

#### 4. REMOVE LOOPHOLES THAT ALLOW PUBLIC CORRUPTION TO FLOURISH

The corrupt actions committed by public officials, frequently featured in newspaper headlines and prime time newscasts, damage the strength and integrity of our governments and the civic vitality of our communities. When people look on public officers and the institutions they serve as laughable, not laudable, the effects are far-reaching. And when the public perceives that law enforcement is powerless to punish public officers for their transgressions, it looks as though being a public officer provides a free pass for corrupt activity.

*“Self-dealing politicians have betrayed the public trust. Given the regularity of scandals, investigations and convictions of elected officials in this state, it is no wonder that the public believes there is one set of rules for the powerful and another for everyone else.”<sup>1</sup>*

The Law Enforcement Council recommends a multi-pronged approach to discourage and, where necessary, punish behavior that is antithetical to the basic responsibilities inherent to public service. First, provide county prosecutors with the power to try corruption cases locally, rather than out-sourcing corruption cases to federal prosecutors. Second, bring the Penal Law Bribery of Public Servants in line with the other bribery laws in New York State. Third, prevent sponsors and their relatives from having a financial interest in or receiving a benefit from a grant. Fourth,

enhance financial reporting requirements and campaign finance laws to close loopholes.

#### New York State Not Equipped with Tools Available to Federal Prosecutors

*“It has been embarrassing that we have so often had to rely on federal prosecutors to deter and punish corruption here in New York...At a time when there is a glaring crisis of confidence in state government, this is the first of a series of actions we must undertake to restore the public's faith in government.”*

*- Assemblymember Marcus Molinaro<sup>2</sup>*

Public corruption cases often cannot be prosecuted locally because New York State simply does not have the tools available at the state level that prosecutors have at the federal level. This leads to the over-federalization of state and local corruption enforcement.

For nearly a decade, former Assemblyman Anthony S. Seminerio lobbied legislative colleagues and government officials on behalf of clients of a company he created called Marc Consultants. He took more than \$1 million in payments from people and organizations doing business with the state. In one instance, he promoted the interests of Jamaica Hospital Medical Center and did not divulge receiving payments in excess of \$300,000, from the hospital. In return, Seminerio helped the hospital to secure state funding and he lobbied other officials to sup-

port Jamaica Hospital Medical Center's efforts to take over other hospitals. Other charges included extorting payments from the Jamaica Chamber of Commerce and accepting hundreds of thousands of dollars to persuade hospitals to hire a specific medical transportation company.

Federal prosecutors, not county or state prosecutors, brought this case, which resulted in a six-year sentence.

U.S. JUSTICE DEPARTMENT PUBLIC INTEGRITY UNIT CASE LOAD					
	2006	2007	2008	2009	TOTALS
<b>STATE OFFICIALS</b>					
CHARGED	101	128	144	93	466
CONVICTED	116	85	123	102	426
AWAITING TRIAL AS OF 12/31	37	65	61	57	220
<b>LOCAL OFFICIALS</b>					
CHARGED	291	284	287	270	1132
CONVICTED	241	275	246	257	1019
AWAITING TRIAL AS OF 12/31	141	127	127	148	543

Consistently high numbers of local and state officials are prosecuted federally, instead of locally. The reason so many cases are prosecuted federally instead of locally is evident when you look at the New York State Penal Law charge Scheme to Defraud, which is a very limited statute.<sup>4</sup> To meet the threshold of Scheme to Defraud, the offender must be a government insider who, as part of an ongoing course of conduct, defrauds the state or political subdivision of property, resources, or services in excess of \$1,000. Lesser amounts or one-time actions do not apply. Actions by non-

public servants who attempt to defraud public servants do not qualify. Finally, the law does not criminalize schemes that have corruption as their object.

Cases that do not fit the narrow Scheme to Defraud fact pattern had been prosecuted federally under the Honest Services Law.<sup>5</sup> Yet in June of 2010, this federal law, which defined Scheme or Artifice to Defraud as “a scheme or artifice to deprive another of the intangible right of honest services,” was found unconstitutionally vague by the Supreme Court.<sup>6</sup> It is critical that New York State act swiftly to enact a well-crafted statute that will apply to cases that are now being given a free pass.

In short, existing state law does not really help anti-corruption efforts in the manner it was intended, and existing federal law has failed to pass constitutional muster because of its vague language. Clearly articulating the standard of conduct required of public servants in New York State statutes will enhance accountability and keep proceedings at the local level.

### **Bribery Laws are Inconsistent, Provide Free Pass to Public Officials**

When most people think of bribery, they think of surreptitiously exchanging money, goods, or services with the intention of receiving a benefit in return. For instance, offering a “kickback” for a building contract, giving money to a sports figure to “throw” a match, or offering money to a government official to “cover up” an issue. Yet, as New York law has been interpreted by the courts, the definition of bribery is not uniform across these categories.

In the key case regarding bribery of a public officer, a hotel employee put cash in the pocket of a building inspector with the

intent that the inspector would ignore any infractions. The hotel employee, Bac Tran, was convicted initially of bribery. However, that conviction was reversed on appeal absent evidence that the defendant understood that the cash would have an effect on the inspector. The court ruled that in cases of bribery of a public officer, an exchange element has to exist. In other words, it is only a crime if the money is given in an explicit exchange for something from the other party. Simply giving money or services is not enough without a clear agreement.<sup>7</sup>

The requirement that an exchange of understanding occur in order to prove a bribery charge is both inconsistent with the laws in other states and inconsistent with other New York laws. The way the law is written and interpreted in *People v. Tran* relies on “agreement or understanding” language that is generally reserved for bribe *receiving*, not *bribing*. For example, Sports Bribe Receiving defines the offense as when “being a sports official, he solicits, accepts or agrees to accept any benefit from another person *upon an agreement or understanding* that he will perform his duties improperly.”<sup>8</sup>

The common language for *bribing*, as seen in Federal law, relies on the intent of the individual offering the bribe: “Whoever . . . corruptly gives, offers or promises anything of value to any public official . . . with intent to influence any official act [is guilty of a felony].”<sup>9</sup> This “intent to influence” formulation can be found in bribery laws in many other states<sup>10</sup> as well as all of the other New York State bribery laws.<sup>11</sup> In New York, a person is guilty of Bribing a Labor Official, for instance, “when, *with intent to influence* a labor official in respect to any of his acts, decisions or duties as such labor official, he confers, or offers or agrees to confer, any benefit upon him.”<sup>12</sup>

Simply rooting the Bribery Involving Public Servants laws in an “intent to influence” would harmonize public servant bribery with New York’s other bribery laws – namely Commercial Bribery, Sports Bribery, and Labor Bribery, in which the “intent to influence” formulation is used. As it stands today, those who bribe public officials are less likely to be prosecuted than those who bribe athletes.

### **Prevent Sponsors and their Relatives from having a Financial Interest in or Receiving a Benefit from a Grant**

In 2010, in response to several pay-to-play scandals, the legislature enacted a series of ethics laws that set the stage for comprehensive reform. The ethics laws require businesses and entities that lobby state government to disclose payments made to lawmakers for any purpose. In addition, lawmakers are required to disclose their outside income – income not derived from their position in the Senate or Assembly.

Recognizing that the legislation was a first step, but by no means a comprehensive reform, Governor Paterson said, “While there are some good aspects of the ethics bill passed today by the Legislature, it does not go far enough to address the underlying issues that have caused the people of New York to lose faith and trust in their government.”

The conviction of former State Senator Efrain Gonzalez illustrates the type of situation that occurs with alarming frequency.

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Ex-Bronx Senator Efrain González Jr. was one of the longest serving state senators in New York. In 2006, he was indicted on charges that he directed grants, also referred to as “member items” to not-for-profit organizations in the Bronx that employed

his girlfriend and family members. In addition, he siphoned the funding from the non-profit and used it to pay for personal expenses, including rent for an apartment in the Dominican Republic, jewelry, college tuition for his daughter, and tickets to sporting events.

González ultimately pled guilty in federal court to misappropriating \$200,000 in state funding from local non-profits for personal use.

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If the very people who allocate money are eligible to receive that money, it creates a perverse incentive. Lawmakers and their family members should not be eligible to benefit from member-items. This would prohibit elected officials from funneling government grants to friends and supporters.

## FINANCIAL DISCLOSURE AND CAMPAIGN FINANCE

### Campaign Finance

Campaign finance laws require candidates to report contributions from supporters. However, there is no provision in the law that dictates record keeping regarding the personal loans a candidate may make to their own campaign. In other words, if a candidate receives a large “personal” gift, and they then choose to take that money and loan it to their political campaign, the paper trail does not include the original donor.

This is important because candidates' contributions and loans to their own campaigns are not subject to contribution limits. Thus candidates and donors can circumvent campaign contribution limits and reporting requirements in a very simple way, without being held accountable.

The recent verdict of “not guilty” in *People v. Anderson* confirmed that individuals who give unlimited “personal” gifts or loans

to candidates and the candidates who transfer that money into their campaigns are not violating the law as it is currently written and understood. Under this interpretation of the law, campaign contribution limits serve no purpose because a candidate can accept so-called “personal” gifts or loans of any amount and then transfer that gift or loan into their campaign coffers. A system that allows a clear and unfettered path around campaign finance rules not only violates the spirit of the Election Laws, it is also inherently unfair to the other candidates who choose to obey the Election Law.

*“[S]tatistics tells us that there's a mounting cost to electioneering, and that money buys more than votes - it buys influence.”<sup>[1]</sup>*

Several changes should be made to the Election Law to clarify that such transactions are prohibited. One change would be to amend the Election Law to require that every candidate for public office and their spouse or domestic partner report any gifts or loans the candidate receives during the campaign and during the 12 months preceding their announced candidacy for office. This would allow the public, the press, and the candidates' opponents an opportunity to discover whether any so-called “personal” gifts or loans were actually given to the candidate in connection with the election.

### Financial Disclosure

The financial disclosure requirements in the Public Officers Law and the Judiciary Law are powerful measures intended to reduce the possibility of corrupt activities. Current provisions in the law permit

the redaction of the categories of value or monetary amounts on the annual statements of financial disclosure filed by public officials and certain candidates for public office in all three branches of state government. The law should be changed to require disclosure of the categories of value to the public. In other words, exact amounts would not be revealed, but the public would be able to ascertain basic categories of monetary amounts in question.

Financial disclosure should also require disclosure of relationships with non-profit organizations. Such disclosure would permit the public to learn where a public official's income actually is coming from, and would make it far more difficult for officials to hide improper financial dealings.

Campaign finance rules should include reporting by every candidate for public office and their spouse or domestic partner on gifts or loans during the 12 months preceding their announced candidacy for office. This would prevent loans intended for campaign use from being disguised as personal gifts.

These changes would allow the public to monitor the sources and values of outside income earned by elected officials.

## SUMMARY

There is no question that a sea-change is necessary in order to reverse the tacit acceptance of corruption of public servants. It is nonsensical that the bribery laws are written and interpreted in a way that treats public officers with kid gloves. It is similarly perplexing that lawmakers and their families and allies can sidestep the law to funnel tax dollars into their own pockets. It is unjust that financial disclosure laws allow personal gifts to be converted into campaign dollars in flagrant disregard of campaign finance laws. And,

finally, it undermines the authority of New York's local and state officials when cases need to be moved to the federal arena because state laws are inadequate to deter and prosecute the behaviors discussed above. In order to ensure that lawmakers are committed to improving the state of New York, there needs to be laws that identify and punish elected officials who seek to abuse the public trust. There is too much important work to get done in New York to afford corrupt officials a place at the table.

It is time for comprehensive ethics reform to end the corruption of public servants that erodes the public's faith in elected officials and undermines communities' civic engagement.

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1. Then-Senator Eric Schneiderman quoted on the eve of Reform Day in Albany when announcing the introduction of the Public Corruption Prevention and Enforcement Act (S.7707), accessed 11/3/2010 at [http://media-newswire.com/release\\_1118559.html](http://media-newswire.com/release_1118559.html).

2. "Assemblyman co-sponsors 'Public Corruption Prevention and Enforcement Act'" May 19, 2010 Press Release available at <http://assembly.state.ny.us/mem/Marcus-Molinaro/story/38132/>.

3. "Report to Congress on the Activities and Operations of the Public Integrity Section for 2009" available at [www.justice.gov/criminal/pin/docs/arpt--2009.pdf](http://www.justice.gov/criminal/pin/docs/arpt--2009.pdf).

4. N.Y. Penal Law §195.20.

5. 18 U.S.C. § 1346.

6. *United States v. Skilling*, 561 U.S. \_\_\_ (2010).

7. *People v. Tran*, 80 N.Y.2d 170 (1992).

8. N.Y. Penal Law §180.45(2).

9. 18 U.S.C. 201(b)(1)(A).

10. See Michigan, Utah, Arizona, West Virginia, Louisiana, Kentucky, Virginia, Idaho, Alabama.

11. See N.Y. Penal Law Article 180.

12. N.Y. Penal Law §180.15.

[i]. Alan Markow "Campaign Spending Doesn't Guarantee Victory, But It Does Boost The Clout Of Special Interests Accessed" California Independent Voter Network, October 22, 2010, available at <http://www.caivn.org/>.