

“Lawyers And Ethics: The Problem of Pay-to-Play”

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It's good to be here for this conference on municipal finance. I want to talk to you today about the vital role that lawyers play in the municipal bond industry. Although I'm not a lawyer myself, I do work in Washington, where -- as Justice Sandra Day O'Connor once said -- there may actually be more lawyers than people. So I've learned a few things about lawyers.

By federal standards, the SEC with just 2,750 staff is a small agency. But 40 percent of our people are attorneys. This extraordinary assembly of legal talent constitutes the backbone of the Commission -- and they've taught me a lot about the honor, dedication, and moral probity to which the entire legal profession aspires.

The high ethical standard set by SEC attorneys stands in sharp contrast to the reputation of the profession outside the walls of our building. Lawyers and lobbyists are among the most unpopular professionals in our nation today.

It's safe to assume that lobbyists have long been targets of scorn. But the law used to stand apart. Certainly, lawyers have drawn a certain amount of derision because of their adversarial role. And yet, over the centuries, the practice of law has remained near the pinnacle of the professions.

In recent years, however, opinion polls among Americans have revealed a deep and growing cynicism toward lawyers. According to the ABA Journal, a recent survey found “a disturbing pattern that the more a person knows about the legal system and the more he or she is in direct contact with lawyers, the lower an individual's opinion of them.”

It's not as if we needed a survey to tell us that lawyers have what we in Washington refer to euphemistically as a “character issue.” Popular culture is studded with the signs of declining esteem: In the movies, lawyers are devoured by prehistoric creatures, while on television, late-night monologues devour them in other ways -- and the audience responds with cheers.

Lawyers have become the targets of an extremely aggressive brand of humor during the 1990s. There are actually sites on the World Wide Web dedicated to lawyer jokes. The profession's fall from grace has been great.

What does this have to do with the municipal bond market? Lawyers play a unique role there -- bond counsel does not exist in any other market, and many people look to bond counsel as their leading light. Shady practices in the municipal market today have placed lawyers at an ethical crossroads. Let me explain:

When I became SEC Chairman four years ago, the need for reform in the municipal bond market was obvious. This huge, \$1.3 trillion market, once primarily the domain of institutional investors, was now dominated by individuals. But practices had not evolved accordingly.

The market was making headlines -- but they were far from good. A Business Week cover story was captioned "The Trouble With Munis." The Economist referred to "America's notoriously corrupt municipal bond market"; and Fortune ran a story, "The Big Sleaze in Muni Bonds."

Corruption and conflicts of interest that would have stirred the envy of Boss Tweed had tarnished the reputation of the municipal market, overshadowing the many honest and diligent people who work there as well.

At the beginning of the twenty-first century, this segment of the securities industry appeared to be stuck in the nineteenth. And yet the importance of a healthy municipal market is well known to everyone in this room.

It represents the schools that teach our children, the water we drink, the power that enhances our lives and drives our economy, the roads that take us where we need to go.

For all of these reasons, I placed improving our municipal bond market among my highest priorities.

As most of you know, our regulatory touch on the municipal market is light. Congress designed it that way. The responsibility for maintaining investor confidence rests heavily on the shoulders of market participants -- issuers, financial advisers, dealers, and especially lawyers.

Ultimately -- more than any Commission rule, release, or enforcement action -- it is the daily actions of each of these individuals that demonstrate the integrity of this market, and earn the public's trust.

But trust cannot coexist with the cynicism bred by such practices as "pay-to-play."

What is "pay-to-play"? Sy Lorne, who served as General Counsel at the SEC, once described an odd experience he'd had in private practice:

"An investment banker called me up and told me that a state political figure had told them that they needed to make a five-figure contribution to his campaign, or be excluded from all state finance activities. They asked me what they should do. I was shocked by the question. After considerable research and evaluation of the law and circumstances at

the time I was forced to tell them that the answer was probably to write a check. There was no clear illegality. I did not like giving that answer.”

That is a real-life example of “pay-to-play,” the practice of making political contributions to elected officials or to candidates for local office, to influence the award of contracts relating to municipal bonds. Such contracts are assigned on a negotiated, rather than a competitive, basis. They can be for legal, underwriting, or advisory services.

There’s little doubt that “pay-to-play” damages the integrity of the municipal bond market. It creates the impression that contracts are awarded on the basis of political influence, not professional competence. The investing public can easily pay more, and citizens of the municipality receive less, when bond services are not bid competitively.

Pay-to-play also breeds contempt for the political process. That was brought home to me several weeks before I came to Washington, when three young securities professionals came to talk to me about their career plans. They worked in the municipal bond department of two major firms.

One of them commented that the only way he was able to survive in the municipal bond business was by buying tables at political fundraising dinners, or by making contributions to officeholders in a position to award lucrative underwriting contracts. The others agreed this was still common behavior.

How discouraging, that even the newest entrants into this very vital part of the securities business were being assimilated into this culture of pay-to-play. Little wonder that confidence in government is so low today. This experience helped convince me to try to change the practice, before it could be ingrained in the minds of a generation that will soon be the leaders of the industry.

When I came to Washington, I had a long talk about pay-to-play with Frank Zarb, who today leads the NASD. Frank suggested a voluntary ban on political donations by firms seeking underwriting business, and he was able to persuade key people in the industry to sign on. This was the catalyst for a cultural shift that took place almost overnight and has since been reinforced with rule G-37 of the Municipal Securities Rulemaking Board.

The MSRB followed with a rule that shed light on consulting arrangements in the municipal market. It required written agreements between dealers and consultants who were hired to obtain municipal securities business. It also mandated the disclosure of such arrangements to issuers and to the MSRB.

One dealer challenged the Board’s rule forbidding pay-to-play on first amendment grounds and was rejected by the courts. A little more than a year ago, the Commission brought its first proceeding for violation of this rule; our action against FAIC Securities, Inc. of Florida resulted in penalties and disgorgement in excess of \$400,000.

Further progress has been made since then. Some issuers have taken steps to preclude “pay-to-play,” most notably Connecticut Treasurer Chris Burnham, who sponsored a two-year bar on

business with the Treasurer's office after making a campaign contribution. That proposal is now state law.

As Treasurer Burnham's actions underscore, the integrity of the municipal market rests not only on the shoulders of dealers, but on other market participants as well. The Public Securities Association recognized this in a letter to ABA President Cooper earlier this week, calling on the organized bar to follow the lead of bankers in ending "pay-to-play."

The PSA letter raises a valid question: Where are the lawyers?

I am sorry to have to report to you that, as of today, no meaningful nationwide measure has been put in place by our country's lawyers to stop, or even slow down, "pay-to-play."

While the National Association of Bond Lawyers acknowledges that no lawyer should make any political contribution for the purpose of getting or retaining municipal finance work, its solution has no teeth. The National Law Journal had stronger words for it -- they called it a "joke."

"Under it," the Journal said, "bond lawyers need to do nothing but check state campaign finance laws, declare them adequate, and call it a day." Stronger steps are needed -- as well as lawyers of strong character to take them.

Some have not been afraid to lead. The Association of the Bar of the City of New York has had the courage to step forward, out of the shadows. After issuing a report that demonstrated the need for action, the City Bar proposed a measure to curb "pay-to-play" statewide.

At the same time, they were realistic enough to see that ending "pay-to-play" in one state is not enough. The City Bar called upon the American Bar Association to pass a resolution to encourage bar associations, judicial rulemaking authorities, and other bodies to adopt policies to end "pay-to-play," on the model of the draft rule the City Bar submitted in New York State.

None of this is rocket science. At the risk of oversimplifying, the resolution would ask bond lawyers to cut the tie between campaign contributions and selection as bond counsel. This does not seem a terribly difficult thing to agree with. And yet, several lawyers have voiced strong opposition to it.

Some have said, "No, we can't do this, it will restrict our first amendment rights." But the courts have upheld the constitutionality of similar measures for dealers. And the bar is known for its creativity -- it should be able to devise clean mechanisms for expressing political support.

Some have said, "No, the problem should be addressed through comprehensive campaign finance reform." I cannot be more clear about this: The SEC is not in the business of campaign finance reform; from our perspective, ending pay-to-play is a matter of market reform.

Some have said, "It's not my problem -- tell the issuers to stop asking for money." But true character lies in accepting responsibility, not shunning it.

Some have said, “No, we must first marshal the evidence to be sure that ‘pay-to-play’ exists.” The evidence has been strong enough to move editorial writers in the regional and national press -- as well as the lawyers’ journals -- to call for action. Moreover, no one knows this market better than the dealers, who have themselves acted to end the practice and now call upon lawyers to join them -- can the lawyers really be blind to what the dealers see? It may be that for those who resist reform, the evidence will never be strong enough.

There is a pattern here: Each of these excuses presents a problem, not a solution. To my mind, this is precisely the kind of behavior that has given lawyers a bad name.

That’s especially true when it comes to a practice like pay-to-play, which bears directly on questions of ethics. In the ABA survey I mentioned earlier, only 22 percent of respondents felt that the phrase “honest and ethical” applied to lawyers. Forty percent said that description did not apply.

Moreover, about half the respondents -- 48 percent -- said that a significant number of lawyers lacked the ethical standards needed to serve the public. Compare this 48 percent “dishonesty rating” with 22 percent for accountants and 30 percent for bankers.

And among recommendations for improving the legal system, “tougher ethical standards” were cited by the public as the highest priority.

The issue of “pay-to-play” presents just about as clear an ethical choice as the legal community is ever going to get. They just don’t come any better.

Here is an opportunity, with one hugely significant gesture, to seriously address the public’s growing cynicism, to shatter the negative stereotypes before it hardens any further, and to begin to turn public opinion in favor of the legal profession once again.

The reputation of lawyers will not be restored through public relations, but through public actions -- not with surveys and slogans, but with character and courage -- not by avoiding responsibility, but by demonstrating decency.

And let the record show that many lawyers have already begun to seize this opportunity for moral leadership. The Association of the Bar of the City of New York, as I’ve noted, has risen to the occasion. The deans of the great majority of New York’s law schools have likewise stepped forward and called upon New York State and the ABA to end “pay-to-play.”

A few weeks ago, several of the leading lawyers in our nation gathered in my office. They came together because they found pay-to-play an odious, obnoxious practice and wished to say so publicly. They felt that more should be done to end the practice -- and that, if given the chance, many of their colleagues would agree with them.

These legal luminaries have organized “The Lawyers’ Committee to End Pay-to-Play” under the honorary chairmanship of one of our country’s outstanding lawyers, jurists, and public servants - - Judge William H. Webster. He has been joined by former Attorney General Elliot Richardson,

former SEC Commissioner Steve Friedman, and by the noted securities lawyers James Doty, Michael Halloran, John Lifton, Jack Levin, and John Olson. And upon the end of his term of office later this week, the Honorable William T. Allen will add his name to the growing list, too. Together, they are asking lawyers across the country to subscribe to the statement they and many of our nation's leading lawyers have already signed.

As a result of this debate, a simple question is crystallizing for the August meeting of the American Bar Association: Will lawyers act to end "pay-to-play," or will they rationalize, temporize, and try to dodge the issue?

Once last century, an American lawyer known for his honesty was faced with an ethical dilemma. Asked to pursue a six-hundred-dollar claim he knew he could win but which would bankrupt a widow and her children, Abraham Lincoln declined the opportunity, saying, "Some things that are right legally are not right morally."

That's precisely where professional standards matter the most. Within the imperfect structure of the law, for lawyers to pay to play MAY be right legally -- but it is absolutely not right morally.

I don't want to personalize the issue, or demonize the opposition. I acknowledge that there are good lawyers on both sides of this question. But even good lawyers can sometimes become so mired in the details of a proposal that they lose sight of the goal.

Our nation's lawyers now face the task of ending "pay-to-play." This is not a time for good lawyers. This is a time for great lawyers. I trust and hope they will heed our call.

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