribution for the Speaker or the Democratic Assembly Campaign Committee from a person or entity seeking the defeat of legislation under active consideration in the Assembly. As a practical matter, the advisory opinion also effectively exempts the Legislature because the Legislature does not exercise enforcement powers.

Accordingly, we make the following suggestions for the proposed advisory opinion. First, we recommend that state-wide elected officials and their staffs be barred from soliciting or accepting contributions of more than a few thousand dollars in the aggregate in any year for the statewide official, or for an entity in which he or she has a substantial interest, from persons or entities with active matters pending before them or their offices for the life of the matter plus one year after that matter is resolved.

Second, we recognize that it is excessive to bar a member of the Legislature from soliciting or accepting campaign contributions from anyone interested in a pending legislative matter, but we recommend that members of the Legislature and their staffs be barred from soliciting or accepting contributions of more than a few thousand dollars in the aggregate in any year for the member, or an entity in which the member has a substantial interest, from persons or entities who are spending other than nominal amounts actively and directly to lobby the legislators or their staffs through private, in-person meetings or phone calls. We also suggest that the bar last for a period of one year after that paid direct lobbying ceases.

We believe that the rule that substantial campaign contributions may not be solicited or accepted by an elected official from those engaged in active paid lobbying of that official should pass constitutional muster. A sharply divided Supreme Court has held that mere promotion of access to elected officials is not a sufficiently compelling indicator of corruption to justify limits on campaign contributions. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 360 (2010). *Cf.* dissenting opinion of Justice Breyer in *McCutcheon v. Federal Election Commission*, 572 U.S. --- (2014), joined by Justices Ginsberg, Sotomayor and Kagan, urging that the sale of access in return for contributions provides a compelling justification for contribution limits. Under *Citizens United* and *McCutcheon*, limitation is permissible when the contribution gives rise to an appearance of quid pro quo corruption.³

We think that targeting a member of the Legislature or his or her staff with paid lobbying activity through direct and private in-person or telephonic communication while simultaneously making substantial political contributions to that member—or to an entity in which the member has a significant interest, such as his or her conference’s campaign committee or his or her party’s housekeeping account--creates the appearance of a quid pro quo arrangement. As with ethics rules generally, the test is one of appearance, and the public is not required to trust that no misconduct occurred in the face of circumstances creating a plausible inference to the contrary.

³ The proposed advisory opinion concerns restrictions on the solicitation and acceptance of campaign contributions by elected officials in circumstances where the potential for conflict of interest is real. This comment addresses that concern by expressing the view that limiting the prohibition to enforcement powers and active litigation is too restrictive. An alternative approach would be to bar the elected official from granting special access to a large contributor. This approach is discussed in the Committee’s report, “Hope for JCOPE.” This alternative, while focused on special access, should also pass constitutional muster because the restriction is on the closed opinion gathering practices of the member and not on the free speech rights of the contributor. There is no constitutional right to have special access to a member of the legislature.

For example, a lawyer is barred from being adverse to a former client in a substantially related matter not because the lawyer will necessarily disclose confidential information gained in the former representation but because one can reasonably suppose and plausibly infer that will happen. Here the circumstances of paid direct lobbying of the official or his or her staff, the substantial contribution and the privacy in which the communication is carried out give rise to such a plausible inference and reasonable supposition of a connection between the contribution and a wrongful attempt to influence governmental action. We believe that such a reasonable supposition and plausible inference meet the test of an appearance of a quid pro quo and provide a compelling reason to bar the solicitation or acceptance of the contribution in these circumstances under the Court's First Amendment jurisprudence.

We urge the Commission to follow our recommendation to help bolster transparency which will, in turn, promote confidence in state government. Thank you again for the opportunity to submit our comments.

Respectfully submitted,



Benton J. Campbell