

New York State Law



Enforcement Council

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Today the New York State Law Enforcement Council (LEC) unveiled its legislative agenda for 2011. The legislative priorities are: 1) expanding the state DNA databank, 2) increasing penalties for intimidating and interfering with witnesses, 3) safeguarding our children through a felony endangerment law that applies when a person in a position of trust inflicts serious or repeated abuse on a child, 4) holding public officials accountable to a high standard of ethical conduct, and 5) enhancing protections for police officers. *

Bronx County District Attorney Robert T. Johnson, Counsel to the LEC, expressed support for the principles behind the LEC priorities, stating, "We believe that we've come up with smart and fair ways to provide additional protection for the public in general, as well as police officers, children, and witnesses in particular. Furthermore, holding public officials more accountable would also provide a much needed boost to confidence in government."

New York County District Attorney Cyrus R. Vance, Jr., said, "At a time when New York State is forced to make significant budget cuts in the face of diminishing resources, the Law Enforcement Council is absolutely essential. Through the LEC, law enforcement partners from around the state stand together to put forth their core priorities. We recognize that it is always our responsibility to be careful stewards of our communities' resources. At the same time, we are in charge of safeguarding our communities, and in order to do so we are asking the legislature to act on the five priorities, which are no or low cost to taxpayers, but will reap substantial benefits to public safety."

✓ *Public Corruption*

There is a popular perception in New York State that corruption among public officials is rampant. While the overwhelming majority of public officials have the public interest as their paramount goal, there is a small minority that uses their authority for personal gain. There is no question that change is necessary in order to reverse the tacit acceptance of corruption of public servants and the perception of Albany as a safe house for corruption.

The Law Enforcement Council recommends a multi-pronged approach to discourage and, where

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necessary, punish behavior that is antithetical to the basic responsibilities inherent to public service. First, provide local prosecutors with the power to try corruption cases locally, rather than out-sourcing corruption cases to federal prosecutors. Second, bring Penal Law articles involving 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.

DNA Databank

DNA is the modern-day fingerprint; crimes are solved by matching DNA recovered at a crime scene to DNA taken from a known individual. Yet, while fingerprints are taken from all suspects on arrest, DNA can only be collected for a specific subset of crimes – and not until after conviction. Expanding the DNA databank to include DNA samples from suspects of all crimes at the time of arrest serves two critical purposes. First, it helps pinpoint suspects, reducing false leads and saving critical, limited resources. Second, it helps eliminate mistaken identification and speeds the exoneration of wrongfully implicated individuals.

Witness Intimidation

There are two classes of crimes – gang violence and domestic violence – that while quite different at first glance, actually have a lot in common. Both disempower and degrade the affected community, stripping victims of their sense of self and security. Perpetrators seek to inflict not only physical, but also mental and emotional violence against their victims. An integral part of gang and domestic violence is silencing victims and witnesses through intimidation and threats of violence.

The Law Enforcement Council recommends policy and procedural actions that will reduce incentives for intimidation; enhance punishments for intimidation; and establish a new cultural norm that restores fundamental rights to individuals and communities who are entitled to full access to the services provided by our law enforcement and criminal justice systems.

Child Endangerment

New York State does not have a child abuse article in the Penal Law. Police and prosecutors must work within the confines of the assault statutes when they are trying to hold abusers accountable. Under those statutes, prosecutors must prove the intentional infliction of serious physical injury or prove the use of a dangerous weapon. In many cases of child abuse, the actions either don't result in grave physical injury; it is difficult to prove that the act was undertaken intentionally, rather than recklessly; or the method of inflicting the abuse does not qualify because it does not stem from the use of a "weapon" as defined in the law. In many of these cases, children are put in danger through abandonment or neglect or they may be subjected to other physical or emotional cruelties that do not fall under the Penal Law definition of "physical injury."

The class E felony, Aggravated Endangering the Welfare of a Child, proposed by the Law Enforcement Council would penalize a person in a position of trust who knowingly acts in a way likely to be injurious to the child's physical, mental, or emotional welfare. The charge requires one of two aggravating factors to be present: the offender has previously been convicted of a crime in which the victim was a minor, or the conduct includes acts that cause the child extreme pain or which are carried out in an especially vicious or sadistic manner.

Police Protection

Police officers knowingly put themselves in physical danger every day. When suspects intentionally disobey the lawful commands of an officer or subject officers to unwanted physical contact, there are often serious ramifications to public safety. Yet, in those situations prosecutors may not have the appropriate laws needed to prosecute offenders. The Law Enforcement Council supports penalties for individuals who fail to heed or obey a police officer's lawful command; subject police officers to unwanted physical contact while they are performing their official duties; or attempt, while driving, to elude a police officer's order to pull over and comply.

The New York State Law Enforcement Council was formed in 1982 as a legislative advocate for New York's law enforcement community. The council's members represent the leading law enforcement professionals throughout the state, including the Attorney General of the State of New York, the District Attorneys Association of the State of New York, the New York State Association of Chiefs of Police, the New York State Sheriffs' Association, the New York City Criminal Justice Coordinator, and the Citizens Crime Commission of New York City. Since its inception, the council has been an active voice and participant both in improving the quality of justice and in continuing efforts to provide for a safer New York.

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Establish High Standards of Ethical Accountability

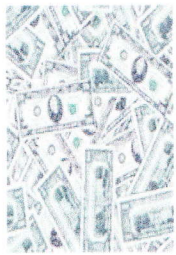
It is time for comprehensive ethics reform to end the corruption that erodes the public's faith in elected officials and undermines communities' civic engagement.

The Challenge: New York State does not have the tools available at the state level to effectively prosecute public corruption.

The Solution: Strengthening the "Scheme to Defraud" statute by clearly articulating the standard of conduct required of public servants in New York State will enhance accountability and keep proceedings at the local level.

The Challenge: The inconsistency of New York State bribery laws provides a free pass to corrupt individuals who attempt to obtain benefits or contracts from public officials.

The New York State Court of Appeals ruled that in cases of bribery of a public officer, it is only a crime if the money is given in an explicit exchange for something from the other party. Giving money or services isn't enough without a clear agreement.



The Solution: Simply rooting the Bribery Involving Public Servants law 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.

"Intent to influence," is the common language for defining bribing. It relies on an exchange in which the individual offering the bribe *intends to influence* the actions of the recipient.

The Challenge: There is currently no statute preventing dishonest lawmakers from awarding government grants to their family members with the intent of diverting those same funds for improper or personal use.

The Solution: New York State must enact a clearly articulated statute that prohibits elected officials from funneling government grants to friends and supporters and from arranging "kick-backs" in exchange for political support.

The Challenge: Candidates can evade campaign finance regulations by accepting "personal" gifts and loans of any amount and then transferring those funds into their campaign coffers.

The Solution: Campaign finance rules should include required reporting by every candidate for public office and their spouse or domestic partner on personal gifts or loans during the 12 months preceding their announced candidacy for office.



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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."

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 Molinaro⁷

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. Seminero 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, Seminero 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
STATE OFFICIALS					
CHARGED	101	128	144	99	466
CONVICTED	116	85	123	102	426
AWAITING TRIAL AS OF 12/31	37	65	61	57	220
LOCAL OFFICIALS					
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.⁴ 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.⁵ 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.⁶ 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.⁷

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.”⁸

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].”⁹ This “intent to influence” formulation can be found in bribery laws in many other states¹⁰ as well as all of the other New York State bribery laws.¹¹ 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.”¹²

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.

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.

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 the case above confirmed that individuals who give unlimited “personal” gifts or loans to can-

didates 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.”⁴¹

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.

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-newsline.com/release_1118536.html.

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

3. "Report to Congress on the Activities and Operations of the Public Integrity Section for 2009" available at www.justice.gov/crim/aipl/docs/aipl-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*, 85 N.Y.2d 170 (1995).

8. N.Y. Penal Law §180.45(2).

9. 18 U.S.C. 205(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 §180.13.

13. Ann Markus: "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.civnet.org/>.