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THE CITY OF NEW YORK LOBBYING COMMISSION

2

PUBLIC HEARING

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22 Reade Street

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New York, New York

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May 3, 2011

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10:00 a.m.

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12 B E F O R E: Hon. Herbert Berman, Chair

13 COMMISSION MEMBERS:

14 Margaret Morton

15 Jamila Ponton Bragg

16 Elisa Velazquez

17 Lesley Horton

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2 MR. BERMAN: Good morning, ladies and
3 gentlemen. Can everybody hear me?

4 THE AUDIENCE: Yes.

5 MR. BERMAN: Good, thank you. My name
6 is Herbert Berman. I'll be pleased to
7 introduce the members of the Commission that
8 are here this morning. On my right,
9 Commissioner Elisa Velazquez, Leslie Horton,
10 Margarate Morton and Jamila Ponton Bragg. On
11 my left the staff people affiliated with this
12 Commission who are here are Bill Heinzen, Jim
13 Caris, Lamonte Bland (ph,) Matt Gorton, Mike
14 Gibbick (ph) and Lisa Jones. And I'm going
15 to tell myself and I'll ask everybody else to
16 shut off your phone.

17 Anyhow, thank you for coming here this
18 morning, and I want to welcome everybody to
19 the third public meeting of the New York City
20 Lobbying Commission. At this hearing we will
21 hear from representatives of lobbying firms
22 on the issues they face in complying with the
23 City's lobbying laws. As we stated when we
24 started this process, it is important to hear
25 from the regulated community of lobbyists and

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2 listen to their concerns. The reason for
3 this is that part of achieving a system that
4 results in the ethical conduct and
5 transparency that we all desire is to make
6 sure we have a system that is fair, that is
7 sufficient, that is possible, so that the
8 vast majority of lobbyists can comply with
9 the requirements of this system and not feel
10 that they're having punishment inflicted.

11 This morning we will hear from the New
12 York Advocacy Association, an Association of
13 lobbyists representing over 50 lobbying
14 firms, associations and in-house lobbyists in
15 New York City. It is our understanding that
16 the Advocacy Association has members that are
17 both large and small insofar as being firms.
18 The association was formed largely in
19 response to the strengthening of the lobbying
20 laws of 2006.

21 Although we have asked the association
22 to present several common issues today, I
23 want to be clear that any member of a
24 lobbying firm who wishes to raise any issue
25 is welcome to do so today, or if not today,

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2 at any time, and that anyone regulated under
3 the lobbying law, whether a member of a firm,
4 a Government Affairs employee, a not-for-
5 profit employee or a client, is welcome and
6 encouraged to testify at our open hearing on
7 May 11th or to submit testimony in writing to
8 LobbyingCommission@CityHall.NYC.gov.

9 I want to thank you for listening to
10 that, and I will tell you that we've invited
11 any number of people who contacted us to
12 submit testimony and to meet with staff, we
13 have had a number of meetings, so, the
14 process is ongoing and it's been an
15 enlightening process and hopefully we'll end
16 up with an improved law.

17 Alright, to begin this session, our
18 first witness, Ken, you are going to testify
19 for Advocacy Association. Would you identify
20 yourself and the person with you?

21 MR. FISHER: Good morning, Mr. Chairman
22 and members of the Commission. My name is
23 Ken Fisher, I'm a partner at the Law Firm of
24 Cozen O'Connor, also associated with Cozen
25 O'Connor Public Strategies. We are pro bono

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2 counsel for the New York Advocacy
3 Association, and accompanying me is Arthur
4 Goldstein from Davidoff & Malito, another
5 member of the association who has been active
6 in our working group on recommendations to
7 you.

8 As you know, Mr. Chairman, we testified
9 at the previous hearing, subsequent, we had
10 the opportunity to talk with staff about some
11 other issues. We have position papers on the
12 items that I'm going to mention today. What
13 I'd like to do is just briefly call off the
14 topics of those memorandums and then we'd be
15 happy to answer questions if the Commission
16 has any.

17 First off, when we refer to a
18 sub-contractor lobbying, it's not unusual for
19 a team of lobbyists to be assembled with one
20 person or a firm coordinating or for a law
21 firm to be retained and then in turn want to
22 hire a lobbying firm to maintain privilege on
23 certain communications. The same system
24 allows for the sub-contractor to be listed as
25 an additional lobbyist and reported under the

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2 main lobbyist reports and client reports, the
3 City system doesn't yet accommodate that.
4 It's unclear how the City would handle that,
5 but it might force the lobbyist, the prime
6 lobbyist, to be considered the client.

7 MR. BERMAN: Ken, if I may, if in fact
8 the law was changed to allow listing under
9 the main lobbyist report, that would be in
10 compliance, then that would be acceptable
11 with State law?

12 MR. FISHER: Consistent with the State.

13 MS. VELAZQUEZ: Ken, I'm sorry. So,
14 currently now, we don't, the City, doesn't
15 capture that subcontractor information?

16 MR. FISHER: No. Right now, there is
17 some -- the Clerk's office has been reviewing
18 this issue and hasn't come out with a
19 definitive position, but their initial
20 position, which they've since put on hold,
21 was that the prime lobbyist should register
22 as the client and then the sub-contractor
23 would register as the lobbyist's lobbyist, if
24 you will. We don't think that that captures
25 the data, because it really is the client

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2 that you're concerned about, you know, and
3 having it in one report just seems to make
4 sense.

5 MS. VELAZQUEZ: Right, okay.

6 MR. FISHER: On the threshold amounts,
7 and I know that you'll be hearing, you've
8 already had some conversation about that, we
9 agree that the threshold amount should be
10 raised. Whether that number is 10,000 or
11 25,000, we don't have an official position
12 on. We do, however, think that registration
13 should be triggered when you cross the
14 threshold whenever it is, in other words, not
15 just reasonably anticipate, which is hard to
16 guess and we believe constitutionally not
17 supportable, as vague. So, we would have the
18 trigger be when you go over the threshold,
19 that's when you have to register.

20 MR. BERMAN: Alright, now, currently if
21 you reasonably anticipate, in other words, if
22 you get a retainer that's in excess of
23 \$2,500, the anticipated agent would then
24 register?

25 MR. FISHER: Right, but if you're

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2 engaged on an hourly basis, for example, you
3 would have to guess as at what point you're
4 actually going to engage in lobbying
5 activity. In other words, a client may come
6 to you because they want to discuss something
7 that's not under lobbying activity but you
8 decide along the way that you want it to be,
9 now you have a paperwork burden of going back
10 and showing to the Clerk's office how you
11 came to register later rather than sooner.

12 MR. BERMAN: Well, a lot of you reco-
13 mmend-let us say hypothetically that you're
14 retained exclusively for lobbying purposes
15 but you're getting hypothetically a \$2,500 as
16 against hours.

17 MR. FISHER: Right.

18 MR. BERMAN: The current rule would
19 require you to register as soon as that
20 retainer would be signed then; am I right?

21 MR. FISHER: Yes. Well, the answer to
22 that is yes, if in fact you are -- as soon as
23 the retainer is signed, you would have to
24 register because you reasonably anticipate
25 because you are going to be engaged in

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2 lobbying activity in the next year.

3 MR. BERMAN: The association proposal is
4 that when you reach the \$2,500 point, that's
5 when you should register?

6 MR. FISHER: Yes, well, whatever the
7 threshold amount.

8 MR. BERMAN: Whatever the threshold,
9 yeah.

10 MR. FISHER: And by the way, that would
11 solve another problem that I know has come up
12 and that's the lack of clarity about
13 community boards and whether you have to
14 register for a community board. Obviously if
15 it's part of a ULURP process you're going to
16 be registering anyway, but if it's something
17 where the ultimate government action is
18 quasi-judicial, such as the Board of
19 Standards and Appeals, that's not lobbying
20 activity but the advisory community board or
21 your way is considered lobbying activity.

22 MS. HORTON: Can I just interrupt you
23 just for one second? I just want to get
24 additional information about how your
25 organization would be affected were the

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2 threshold to be raised whether it be to 5,000
3 or 10,000, do you have a sense of, whether it
4 be how many members or how many fewer people
5 would have to register, anything like that
6 that you can offer us?

7 MR. FISHER: The only data we have is
8 what was referenced by the State Commission
9 on Public Integrity and their testimony,
10 which they felt that if you raised the limit
11 to \$10,000, it would still capture 98 percent
12 of their registrants. So, I don't know what
13 the data -- I think the Clerk's Office could
14 tell you what kinds of numbers people are
15 reporting.

16 But there is one other very important
17 point in this area and that is that we
18 believe that the registration requirement
19 should be triggered by the client
20 expenditure, not the lobbyist's status.
21 Right now, if I am a registered lobbyist for
22 any client, I must register for clients even
23 if I'm doing it for free. I am representing
24 the New York Advocacy Association for free
25 but I nonetheless had to pay a couple of

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2 hundred dollars for the privilege of doing
3 that because my firm is registered as a
4 lobbyist for any client. We believe that the
5 registration requirement should be on a per
6 client basis; the client goes over the
7 threshold, then you register for that client.
8 If you're doing it for free where you're
9 under the threshold, then there shouldn't be
10 a registration requirement simply because
11 you're registered for someone else.

12 MR. BERMAN: If you increase the
13 threshold amount, that would effectively also
14 remove from the burdens of filing the small
15 non-for-profits that we've heard so much
16 about.

17 MR. FISHER: Yes, and small businesses
18 for that matter as well. But again, on the
19 community board, for uncontroversial
20 community board matters, and you know the
21 threshold would likely not be reached if the
22 only lobbying activity is the community board
23 itself, for more controversial things, the
24 chances are you'll go over the threshold and
25 then the disclosures would be made.

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2 Couple other things I just want to touch
3 on quickly that are more technical in nature,
4 we understand there's been some discussion
5 about whether lobbying should be reported on
6 a cash basis or an accrual basis. Right now
7 the statute basically says "incurred or
8 received." I think most lobbyists report
9 what they bill the client. I know this will
10 be shocking, but we don't always collect what
11 we bill. Having to go back and correct that
12 would be a paperwork nightmare, so, we think
13 simply whatever -- what the client incurs is
14 what ought to get reported, if there's a
15 slight over-reporting, we don't think that
16 that hurts the public interest.

17 MR. BERMAN: Alright. So, let me
18 understand this. Currently?

19 MR. FISHER: It's incurred or received,
20 and most of us report what's incurred, what's
21 billed.

22 MR. BERMAN: So, you're willing to say,
23 even if it may not apply, you'd rather be
24 just burdened with having to deal with the
25 incurred and that covers everything anyhow?

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2 MR. FISHER: And not go back after the
3 fact and not have to amend reports later on.

4 MR. BERMAN: I understand what you're
5 saying.

6 MR. FISHER: There's been quite a bit of
7 discussion about payroll records particularly
8 for supportive staff, so, just to simplify
9 that as best as I can, when we're dealing
10 with a third-party lobbyist, the amount that
11 the client is paying the firm or the
12 individual lobbyist is the amount that ought
13 to be reported, there have been some efforts
14 to get the compensation of individual
15 lobbyists reported, we resisted that and
16 that's no longer being sought.

17 We have heard anecdotally of audits that
18 have attempted to get payroll records of
19 support staff in the office, my file room
20 clerk, my secretary or whatever. Again, the
21 client is paying us a lump sum, what we do
22 with it really doesn't go to the disclosure
23 issue.

24 For in-house lobbyists, primarily the
25 non-for-profits but also some businesses,

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1
2 they have to do a calculation of how much
3 staff time, who is spending on what, to be
4 able to determine what their threshold -- you
5 know, whether they've crossed the threshold,
6 and also the amount of lobbying activity that
7 financially that they have to report; did the
8 head of a non-profit spend a little bit of
9 time or a lot a time; is it a full-time
10 government relations person or not. Our
11 recommendation, we don't have a specific
12 recommendation in terms of how to handle it,
13 but there ought to be safe harbor rules, you
14 know, like there are for non-profits with the
15 IRS in terms of the amount of lobbying that
16 they can do, there's a couple of formulas.
17 So, either the people ought to be able to
18 take, you know, some flat percentage of their
19 payroll or some other formula that -- because
20 making people keep time sheets in that
21 environment doesn't seem to be very
22 productive. So, we support the Human
23 Services Council and some of the other
24 non-profits that you'll be hearing from, and
25 we think that the development of some safe

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2 harbor formulas would solve that, would go a
3 long way to solving that problem. There is
4 an advisory opinion that deals with the
5 payroll issue that you may want to look at.

6 Again, just briefly, couple of other
7 things. Having to report who is a decision-
8 maker when you're dealing with government
9 agency staff is burdensome and in many cases
10 embarrassing. When we met with your staff,
11 the first thing we asked them is, "Okay,
12 which one of you is a policy maker?" because
13 that's what we seem to be required to do.
14 The statute doesn't say that, the statute
15 says "person or agency." To me, the people
16 reference that are the Mayor, the
17 Comptroller, the Public Advocate, the Borough
18 Presidents, I might be able to stretch it to
19 City Council members, although I think
20 routinely most of us view that we're lobbying
21 all 51 Council Members and they're the
22 decision makers.

23 Agencies: If we say we're lobbying HPD,
24 I'm not sure that it matters -- if we say
25 we're lobbying the Mayor's Office of Contract

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2 Services, I'm not sure whether it matters.
3 Whether we list Marla Simpson by name or her
4 counsel if the agency that's effected --
5 there's a certain element to voyeurism in the
6 press' mind in wanting to know who
7 specifically talked to who.

8 MR. BERMAN: Are you currently required
9 to list the individuals?

10 MR. FISHER: Yes.

11 MR. BERMAN: So, your recommendation --

12 MR. FISHER: Person or agency.

13 MR. BERMAN: Is to just do the agency,
14 not the individual?

15 MR. FISHER: Yes, and by the way, we
16 can't report about our activities here
17 because you're not in the "drop-down menu."

18 (Laughter)

19 MR. FISHER: There's a specific menu of
20 government agencies and staff members and as
21 of earlier this week you weren't in it, so I
22 can't report my lobbying activities here.

23 MR. BERMAN: That's an unlikely story,
24 Ken, but I think it's a good one.

25 (Laughter)

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MR. FISHER: And this is the last point that I want to make, and I know this is going to be somewhat controversial, so forgive me if I just take a moment on this: We believe that there are classes of professionals who are engaged in lobbying activity but by unwritten tradition are exempt from those rules; principally design professionals involved in land use matters, some economists and others. Generally speaking, if you're testifying in response to an invitation or you're, you know, we would include public hearings where the public is invited generally to testify as you did earlier, Mr. Chairman, if you're testifying, if you're providing technical information, response for information, if you're preparing applications for the client but are not engaged in advocacy, then the statute allows, you know, for that and you're not really considered a lobbyist. But when you engage in lobbying activity, you engage in lobbying activity regardless of the initials after your name. And let me give you an illustration of that

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2 that's very aft: We're meeting in the same
3 room where the Board of Standards and Appeals
4 holds their hearings, and as I mentioned
5 before, BSA proceedings by themselves are
6 quasi-judicial and not subject to the
7 lobbying law. However, if you go to the
8 community board on your way for an advisory
9 opinion, then that may, if you cross the
10 2,000 non-threshold, that would be considered
11 lobbying activity and you'd have to
12 register. So, I pulled the calendar from a
13 recent BSA session where there were six items
14 on variances and special permits, all of
15 which require you to go to the community
16 board on your way to the BSA. Of those six
17 applications, they were filed by five
18 different firms, not one of the firms was
19 registered to lobby on those matters. One of
20 the applicants -- and in the BSA system the
21 professional is the applicant. One of the
22 applicants was in the system for other
23 clients but had not registered for either of
24 the two matters that he was appearing before
25 the BSA that day. Now, and I mention, if

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2 you're in the system for anybody, you have to
3 be in the system for everybody even if he was
4 under the threshold for each of those
5 clients.

6 MS. VELAZQUEZ: Are we sure in those
7 instances that those individuals were
8 actually representing or lobbying at the
9 community board level for those clients?

10 MR. FISHER: We don't know that. What
11 we know is that they were the applicant, they
12 filed the application, they're listed as the
13 applicant. We know that they have an
14 obligation to notify the community board of
15 the application, and we know that under the
16 BSA procedures that the matter had to be
17 presented at the community board. So, is it
18 theoretically possible that somebody other
19 than the applicant made the presentation at
20 the community board? That's theoretically
21 possible but it's unlikely that in all six
22 cases that was the case.

23 MS. VELAZQUEZ: So, does the applicant
24 actually go before the Board of Standards and
25 Appeals or does the attorney?

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2 MR. FISHER: Yes. I have sat at this
3 counter as the applicant on variance case and
4 special permits after having presented at the
5 community board.

6 MS. VELAZQUEZ: Okay.

7 MR. FISHER: And here's the other point
8 that I want to make about this: So, of the
9 six applications, three of them were filed by
10 what appears not to be lawyers; one is filed
11 by an architect, one is filed by an engineer,
12 the third one is filed by an LLC, we're not
13 quite sure who they are; but the work that
14 the architect and the engineer were doing in
15 those cases, identical to the work that the
16 lawyer was doing. All three of them are the
17 applicants, all three of them are responsible
18 for the same things, and in that case the
19 architect and the engineer are not just
20 putting their seals on the applications,
21 they're not just providing technical work,
22 they are standing up at the BSA as the
23 applicant and we believe that they stood up
24 at the community board and spoke there as
25 well. Now, it may be that they were under

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2 the threshold, but with a \$2,000 threshold,
3 you would have to think at least, you know,
4 one of them would have of crossed that line.
5 So, from the practical point of view, the
6 exclusions are fine for people who are simply
7 preparing testimony or technical materials,
8 whatever. But when someone comes to a public
9 hearing and says, "I think that the disparity
10 study on women and minority owned businesses
11 is good" or "bad" and "I'm an economist,"
12 then their opinion is lobbying in the same
13 way that my opinion would be if I got up as a
14 lawyer and I said the same thing. So, we
15 think this is by custom, the statutory
16 definition does not seem to allow for this,
17 and we certainly think that the broader the
18 capture there the better.

19 And we would also urge an amnesty, we're
20 not looking to burn anybody on this, but, you
21 know, so, we think that if this is a policy
22 that's going to go into effect, that people
23 should not be heard for, you know, for what
24 was a generally accepted practice even if it
25 wasn't authorized by the statute.

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2 MR. BERMAN: Annunciate your
3 recommendation though.

4 MR. FISHER: Basically that the
5 definition of lobbying activity be clarified
6 and that the Clerk's Office notify, basically
7 publicize the fact that if you engage in
8 lobbying activities, even you are wearing
9 some other hat, that you must register.

10 I still have land use lawyers who say to
11 me, "I'm a lawyer, I'm not a lobbyist." No,
12 I'm sorry, you're a lobbyist whether you like
13 or it not. Just like the investment banking
14 firms, a lot of them are registered because
15 they do public finance. We think of them as
16 bankers, they're writing bonds but registered
17 as lobbyists and that's fine.

18 MR. BERMAN: But the flip side of what
19 you're saying is that if you're strictly
20 there for technical assistance, you should
21 not be required to file?

22 MR. FISHER: That's what the statute
23 provides now, and we think that that's
24 perfectly fine. We're not looking to inhibit
25 people or subject people to the lobbying

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2 regulations and the paperwork unnecessarily,
3 we just think that if people are engaged in
4 advocacy, it doesn't matter what profession
5 they have.

6 MR. BERMAN: Let us assume that you're
7 meeting with City Council or a decision maker
8 and you're lobbying and you call Arthur who's
9 an engineer for some technical advice, does
10 he have to file?

11 MR. FISHER: I think that if Arthur has,
12 let's say, drafted the EIS, the environmental
13 impact statement, as part of a land use
14 application, that's technical and that's part
15 of the application and that's covered by the
16 current exemptions.

17 But if I bring Arthur to a meeting with
18 the Council member and he's going to argue
19 why the traffic mitigation that we've come up
20 with for our new shopping center --

21 MR. BERMAN: That's lobbying.

22 MR. FISHER: -- is the right solution for
23 Canarsie, that's lobbying.

24 MS. MORTON: Where do the fees come into
25 play though; so, then do we have to double

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2 the amounts, the client then has put forth
3 what they charge for Arthur and his lobbying
4 and your lobbying, then they'd be closer to
5 threshold that much faster?

6 MR. FISHER: Well, that very well may be
7 the case, but right now a disproportionate
8 amount of money that's reported on these land
9 use items because land use practitioners
10 capture pretty much everything they do
11 leading up to the ULURP public hearings. In
12 other words, the amount of time that I spend
13 talking to individual Council members or
14 Borough Presidents or even the City Planning
15 Commission staff on a zoning application is
16 only a small fraction of what's typically
17 reported. We may spend tens of thousands of
18 dollars, hundreds of thousands of dollars,
19 sitting with the architects and the bankers
20 and whatever, figuring out what the building
21 is going to look like, we have no way of
22 breaking that out from the other kinds of
23 advocacy, we report all of that.

24 Obviously, if you limit it to only
25 direct contacts rather than what happens in

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2 the back office, that would bring those
3 dollar amounts down considerably and a lot of
4 people would be left out of the threshold.
5 But right now, the practice at the Clerk and
6 the State is that if Arthur and I are in a
7 meeting talking to each other and we're
8 billing the client for that, that's
9 considered lobbying activity, not just when
10 we come and testify before you.

11 MR. BERMAN: I'm sorry, may I proceed or
12 are you --

13 MR. FISHER: I just want to say one
14 other thing. I mean, we're happy to meet
15 with your staff to go through the technical
16 services definition that's in the statute.

17 But I want to make one last comment,
18 because I know that you have other witnesses
19 as well. The Clerk's Office -- and by the
20 way, I want to be very clear, we like our
21 friends in the Clerk's Office, they do a good
22 job with very limited resources but they've
23 inherited --

24 MR. BERMAN: You made a very good
25 comeback, Ken.

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2 MR. FISHER: They've inherited a legacy
3 system that is antiquated in many ways in
4 which we think was not well thought out when
5 some of the earlier opinions were granted.
6 So, what we'd like to do is to urge very
7 strongly that the Commission urge the Clerk's
8 Office do two things: One, engage in a
9 formal rule making after this exercise has
10 run its course you. Whatever changes to the
11 statute are made or not made, there ought to
12 be a formal rule making procedure. We know
13 it will take a long time, we understand that,
14 but the reason we recommend that is that it
15 allows people to have a formal role in public
16 commenting so that issues can be thought
17 through, there's nuances, it's an opportunity
18 for some debate and for people to point out
19 things that may have just not come up because
20 the Clerk's Office was looking at it in
21 connection, for example, with an in-house
22 lobbyist, but a third-party lobbyist may have
23 a different perspective. So, we think a rule
24 making proceeding is very important.

25 In the meantime, what we'd like to

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2 recommend is that the Clerk's Office post
3 draft advisory opinions and be encouraged to
4 post draft advisory opinions on their
5 website, let there be some opportunity for
6 comment and if you would later adopt it, so,
7 again, not the same as a CAPA, administrative
8 act, you know, proceeding, but at least some
9 opportunity for public input.

10 I can tell you, Mr. Chairman, I'm Sorry
11 my mom and dad weren't around to hear me say
12 these words, but about a year ago I was
13 appointed as an expert advisor to the United
14 Nations -- that's actually my title -- on
15 procurement integrity, and one of the things
16 they do --

17 MR. BERMAN: You want to define that?

18 MR. FISHER: I am an official
19 international man of mystery now. The reason
20 I tell you that is because when they were
21 redoing their procurement manual, they did it
22 in a wiki system, they posted it, it was
23 secure posting only for the U.N. community
24 but they posted their draft manual on the
25 website and then people could rewrite

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2 sections of it and keep a trail of who had
3 made what changes, at the end of it, they
4 came out with a document that had a huge
5 amount to buy-in and avoided a lot of
6 problems after the fact. So, we would
7 encourage the Clerk's Office to adopt
8 something like that, the technology is
9 inexpensive and would give an added sense of
10 both buy in and transparency to the area of
11 lobbying regulation.

12 MR. BERMAN: Let me report that the
13 Clerk is here in attendance today, I
14 recommend that you talk to him.

15 MR. FISHER: I'm actually looking
16 forward to meeting with him and his staff.

17 MR. BERMAN: I have one question and
18 then we'll proceed. At one of our last
19 meetings, I think it was at the last meeting
20 I spoke to a representative at the Bar
21 Association and he raised an issue which is a
22 matter of concern to me; at what point, if
23 the lawyer is automatically deemed to be a
24 lobbyist, how does that intrude on
25 confidentiality, etcetera? I don't know what

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2 the answer is, I just, you know, I seek
3 advice from people on that issue.

4 MR. FISHER: You know, it's an important
5 question, it comes up in a couple of
6 respects. First of all is the disclosure of
7 the identity of the client, the Code of
8 Professional Responsibility says we can do
9 that with the client's consent. We now
10 routinely write into our engagement letters
11 that telling people that they have to
12 understand that everything including our
13 compensation is going to be reported.
14 Secondly, it comes up for those of us,
15 particularly those of us who keep time
16 records as opposed to flat amounts, we
17 actually have a real concern about an audit
18 that looks at our time records and sees what
19 may be privileged information in terms of,
20 you know, sometimes we memorialize our
21 communications with our clients. I told
22 Arthur that I had seen -- you know, told
23 Arthur about my conversation.

24 MR. BERMAN: Precisely.

25 MR. FISHER: Whatever, the only way

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2 around that I think is -- and again it goes
3 to, the only way around that for us would be
4 if the sub-contractor issue gets straightened
5 out, we'll have two matter numbers in what
6 captures the time for -- privilege thought
7 would have been one. There's no privilege
8 about lobbying by the way. As I understand,
9 if you're a lawyer who's giving advice on
10 lobbying, that's not necessarily privileged.

11 MR. BERMAN: No, I understand that, and
12 the retainer itself isn't privileged either.

13 MR. FISHER: Right. And the third place
14 it come up, and it's not so much a privilege
15 issue as it is in business trade secrets -- I
16 may have mentioned this at the last
17 hearing -- which is that of the EDC, the
18 Economic Development Corporation or other
19 government agencies typically do not reveal
20 who is responding to request for proposals
21 until after the procurement process is over,
22 but if you register to lobby, you must
23 disclose the fact that your client is seeking
24 that piece of property or other opportunity.

25 MR. BERMAN: Well, I personally would

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2 welcome your recommendations. Commissioner
3 Velazquez?

4 MS. VELAZQUEZ: Ken, getting back to the
5 sub-contractor lobbyist issue, so, I just
6 want to understand now currently. So, is it
7 that the Clerk's Office requires you to list
8 the sub-contractor as the lobbyist and you as
9 the client now; is that what's happening?

10 MR. FISHER: I want to be precise about
11 this.

12 MS. VELAZQUEZ: Okay.

13 MR. FISHER: Mr. Goldstein's firm has
14 actually been testing this, they have been in
15 a dialogue with the Clerk's Office for a year
16 about this issue. As I understand it, the
17 initial position that the Clerk's Office took
18 was that Davidoff and Malito, should be
19 listed as a client and that the sub-lobbyist
20 should register with them as the client even
21 though they were registered as the lobbyist
22 for somebody else for the ultimate client.
23 They expressed some concern about this, they
24 said that that was not the State policy, they
25 thought it was not the best way to disclose

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2 it because if you wanted to know what was
3 being spent, influenced, that particular
4 decision, you were not going to have to look
5 at two different client reports, the real
6 client and Davidoff Malito in order to get
7 the total, they weren't otherwise aggregated.

8 The Clerk's Office said, "You know what,
9 you're raising legitimate issues, we need to
10 think about this and hold off for the time
11 being, and as of now, the matter is
12 unresolved.

13 MS. VELAZQUEZ: So, how would you
14 disclose it now that you have a
15 sub-contractor lobbyist working with you; how
16 do you disclose it currently?

17 MR. GOLDSTEIN: Arthur Goldstein from
18 Davidoff, Malito & Hutcher. You would add
19 under additional lobbyists --

20 MR. FISHER: He wants to know today how
21 it's working.

22 MR. GOLDSTEIN: Well, it's unresolved,
23 except I wanted to clarify, the Clerk's
24 Office I think -- and they stated for
25 themselves either publicly or privately --

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2 are working with DeWitt to create the third-
3 party lobbyist box on the system similar to
4 the way the State has it.

5 MS. VELAZQUEZ: Okay, so, that's good.
6 But the question is now is when you are doing
7 your reports now. So, what you're saying is
8 you're not reporting the sub-contractor
9 lobbyist, you're just reporting the client
10 that that sub-contractor lobbyist is lobbying
11 for?

12 MR. GOLDSTEIN: Correct.

13 MS. VELAZQUEZ: So, what I'm trying to
14 get at now is that we're missing that tier
15 currently in our data?

16 MR. GOLDSTEIN: Yes.

17 MR. FISHER: We believe that the
18 resolution of that is simply what the State
19 system has which is that the sub-contractor
20 lobbyist is listed as an additional lobbyist.

21 MS. VELAZQUEZ: Right.

22 MR. FISHER: And what the prime paying
23 the sub-contractor is listed as an expense on
24 the prime's and the client's reports.

25 MS. VELAZQUEZ: Understood. Okay, so,

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2 now just I want to get back to -- just to
3 switch tops topics a little, on the pro bono
4 representation. So, I think what you said is
5 if you're representing, do your lobbying on
6 behalf of a client on a pro bono basis and
7 you don't hit the threshold, you wouldn't
8 have to report it?

9 MR. FISHER: Currently today if you are
10 a registered lobbyist for any client, you
11 must register as a lobbyist for any other
12 client for whom you engage in lobbying
13 activities even if that client does not go
14 over the threshold, okay? So, let's take, we
15 represent a non-profit called Project
16 Rebirth, they've done a fantastic film about
17 the World Trade Center and people's lives
18 who were affected by September 11th. We did
19 that on a pro bono basis. They, nonetheless,
20 even though they spent zero on lobbying, we
21 had to register for them, somebody had to pay
22 the lobbying fees for them, we have had to do
23 two years of reports for them even though
24 they expended zero funds in support of their
25 lobbying effort, because they selected us.

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2 If they had hired somebody who had no other
3 lobbying clients to do the same thing, they
4 would not have been subject to that
5 requirement.

6 MS. VELAZQUEZ: But you're saying you
7 didn't do any lobbying for them?

8 MR. FISHER: Oh, no, we did, but there
9 was no funds expended.

10 MS. VELAZQUEZ: My question, I guess I
11 view the funds as threshold issue, you know,
12 why we have the threshold and I think why
13 we're talking about raising the threshold is
14 if you spend that much money on lobbying
15 activity, so whatever the threshold is
16 amounts to a certain amount of hours that you
17 spend engaging in this activity, so if you
18 are doing something pro bono and you never
19 hit the threshold but just your spending many
20 hours engaging in the activity, I think
21 that's information we want to have.

22 MR. FISHER: Well, let me say two things
23 about that, Commissioner. The first is, as I
24 mentioned in my initial testimony, the United
25 States Supreme Court has said that the only

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2 way that a lobbying law can be constitutional
3 is if it's advancing the ability of the
4 public and the public officials to know what
5 is being expended in order to influence their
6 decisions. So, if it's zero, then there's
7 nothing to be reported.

8 Now, if you want to prove the negative,
9 if you want everybody to report zero, then
10 there ought not to be any threshold and every
11 lobbying activity of any kind should, you
12 know, would trigger all of these rules.

13 I would suggest, however, that there is
14 an opportunity for disclosure to the extent
15 that the public needs to know this
16 information which is that people's
17 interactions are captured; if you testify, it
18 gets captured; if you go into a government
19 office, you have to tell them your identity
20 and who you are going to see. So, it's not
21 that that information isn't available, it's
22 just not organized, you know, in the same
23 way, but I don't see what the public interest
24 is in enforcing me to disclose the fact that
25 I haven't been paid, and that's what you're

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2 forcing me to do, and you forced my client to
3 pay a fee to participate in these hearings --
4 because it's not clear to me -- you know, I'm
5 here a lawyer but I'm a member of the
6 association -- not entirely clear how that
7 would play out. But putting that aside for a
8 second, that's the problem, and it's only
9 because I have other clients. In other
10 words, if I represented 10 clients, I
11 represented 10 clients who each spent \$1,000
12 and only \$1,000 on lobbying activity and met
13 the \$10,00 worth of income, I wouldn't have
14 to register for any of those clients because
15 they're all under the threshold and
16 therefore, I'm off the hook.

17 But if I had one client that was paying
18 me \$2,000, I would have to register for the
19 other nine even if I were doing them for
20 free. The registration requirement ought to
21 be triggered by the client, not by the
22 lobbyist.

23 MS. VELAZQUEZ: I have one more
24 question, I'm sorry. On the payroll
25 information, that information is requested as

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2 part of the audit process, it's not part of
3 the registration process?

4 MR. FISHER: It's not part of the
5 registration process but it is part of a
6 reporting process, so when the non-profit or
7 the small business, whoever, could be
8 Verizon, anybody that has an in-house
9 lobbyist, once they register because they
10 really anticipate crossing the threshold,
11 now, when they do their periodic reports,
12 they have to say how much they did. Well,
13 that's easy if you have a full-time
14 government relations director, you can take
15 her salary and her benefits. Some people
16 include benefits, some people don't, that's
17 why I think rules would be helpful. But, you
18 know, where do you go beyond that; some
19 portion of the executive director's salary?
20 Maybe that makes sense. But what about the
21 mailroom clerk or the secretary who's
22 scheduling an appointment with a Council
23 member's office? That doesn't seem to need
24 disclosure, you know, to satisfy any public
25 interest so far as I can tell.

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2 MR. BERMAN: How would you correct that?

3 MR. FISHER: I think that, you know, I'm
4 going to defer to the, principally to the
5 non-profits and the Human Services Council on
6 this because I think they're the universe
7 that's most affected by it. But I think that
8 the simplest way to do it would be two
9 things: One, to say that it's people who are
10 engaged in direct lobbying activity, so, the
11 support staff of the office is not engaged in
12 direct lobbying activity unless they're, you
13 know, they're counting some direct contact
14 with the public officials.

15 And secondly, you know, I would allow
16 organizations, you know, to -- some formula,
17 where they could just take some percentage of
18 their executive staff and report that number
19 without having to keep individual records for
20 people. I would give them alternatives.

21 MR. BERMAN: Ken, to borrow a question
22 that's plagued theologians for centuries, I
23 would like you to flesh out your thinking for
24 us as to what the law should say as to when
25 lobbying begins; is it meeting with a client

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2 on an issue or if it's upon retention?

3 MR. FISHER: We think that lobbying
4 begins when lobbying begins. We think it's
5 when you contact the public official, we
6 don't think it's the preparation work for
7 that. You know that there's a lot of
8 discussion about that, some people think if I
9 walk in with this well-crafted half a piece
10 of paper that I've a spent \$50,000 worth of
11 time figuring out what this piece of paper
12 should say, that I should report \$50,000, I
13 think that I should only report the time
14 talking to you.

15 MR. BERMAN: Well, the State law
16 basically indicates that lobbying begins when
17 a piece of legislation is submitted, does
18 that mean that -- do you recommend changing
19 that?

20 MR. FISHER: No, I don't agree with the
21 State law on that, I am speaking for myself,
22 not for the association.

23 MR. BERMAN: Obviously.

24 MR. FISHER: We think the City has it
25 better in that regard, which is if I come to

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2 talk to you about introducing a bill, that's
3 lobbying, it's not when the bill actually
4 gets introduced.

5 MR. BERMAN: So, that would be
6 irrelevant, the initiation of legislation for
7 our process in the City would be irrelevant?

8 MS. VELAZQUEZ: It would be when you
9 start to talk to people about that, for
10 example.

11 MR. FISHER: When you start to
12 advocate. When you advocate that the public
13 official take an action, that's lobbying
14 activity and that ought to be what you
15 report.

16 Again, in my view, we should only be
17 reporting only that activity and not the
18 three hours that we spend sitting with our
19 client talking about, you know, whether we're
20 going to call Council Member Berman or not.

21 MR. BERMAN: That, however, could be
22 included on my behalf as threshold?

23 MR. FISHER: Yes.

24 MR. BERMAN: Any other questions?

25 MR. FISHER: Actually, Mr. Chairman,

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2 that might go towards keeping additional
3 folks out of meeting the threshold, but for
4 larger projects, as I mentioned, on a typical
5 zoning matter, the fees may run a quarter of
6 a million dollars, maybe 50,000 of that, at
7 most, over a two- or three-year period of
8 time is actually spent in direct
9 communications with public officials,
10 particularly the staff at City Planning. The
11 rest of the time is work that the client is
12 doing with the professionals, with the
13 architect or whatever the case may be.

14 Legislation may be a little bit
15 different. Procurement lobbying will be a
16 little bit different also, but, you know, do
17 you really -- do you want to capture the
18 amount of money that somebody spends putting
19 together an RFP? That actually might be worth
20 while because we made the agencies recognize
21 how unreasonable some of the RFPs are.

22 MR. BERMAN: Are there any other
23 questions?

24 (No response)

25 MR. BERMAN: Thank you very much, and of

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2 course we welcome your continuing interaction
3 with our staff.

4 MR. FISHER: Thank you.

5 MR. BERMAN: Anybody else who seeks to
6 testify today?

7 (No response)

8 MR. BERMAN: I'm sorry, is there someone
9 else who wants to testify? No? Don't be
10 embarrassed.

11 (No response)

12 MR. BERMAN: Okay. Well, under those
13 circumstances, our next two hearings are as
14 follows: Tuesday, May 3rd at 5:30 p.m. City
15 Planning office at 22 Reade Street, and that
16 is going to be basically for the non-for-
17 profit issues, and Wednesday May 11th also at
18 5:30 p.m., again at 22 Reade Street, that's
19 an open hearing for anyone who seeks to
20 testify. We've gone the route of taking the
21 evening hearings so that more people would
22 have available time to come in and testify.

23 I want to thank everybody for attending
24 today and I look forward to seeing as many of
25 you as possible on May 3rd and I thank my

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fellow Commissioners, and we are adjourned.

Thank you very much, ladies and gentlemen.

(Time noted: 10:59 a.m.)

1 C E R T I F I C A T I O N

2

3 STATE OF NEW YORK)
4 COUNTY OF NEW YORK) : SS.:

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6

7 I, CASEY MARTIN, a Stenotype Reporter and
8 Notary Public for the State of New York, do hereby
9 certify:

10 THAT this is a true and accurate
11 transcription of the City of New York Lobbying
12 Commission public hearing held on April 27, 2011.

13 I further certify that I am not related
14 either by blood or marriage to any of the parties
15 in this matter; and

16 I am not in any way interested in the
17 outcome of this matter.

18 IN WITNESS WHEREOF, I have hereunto set my
19 hand this 27th day of April 2011.

20

21 _____
22 CASEY MARTIN

23

24

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