

## **REPORT OF THE ADVISORY PANEL ON A GOVERNOR'S CODE OF CONDUCT**

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### **I. BACKGROUND**

Governor McGreevey recently restated his intention to subject himself to a Code of Conduct setting forth standards to guide his ethical obligations. The State Conflicts of Interest Law, N.J.S.A. 52:13D-12 et seq., currently requires agencies of the Executive Branch to promulgate a code of ethics to govern the conduct of their respective officers and employees.

Governor McGreevey has directed his staff to revise the Code of Conduct for the Governor's Office to ensure its applicability to the Governor. In connection with these revisions, the Governor convened this Advisory Panel (composed of John J. Degnan, Stewart G. Pollock, W. Cary Edwards, Michael R. Cole, and John J. Farmer; each of whom has served as a Chief Counsel to the Governor and three of whom served as Attorney General) to make recommendations for accomplishing the task. The Governor asked that those recommendations be provided by October 15, 2003.

The first issue was whether the Governor could accomplish his objective by making his Office's Code of Conduct clearly applicable to the Chief Executive. We unanimously concluded that such a direction would not be in the best interests of the State or its citizenry, considering the unique role of the Governor as the single head of State government and his companion responsibilities as de facto head of a political party. We next considered what would best constitute a Code of Conduct for this unique Office. In constructing a proposed Code, we reviewed the State Conflicts of Interest law, regulations promulgated by the Executive Commission on Ethical Standards interpreting the statute, interpretive decisions, opinions and informal rulings of the Commission, and [end of page 1] the practice of other major states and of the federal government. Lastly, we have drawn on our own experiences and understandings of the workings of government as Governor's Counsels and, in some cases, Attorneys General, in advising Governors, as well as State officers and employees, regarding their ethical obligations.

Our goal has been to develop practical recommendations that balance the breadth of responsibility reposed in the position of Governor with the Governor's desire to adhere to the highest levels of ethical standards. This Report proposes a Code of Conduct for the Governor (Exhibit A, attached hereto) and explains the Panel's reasoning for its provisions.

### **Summary of Recommendations**

**We have concluded that the existing Governor's Office Code of**

**Conduct is unworkable for the position of Governor and that it cannot be easily modified to accommodate the unique duties imposed upon a Governor.**

**We therefore recommend that the Governor adopt a Code of Conduct designed specifically for the position of Governor and that it apply only to the Governor.**

**We further recommend that the Governor establish an advisory panel, composed of distinguished persons familiar with the duties of Governor and ethical standards, to hear and review inquiries concerning the Governor's compliance with the Code of Conduct.**

## **II. THE GOVERNOR'S UNIQUE POSITION**

Governor McGreevey thought it proper to subject himself to the existing Governor's Office Code of Conduct and to remove any ambiguity on that score that may have existed heretofore. The Governor has asked this Panel for recommendations on how to amend the existing Code to accomplish this objective. Although it is, of course, the Governor's decision to make, we believe it would not be a workable solution for [end of page 2] Governor McGreevey or his successors to subject themselves to the same Code that applies to members of his Governor's Office staff or any other persons in the Executive Branch. Neither do we believe that the Governor should be subject to the jurisdiction of the Executive Commission on Ethical Standards and its regulations. The details of the existing Code, as well as the regulations and guidelines of the Executive Commission, provide adequate direction to public employees generally, but do not recognize or allow for the unique role of the Governor. That lack of recognition would unduly hamper the accomplishment of the duties and responsibilities of that position.

As the only statewide elected State official in New Jersey, the breadth of the Governor's responsibilities is extensive. N.J. Const. (1947), Art. V. His position is routinely cited as the nation's most constitutionally diverse and powerful. As the head of State government, he is charged with administering a government structure composed of 15 principal departments, over 400 agencies, 51 independent authorities and about 67,000 employees. The Governor is the single person constitutionally authorized to execute bills into law, or veto (or conditionally veto) bills, to make nominations and appointments, to both the Executive Branch and the Judiciary, to propose and adopt a budget, and to declare emergencies and exercise emergency powers.

But the Governor is more than just a chief executive officer. In his efforts to make New Jersey better, the Governor is called on to be an advocate for his constituents, a mediator, a proponent for New Jersey, and sometimes a political partisan. Unlike other government positions, either elected or appointed, little separates a Governor's public and personal life; it is indeed a 24-hour a day occupation. The governorship also calls on the Governor's family, particularly his spouse, to assist him in carrying out his public duties. [end of page 3]

An ethics code that may be workable for State officers or employees who have clearly defined governmental responsibilities, set hours of work, and a plain demarcation between official duties and private activities is not compatible with the broad duties assigned by the State Constitution and, perhaps more compellingly, by public expectation, to the Office and personage of Governor. As the Chief Executive of a State with a \$24 billion annual budget, the Governor faces an unending and often contentious array of public policy, economic, social, regulatory, and political demands.

A Code of Conduct applicable to the Governor must therefore, in our view, be more

flexible than the existing Governor's Office Code or Executive Commission rules. It should reflect the wide-ranging nature of the position of Governor. The Code must allow the Governor the flexibility to accomplish the job for which he was elected. The fact that a more flexible Code is applicable will not result in a diminution of ethical constricts. Given the nature of the position, and its public visibility, the Governor is also the most extensively and intensively scrutinized official in the State. The media closely follows his actions. The Governor's political critics and adversaries also monitor the Governor's conduct. Any perceived ethical lapse of the Governor will be magnified by public scrutiny.

### **III. DISCUSSION OF KEY PROPOSALS OF A GOVERNOR'S CODE OF CONDUCT**

We recommend applying essential portions of the Conflicts Law and the existing Code for the Governor's Office. The Governor obviously should not accept any gift or thing of value that he knows is intended to influence his decisionmaking. The Governor should not be permitted to utilize confidential information for his private, personal pecuniary gain. The Governor should not personally be allowed to enter into contracts [end of page 4] with the State, or its interstate agencies, for the sale or purchase of real or personal property.

But it is not hard to see how the Governor, in carrying out duties traditionally associated with the position, could quickly run afoul of the Conflicts Law, its implementing rules and the existing Governor's Office Code of Conduct if applied literally and strictly to his actions. We cite a number of problem areas below to demonstrate why we have concluded that a separate Code of Conduct for the Governor is appropriate. We have set forth specific provisions in the proposed Code itself (attached hereto as Exhibit A) to address these issues.

#### **A. Advocacy/Endorsements**

Pursuant to the Conflicts Law, State employees are generally prohibited from appearing or representing or negotiating before a State agency on behalf of an entity or person other than the State. Under Executive Commission precedent, representational activities include such activities as "correspondence to a State agency on behalf of a third party" or "telephone calls to a State agency on behalf of a third party," ECES, "Frequently Asked Questions."

One duty of the Governor is to promote economic activity in the State. A strict application of the Conflicts Law would prohibit the Governor from endorsing a redevelopment project he believes would benefit the regional economy by creating jobs, creating tax revenue or revitalizing a blighted area. See, N.J.S.A. 52:13D-16. Similarly, the Governor would be precluded from discussing with his own cabinet officers the policy implications involved with discretionary permitting or other regulatory decisions concerning important projects. [end of page 5]

Another responsibility of the Governor is to promote civic involvement. The same conflicts rules, applied literally, would prohibit the Governor from endorsing the work of such groups as the Red Cross, 4-H Clubs, the Police Benevolent Association, or the thousands of other charitable and civic organizations that contribute so much to the fabric of our State. N.J.A.C. 19:61-6.6. We believe these actions are well accepted gubernatorial activities that should be recognized in a Governor's Code of Conduct.

#### **B. Use of Insignias**

Interpretations of the Conflicts Law prohibit a State employee or officer from displaying insignias or photographs of private persons or entities when doing so would create an appearance of official State endorsement of the private entity. N.J.S.A. 52:13-16; N.J.A.C. 19:61-6.6. Thus, the Executive Commission would consider a Department of Treasury auditor's use of a calculator

emblazoned with the name of an accounting firm on it a violation of this standard. Governors, however, are routinely called on to wear hats and other clothing, appear at fairs and dinners, and appear in and display photos and artifacts bearing the names of private persons and entities. These may occur at sporting events, new plant openings, boat launchings, and other celebrations. These activities are, in our view, well within the Governor's advocacy functions. A Code of Conduct must properly recognize these gubernatorial activities.

### **C. Acceptance of Gifts and Favors**

As the Chief Executive of the State, the Governor is regularly offered gifts and other mementos from the numerous individuals and organizations he meets with every day. As the symbolic head of state, the Governor cannot under most circumstances refuse to accept these tokens of gratitude. Indeed, to do so, in many instances, would be viewed as a breach of etiquette. On the other hand, depending on the nature and [end of page 6] circumstances of the gift, an appearance of impropriety may arise when the item exceeds nominal value under the Conflicts Law. Historically, the decision to accept gifts from individuals and groups has been left entirely to the Governor's discretion.

We have evaluated a number of standards that could be adopted to avoid the potential of a conflict of interest arising from an unsolicited gift to the Governor. These options range from an outright prohibition on the acceptance of all gifts of more than nominal value, to the voluntary imposition of a disclosure requirement under which the Governor would remain free to accept gifts, but would publicly disclose any gifts having a value over a certain amount.

An example of outright prohibition is California. California prohibits all elected state officials -- including the Governor -- from accepting any gifts valued at over \$250. Cal. Gov't Code Section 89504. The advantage of this approach is obvious - it creates a bright line that, if followed, unquestionably eliminates any potential for a conflict of interest. By contrast, the Governor of New York is free to accept gifts but must annually submit a detailed financial disclosure statement, which includes a disclosure of all gifts received with a value exceed \$1,000. N.Y. Pub. Off. Section 73-a(3). In addition, the Governor of New York is prohibited from accepting a gift of greater than \$75 in value "under circumstances in which it could reasonably be inferred that the gift was intended as a reward for any official action on his part." N.Y. Pub. Off. Section 73(5). Pennsylvania and Connecticut have adopted mechanisms similar to New York. They allow for the receipt of gifts within limits, but. require reporting.

On the federal level, the Foreign Gifts and Decorations Act ("FGDA"), 5 U.S.C.A. Section 7342, governs the disposition of gifts made by foreign governments to federal employees. Recognizing that gifts of nominal value raise no legitimate ethical [end of page 7] concerns, the FGDA permits federal employees to accept and keep any gift of minimal value (presently deemed to be \$285, 42 C.F.R. Section 102-42.10). When the gift is of greater than minimal value, however, that gift "is deemed to have been accepted on behalf of the United States and, upon acceptance, shall become the property of the United States." 5 U.S.C.A. Section 7342(c)(1)(B). Thus, a federal employee who is the beneficiary of such a gift must deposit the item with his or her agency within 60 days of receiving it. 5 U.S.C.A. Section 7342(c)(2). Under the regulations promulgated to effectuate the FGDA, however, the recipient is permitted to purchase the item if the agency elects to dispose of it through sale. 41 C.F.R. Section 102-42.20.

In this regard, we have also examined the provisions of N.J.S.A. 2C:27-6. That statute makes it a criminal offense to accept any benefit "not allowed by law." We understand this to mean that the benefit may not be accepted if it is prohibited by law. This would include gifts given to improperly influence a public official in the discharge of his public duties and gifts that the public official receives with corrupt intent. N.J.S.A. 52:13D-14; -13D-23(e)(6). Our recommendations are consistent with these statutory provisions. We also believe that the type of

gifts we recommend the Governor may accept--those less than \$285 in value, as opposed to those he would accept only on the part of the State--are of a level that fall within the safe harbor provisions of N.J.S.A. 2C:27-6(d)(3), in any event.

After reviewing these issues, we propose the adoption of a guideline modeled on the FGDA. We have rejected the notion that the Governor should evaluate every gift in an effort to define the intention of the giver. At some level it can be said that every gift is intended to "influence" to some extent. No one could reasonably believe, however, that a Governor could be so easily corrupted by gifts of relatively small value. We are only [end of page 8] concerned by gifts, which by their intrinsic nature, have the capacity to unduly influence government decisionmaking.

Our proposal would permit the Governor to accept and to keep all gifts valued under a certain amount (we believe that \$285, the current federal standard, would be a reasonable threshold; we further recommend this standard be indexed to the federal law). Where the value of the gift exceeds this threshold, the Governor would treat the item as a donation to the State. Although the Governor could possess and/or display any such gift during the duration of his incumbency on behalf of the citizens, he would be required, before leaving office, to deliver the item to the State Museum or other State entity for appropriate disposition, or purchase the item with his personal funds.

In most circumstances, of course, these issues present no significant problems for the Governor. The vast majority of the gifts offered to the Governor - tee shirts, baseball caps, plaques, and the like - are of relatively minor value, and may be kept without any concern for appearances. Indeed, if there is any danger associated with accepting these sorts of gifts, it is the opposite concern: ensuring that they are handled with proper care and respect. There is no surer way to hurt the feelings of or embarrass an individual or group, than to treat a remembrance from them carelessly.

A more sensitive problem arises when the value of the gift is more substantial. In certain circumstances, an individual or organization may present the Governor with a gift of potentially significant value - a Boehm statue, a gold pen, and so on. The Governor must exercise care and discretion in determining when and under what circumstances to keep them. The Governor should, therefore, continue to decline any gift where he believes the gift is offered with intent to unduly influence him, regardless of whether the gift is above or below the \$285 threshold. [end of page 9]

Under this proposal then, when a gift of over \$285 is made to the Governor, the Governor would treat it as a gift to the citizens of New Jersey and dispose of it accordingly - by either turning it over to the State Museum at the end of his term, or by purchasing it with his personal funds. The Governor should be under no compulsion to immediately dispose of the item. Rather, as Chief Executive of New Jersey, the Governor should be permitted to retain (and preferably display in a suitable manner) such gifts during the period of incumbency, on behalf of the citizens of the State. At the conclusion of his final term as Governor, he would then have the choice of either delivering the gift to the State Museum for appropriate disposition, or purchasing the gift at fair market value.

#### **D. Travel**

Part of the Governor's job is to be an advocate for the State. Another part of his job as head of the government is to reach out to constituents and other interested parties. There is a recognized public value in having the Governor travel out-of-state for trade missions and economic development conferences, meetings with constituents and advocacy groups, and for political reasons. Past practice supports having the State pay for "public purpose" trips of

Governors and their spouses, even if the State separately receives reimbursement for some or all of the cost of the travel, meals, lodging and related expenses.

The current ethics formulations concerning when a regular State officer or employee may take a trip reimbursable by the State or the event sponsor are not readily adaptable to the Governor. N.J.A.C. 19:61-6.2 to 6.5. Generally, the rules require an individual examination of the circumstances surrounding the reason for the trip, the sponsor, the purpose of the event and the role of the State officer or employee. Ibid. We [end of page 10] believe this approach is unworkable when applied to the Governor given the nature of his public leadership responsibilities.

We have set forth in the proposed Governor's Code a threshold test: does the trip advance a legitimate State purpose considering the role of the Governor in all of its facets? If so, the State should pay for the costs of the trip. If the trip or any part thereof does not meet that standard, the State should not pay. Those costs should be borne personally by the Governor or his political party. Any reimbursement (by private groups, foreign states, counties or other municipalities, State political party, etc.) for the government-related trip should be made to the State. For example, past Governors often used Commerce Department funds for travel promoting the State, or funds of the department substantively aligned with event (e.g. Labor Department's funds would be used in connection with speeches before a labor group) to fund such travel.

#### **E. Attendance at Events/Meals/Entertainment**

The Governor is routinely requested by constituents to attend a variety of events and dinners, public and private. For example, the Governor may attend plays, perhaps to support a broad public purpose, i.e., the arts, or a sporting event to show pride in New Jersey. Acceptance of the cost of this entertainment and food from an "interested party," would in most cases violate the existing conflicts rules since "interested party" is defined broadly to mean a person subject to the "supervisory authority of the State official's agency." N.J.A.C. 19:61-6.2 to 6.5.

We believe the essential question remains as the benchmark: in the context of the full-range of the Governor's responsibilities, does attendance of the Governor -- or his immediate family members -- at the event serve a public purpose? If so, we believe the Governor (or the immediate family members) should not be precluded from attending or [end of page 11] eating at such events; neither do we believe the State should be required to reimburse the sponsoring organization for the costs of such entertainment or meals. If no public purpose is served, then reimbursement can be made by a political party or by the Governor's personal funds. We believe such instances will be rare.

#### **F. Use of Title**

Literally applied, the ethics rules would preclude a charitable organization from advertising the Governor's participation in a fundraising or other event promoting a private organization. N.J.A.C. 19:61-6.6. Thus, while the Governor could attend a dinner honoring the victims of September 11, it would, strictly speaking, be an ethical violation if the sponsors of such an event identified the Governor on the program by his official title. It would likewise be a violation for the Governor to allow the use of his title in connection with fundraising for partisan political purposes.

We believe these restrictions undermine legitimate civic and political responsibilities of the Governor, and thwart public expectations of the Governor. The honorific title of Governor is used as much out of respect for the position as for a particular incumbent. The public expects him to be on call 24-hours a day. We are of the view that unlike a regular employee with defined duties and set work hours, it is simply unworkable and in fact unnecessary to engage in an unachievable effort to distinguish between a Governor's public and private status. To the public, a

Governor can rarely if ever shed his gubernatorial status. We believe depriving the Governor of using his official title is unworkable, serves no public end and would, in fact, be unwelcome by the public. [end of page 12]

#### **G. De Facto Head of a Political Party**

The Governor is de facto head of his political party. That status supports his ability to advocate his public, governmental agenda. Our system recognizes in law the importance of party politics. Although the public of course expects Governors to rise above their parties and partisan positions, the interrelationship of politics and effective governance cannot be ignored.

Accordingly, we recommend the Code accommodate the Governor's partisan political activities by permitting the use of his Governor's title when attending campaign events, soliciting political contributions, endorsing candidates, and drawing upon the financial resources of his party in paying for expenses not properly paid for by the State.

#### **H. The Role of the Immediate Family**

The Governor's spouse and immediate family should abide by the same rules as the Governor even though they are not officers or employees of the State. Any ethics policy should recognize the public expectation that the spouse of Governor is a public person who assists the Governor by promoting and attending to a variety of State functions. She, too, is an ambassador for the State. The State budget provides funding for staff to assist the spouse in performing this important public role (e.g. answering mail, attending official events, just like the President's spouse). FY 04 State Appropriations Act.

#### **IV. ADVISORY ETHICS PANEL**

The Executive Commission on Ethical Standards does not have the power to enforce the Code of Conduct against the Governor. We believe that is appropriate. The Commission is comprised of his appointees, and its focus is on the enforcement of ethical [end of page 13] provisions directed toward an entirely different category of State officers and employees whose circumstances, duties and responsibilities differ greatly from the Governor's.

Nevertheless, we believe the Governor should have available to him a panel to advise him on conflict issues if he requires such advice. We suggest the Governor establish a standing advisory panel comprised of independent individuals knowledgeable about ethics, the duties of Governor and the workings of State government to review such matters as the Governor may bring before it and to informally advise him.

#### **V. CONCLUSION**

We hope that these efforts provide a suitable guidepost for Governor McGreevey and his successors.

Respectfully submitted,  
**Advisory Panel on a Governor's Code of Conduct**

Members:

John J. Degnan  
Stewart G. Pollock  
W. Cary Edwards  
Michael R. Cole  
John J. Farmer

Dated: October 15, 2003

