

# Administrative Board Closes “Pay To Play” Saga: 1995-2000

BY STEVEN C. KRANE

For five years, the Association of the Bar of the City of New York (“ABCNY”) had spearheaded a dedicated effort to eradicate pay to play by New York lawyers. Following the adoption by the ABA House of Delegates on February 14, 2000 of a new Model Rule 7.6 which would go a long way towards eliminating pay to play, the ABCNY continued to press for adoption in New York of more explicit rules prohibiting the practice. According to the ABCNY, New York’s EC 2-37 and 2-38 do not address lawyer contributions to judges to obtain appointment as a fiduciary, and DR 2-103(B), to which the ECs refer, has never been applied to a lawyer who made a political contribution for the purpose of obtaining government legal work.

Shortly after the ABA amended the Model Rules in February to adopt the new Model Rule 7.6, the ABCNY reiterated its request to the Administrative Board of the Courts (the “Board”). (The Board consists of the Chief Judge and the Presiding Justices of the four departments of the Appellate Division.) The ABCNY proposed a rule that either (a) tracks the substance of Model Rule 7.6, (b) contains a bright line prohibition on accepting government legal work within a stated period of time following the making of contributions over a certain dollar amount (the ABCNY proposes a two-year ban following a \$500 contribution), or (c) places the judiciary’s imprimatur on the statement in EC 2-37 that the Code of Professional Responsibility currently prohibits pay to play. The proposals were contained in a letter from ABCNY President Michael A. Cooper to the Board.

## **Board Responds To ABCNY Letter.**

The Board acted swiftly and, on March 6, 2000, issued a document entitled “Statement of the Unified Court System on ‘Pay to Play’.” Adopting the ABCNY’s option “c,” the Board stated: “‘Pay to play’ is wrong. The practice should not go on. The existing Disciplinary Rules of the Code of Professional Responsibility, promulgated by the four Appellate Divisions, already prohibit ‘pay to play.’” Opining that DR 2-103(B) does not, by itself, “specifically address the nuances of campaign contributions and other donations in the political arena,” the Board quoted EC 2-37 and 2-38 in their entirety. Significantly, the Board stated that “Ethical Considerations are interpretative guidelines in applying the disciplinary rules.”

The Board concluded that the two EC’s, taken together, “provide the necessary legal framework to prohibit ‘pay to play.’” The Board observed in addition that DR 2-103(E) “closes the circle by prohibiting the actual acceptance of a legal engagement in violation of [DR 2-103(B)]” The Board declined to go further to fix contribution amounts beyond which no government legal engagements could be accepted.

The Board’s action represented the denouement of the ABCNY’s valiant five-year battle to promote a bright-line barrier between lawyers’ political contributions and judicial or political appointments such as

guardianships and receiverships. This article reviews the history of the movement to eliminate the practice of pay to play, both nationally and in New York.

### **New ABA Model Rule 7.6**

Model Rule 7.6 approved by the ABA House of Delegates (by a margin of nearly two to one) on February 14, 2000 amends the Model Rules of Professional Conduct. If adopted by the states, the new Rule will go a long way toward eliminating “pay to play,” the new rule, which is accompanied by six explanatory comment paragraphs, provides:

A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

[Note: The ABA Model Rules of Professional Conduct do not have the force of law in any jurisdiction unless and until adopted by the appropriate attorney regulatory authority. New York has never adopted the Model Rules. New York lawyers are governed by a set of rules that take the form of the original ABA Model Code of Professional Responsibility but that have been amended to include much of the substance of the ABA Model Rules.]

### **The Beginnings Of The Pay To Play Movement**

In 1995, the ABCNY Committee on Government Ethics issued a report that discussed the corrosive practice of pay to play in the municipal finance area, 52 THE RECORD 143 (1997). The report explained that [as first documented by the “Feerick Commission” (the New York State Commission on Government Integrity), and corroborated by independent studies] many attorneys specializing in municipal finance were receiving lucrative municipal finance work not as a result of the quality of their legal representation, but because of the political contributions they had made to the public officials who in turn were responsible for awarding them the municipal finance work. To stem this practice, the ABCNY urged adoption of a rule that would render ineligible for municipal finance work attorneys and their firms who had made political contributions to municipal finance officials.

The ABCNY proposed the adoption of a Court Rule patterned on Rule G-37 of the Municipal Securities Rulemaking Board, which governs investment bankers [The Rule had been approved by the Securities and Exchange Commission, and found constitutional by the D.C. Circuit, *Blount v. SEC*, 61 F.3d 938, cert. denied, 517 U.S. 1119 (1996)]. The issue was hotly debated after issuance of the ABCNY report, with widespread and virtually unanimous support for significant positive action by newspaper editorial boards, including The New York Times, Newsday, The Albany Times Union, The Buffalo News, USA Today, The National Law Journal, and Crain’s New York Business.

### **Pay To Play Condemned By ABA Delegates**

In August 1997, the ABA House of Delegates adopted a resolution that condemned the practice of pay to play with respect to all attorneys, not just those engaged in municipal finance, called on judicial rule making agencies and lawyer disciplinary agencies to enact rules that would discourage pay to play, and created a Special Task Force to determine whether additional professional standards dealing with pay to play should be adopted.

In April 1998, the House of Delegates of the New York State Bar Association (“NYSBA”) recognized “that there is a perception that lawyers are expected to make political contributions to public officials in return for being considered eligible by public agencies to perform professional services,” and therefore adopted a resolution that “to the extent that the practice of ‘pay to play’ may exist, such conduct is wrong and should be prohibited.” The resolution directed the appointment of a Task Force to study and report on the issue.

### **The ABA Takes Action**

In July 1998, the ABA Task Force issued its report. It concluded that mere condemnation of the practice of pay to play was not going to be sufficient and unanimously urged adoption of both a new Model Rule declaring pay to play to be unethical and a rule requiring disclosure of lawyer campaign contributions. The Task Force also recommended that a rule be promulgated that would render a lawyer and his or her firm ineligible to accept legal work from a public official to whom the attorney had made a political contribution unless the lawyer demonstrated that the contribution was made for a purpose other than being considered for retention to perform legal services.

The ABA House of Delegates, on August 4, 1998, adopted a resolution declaring that pay to play is wrong and should be condemned, that a new ethical rule should be prepared declaring pay to play to be unethical, that disciplinary authorities should adopt rules that require disclosure of political contributions by attorneys who render legal services to the government, and that “[w]here local circumstances warrant” a rule should be considered for adoption that would limit or prevent a lawyer who has made a political contribution to a government official from accepting a legal engagement from a governmental entity with whom that official is affiliated.

Over the course of the next year, the ABA Standing Committee on Ethics and Professional Responsibility (“ABA Ethics Committee”) prepared and circulated a proposed new Model Rule. Despite the fact that the proposed rule did nothing more than implement prior instructions from the House of Delegates to draft such a rule, the House rejected it at its August 1999 meeting by a vote of 164 to 146. Because the vote had been taken very late in the session after a substantial number of delegates had departed (only 310 of the 530 members of the House were present and voting) and without adequate opportunity for balanced debate (only one “pro” speaker, other than the moving sponsor, was recognized before a tired House called the question), the matter was resubmitted to the House of Delegates in February 2000 (at an earlier point on the agenda), at which time the very same proposed Model Rule was approved by a vote of 266 to 157.

### **New York Considers The Issue**

In the meantime, consistent with the resolution adopted at the April 1998 NYSBA House of Delegates meeting, the Task Force to Study Pay to Play Concerns, chaired by A. Thomas Levin of Mineola, had been at work. The Task Force issued a report on December 6, 1998 in which it recommended, among other things:

clarification of existing statutes, to make clear that it is illegal for any person or entity to make or solicit contributions, or provide or solicit anything of value, to any public official, candidate for public office, political campaign committee or political party, in exchange for a promise, express

or implied, of designation or selection of any person or entity to provide any service to any public entity, or to be considered to provide any such service.

The Task Force also recommended adoption of Ethical Considerations “explaining that the practice of pay to play is improper and prohibited by existing provisions of the Code of Professional Responsibility.” It was the view of the Task Force that while “[n]ewspaper articles, and other media reports, are replete with examples where lawyers and law firms ... who have contributed substantial sums to political candidates or parties subsequently have received appointments from the recipient candidates or parties to provide services to public entities,” one could not necessarily correlate the fact of the contribution with the fact of the appointment. According to the Task Force, “many people make substantial contributions to those same candidates or parties, without receiving such appointments, and apparently without the intention or hope of receiving such appointments.” Thus, the Task Force concluded that the only contributions that should be prohibited were those involving a demonstrable quid pro quo, and such contributions were already prohibited by DR 2-103(B), which provides:

A lawyer shall not compensate or give anything of value to a person or organization to recommend or obtain employment by a client, or as a reward for having made a recommendation resulting in employment by a client, except that a lawyer may pay the usual and reasonable fees or dues charged by a qualified legal assistance organization or referral fees to another lawyer as permitted by DR 2-107.

### **NYSBA Delegates Adopt Two EC's**

Accordingly, at its January 1999 meeting, the NYSBA House of Delegates adopted two new Ethical Considerations for the purpose of expanding upon and imbuing a gloss upon DR 2-103(B) (the language of which is tracked in the EC). EC 2-37, entitled “Improper Political Contributions,” states:

**EC 2-37.** Campaign contributions by lawyers to government officials or candidates for public office who are, or may be, in a position to influence the award of a legal engagement may threaten governmental integrity by subjecting the recipient to a conflict of interest. Correspondingly, when a lawyer makes a significant contribution to a public official or an election campaign for a candidate for public office and is later engaged by the official to perform legal services for the official's agency, it may appear that the official has been improperly influenced in selecting the lawyer, whether or not this is so. This appearance of influence reflects poorly on the integrity of the legal profession and government as a whole. For these reasons, just as [DR 2-103(B) of] the Code prohibits a lawyer from compensating or giving anything of value to a person or organization to recommend or obtain employment by a client, the Code prohibits a lawyer from making or soliciting a political contribution to any candidate for government office, government official, political campaign committee or political party, if a disinterested person would conclude that the contribution is being made or solicited for the purpose of obtaining or being considered eligible to obtain a government legal engagement. This would be true even in the absence of an understanding between the lawyer and any government official or candidate that special consideration will be given in return for the political contribution or solicitation.

EC 2-38 lists “factors to be considered” in “determining whether a disinterested person would conclude that a contribution to a candidate for government office, government official, political campaign

committee or political party is or has been made for the purpose of obtaining or being considered eligible to obtain a government legal engagement.”

### **Conclusion Of Saga**

The March 6 statement by the New York Administrative Board resolves two questions left open by a literal reading of New York DR 2-103(B): (a) whether the making of a political contribution is the equivalent of compensation or the giving of a “[t]hing of value” (it is) and (b) whether it would apply to a payment made for the purpose of “being considered for employment,” or only those resulting in “recommendations” or actual engagements (it will).

Whether DR 2-103(B) will be interpreted to cover a judicial appointment — i.e., whether that constitutes “employment by a client” — is still an open question.

As a practical matter, it remains to be seen whether the New York courts will actually prosecute attorneys for improper political contributions. Public discipline (censure, suspension or disbarment) of an attorney who has violated DR 2-103(B), as now officially englossed by EC 2-37 and 2-38 in the pay to play context, would go a long way toward alleviating the concerns of those who believe that we have not put the final nails in the coffin of pay to play.

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