KANTOR|DAVIDOFF

Kantor, Davidoff, Mandelker, Twomey, Gallanty & Kesten, P.C.
415 Madison Avenue, 16th Floor
New York, New York 10017
Tel: (212) 682-8383
Fax: (212) 949-5206
www.kantordavidoff.com

Connecticut Office
495 Post Road East
Westport, CT 06880
Tel: (203) 222-1100
Fax: (203) 226-7323

Laurence D. Laufer
Of Counsel
Writer's extension: 720
Writer's e-mail: laufer@kantordavidoff.com

April 24, 2016

BY EMAIL
Risa Sugarman
Chief Enforcement Counsel
New York State Board of Elections
Campaign Finance Unit
40 North Pearl Street, Suite 5
Albany, New York 12207-2729

Re: Leaked Referral for Criminal Prosecution; FOIL Request

Dear Ms. Sugarman:

As your office likely knows, I represent various entities and organizations who are named in a January 4, 2016 memorandum issued by your office to the State Board of Elections. I was startled and appalled to learn of this January 4, 2016 memorandum by reading press accounts indicating that it had been initially issued by your office to refer a set of allegations to the New York County District Attorney. *See* Lovett, "EXCLUSIVE: De Blasio team skirted campaign donation limits", N.Y. Daily News, Apr. 22, 2016. Beyond the legal and regulatory issues implicated by your office's memorandum being improperly leaked to the press, your memorandum reflects either a shocking lack of understanding or a complete disregard of the most fundamental aspects of the state's election laws. As someone who has been intimately involved in the enforcement, analysis and application of the election laws for over three decades, I am at a loss to understand any proper purpose that could have been served by a criminal referral based on conduct that is unquestionably authorized by the existing law, let alone the improper disclosure of such a referral to the extent your office is responsible for leaking it or providing it to others not authorized to receive it.

I have practiced law in New York, with a specialty in New York campaign finance law, for over thirty years. As a New York City Assistant Corporation Counsel, I helped evaluate the City of New York's authority to adopt campaign finance legislation in the context of New York Election Law Article 14. I then helped draft the landmark New York City Campaign Finance Act, which was adopted into law in 1988. Subsequently, I became counsel to the executive director and general counsel to the New York City Campaign Finance Board, an agency I am proud to have helped establish and build for 12 years from its inception in 1988.

Subsequently, during these past 16 years, I have counseled and represented hundreds of candidates across the political spectrum, individuals, political committees, corporations, advocacy organizations, labor unions, and others regarding issues and matters arising under both State and City campaign finance laws in New York (and elsewhere). I was honored to have served three years as chairman of the Special Committee on Election Law of the New York City Bar Association. I also happily give my time to teaching continuing legal education programs in this subject area, as well as to assisting efforts of reform advocates and to publishing commentary on these laws. Under retention by the Governor's Office in 2014, I assisted staff at the State Board of Elections in its implementation of Election Law Article 14, §§14-200-213, a program for the public campaign financing of elections to the office of State Comptroller (now sunset). I am also frequently consulted by election lawyers and other attorneys for counsel on matters requiring special expertise in campaign finance law.

As I understand it, when your position and office was created in 2014, you and it were invested with investigatory authority pursuant to Election Law §§3-102(3) and 3-104(1)(b). Under Election Law §3-104(5)(b), as enforcement counsel, you are authorized to "refer [matters] to the attorney general or district attorney … to commence a criminal action…." In other words, you, as enforcement counsel, are not vested with the authority – or discretion – to commence or prosecute a criminal action.

Given this lack of criminal prosecutorial authority, and the lack of any authorization in Election Law §3-104(5)(b), it is of great concern that your office failed to secure the confidentiality of its referral memorandum in this case. The State's Freedom of Information Law instructs State employees against providing public access to records "compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;
ii. deprive a person of a right to a fair trial or impartial adjudication;
iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or
iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures…."

See Public Officers Law §87(2)(e). This leak was, at a minimum, contrary to both items i and ii, quoted above. In addition, any leak of the confidential document would also be a violation of Public Officers Law Code of Ethics, codified at Public Officers Law §74, which states that:

> "No officer or employee of a state agency, member of the legislature or legislative employee should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests."

Public Officers Law §74(3)(c).

It hardly bears repeating that the leak of a document alleging potential criminal violations by individuals specifically named raises serious legal and regulatory issues that should be fully investigated. And when the leaking office lacks any legal authority or discretion whatsoever to commence a criminal action, such as your office lacks, the leaking of such a document or failure to secure its confidentiality is a complete dereliction of duty, or an ultra vires intentional act

might be more apt, depending on the particular circumstances. In any event, the leak is certainly a highly prejudicial and perhaps politically-motivated act, which is contrary to both your non-partisan, independent function and to the bi-partisan charge of the agency by which you are employed – that is, if you or your office was responsible, directly or indirectly. In raising these issues, I am aware of prior reports that your office has failed in the past to properly recognize its confidentiality obligations in connection with its investigations. *See*, *e.g.*, Lovett, "Head of unit investigating state election law violations kept Cuomo's office in loop," New York Daily News, October 1, 2014, http://www.nydailynews.com/new-york/head-unit-investigating-state-election-law-violations-cuomo-office-loop-article-1.1958907.

I should further note that your memorandum itself is anything but non-partisan given its complete disregard of the long recognized principles underlying our state's election laws discussed below and its singular focus on a small group of individuals to the exclusion of the rest of the state Democratic party who were involved in the entirely proper efforts to win a Democratic majority in the State Senate, including the State Democratic Committee and other prominent elected officials and individuals.

In any event, pursuant to the Freedom of Information Law, I hereby seek copies of all correspondence, such as letters, emails, notes, memoranda or other documents, whereby the memorandum your office produced that is referenced in the *Daily News* story, cited above, was transmitted or conveyed to any person or entity other than members and employees of the State Board of Elections or the New York County District Attorneys' office. This includes any and all transmittals or conveyances to any members of the press, other state officials and employees, or any other person or entity.

(As an aside, this unnecessary leak will surely sow confusion and chaos as to settled law and expectations in this year's State legislative elections. I cannot think of a single prior instance in which an election regulator so cavalierly disregarded consequences for the regulated community and for public confidence in the very laws he or she is charged with enforcing.)

Rather more egregious than the leak, however, is the profound misunderstanding of election law and the novel, esoteric and chilling interpretation you apparently seek to advance in the charges you make (which has been printed verbatim in press reports stemming from the leak).

Your office is apparently characterizing political party committees as mere "straw donors" and treating a coordinated political party effort to elect a majority to the State Senate as some kind of criminal conspiracy. In light of the provisions of the Election Law that actually apply to political party financing, as detailed below and well known by election law practitioners, these reported characterizations make no sense whatsoever.

Article 14 of the Election Law recognizes and authorizes a statewide infrastructure of state, county and legislative leadership committees to engage in the financing of a coordinated campaign to elect the party's candidates in a general election. Campaign finance law neophytes may mistake the term "coordination" as some kind of pejorative suggesting violation or evasion of a contribution limit applicable to an individual candidate. But under New York state law, in the context of political party financing, coordination is a positive value for amassing and deploying resources – financial or otherwise – to help a political party to achieve what is always a paramount objective: electing a slate of candidates.

In the American political system political parties are not mere cyphers for candidates. Far from it. Witness, for example, the massive public friction between the national Republican Party leadership and its leading contender for the Republican nomination for president. Further, the speech and association rights of the party and its adherents in supporting the party and its candidates are constitutionally distinct from those of the candidates themselves. In other words, the party and each of its candidates are separate actors for First Amendment purposes, even when working in tandem. As a result, the anti-quid-pro-quo-corruption interest addressed by contribution limits has very different ramifications for party as opposed to candidate financing. This constitutional differentiation is mirrored in the very different contribution limits Article 14 establishes for parties and for candidates.

Here's how this law works.

Article 14 of the Election Law gives political parties far greater flexibility to raise and disburse funds in support of candidates in a general election than any other individual or entity, expressly enabling the party's committees to give unlimited financial support to the party's candidates. In seeking to win a Democratic majority in the State Senate, for example, a coordinated party campaign may solicit maximum contributions to political party committees, help guide those political party committees in making transfers to help specific candidates, and ultimately aid the candidates' authorized committees in making effective use of the funds they receive. Party leaders, such as a governor or a mayor of the City of New York, may well be expected or at least asked to participate, encourage, or even lead such party-building efforts. In turn, candidates seeking election may appeal to a party's hierarchy and its committees for financial and other support.

These provisions for political party financing in support of candidates have been familiar territory for other political parties, candidates, and elected officials over the years, and well known given the public reports of those efforts. *See, e.g.*, Lovett, "NY Senate GOP used same loophole they ripped Dems for", N.Y. Daily News, May 4, 2015, http://www.nydailynews.com/blogs/dailypolitics/ny-senate-gop-loophole-ripped-dems-blog-entry-1.2208909; "Dollars from Mike pals to a third party", N.Y. Daily News, Oct. 5, 2008, http://www.nydailynews.com/news/2008/10/05/2008-10-05_dollars_from_mike_pals_to_a_third_party.html; "Bloomberg Steps In to Help G.O.P. in Albany Fight, The New York Times," March 1, 2008, http://www.nytimes.com/2008/03/01/nyregion/01bloomberg.html. There is nothing novel about the 2014 Democratic Party campaign to elect Democratic candidates to the State Senate, other than your attempt to selectively criminalize it.

In your drive to allege crimes, you might contend that a general election campaign where party leaders, party committees, party operatives, party consultants, party employees, party volunteers, party members, and party candidates all work together (*i.e.*, "coordinate") to achieve the party's paramount objectives just can't be done without illegally evading contribution limits and engaging in a criminal conspiracy. But it's actually quite simple to do under our current election laws if you understand the law and are properly advised since the state's election laws permit and authorize exactly such conduct.

Anyone may solicit contributions to the campaign account of the state or county constituted committees of a political party, or to the campaign account of a party's legislative

leadership committees. *See* Election Law §14-100(2) and (3) (defining party committee and constituted committee). Contributors and these political party committee recipients must adhere to the annual contribution limits. In 2014, these annual limits were $102,300 per year to the campaign (*i.e.*, non-housekeeping) account of each political party committee. *See* Election Law §14-114(10). (Because the $150,000 aggregate limit of Election Law §14-114(8) was no longer applicable pursuant to judicial and State Board of Elections decisions, a single contributor could, at that time, make maximum $102,300 contributions to multiple political party committees.)

Contributions to a political party committee's campaign account may be used "for the express purpose of promoting the candidacy of specific candidates". *See* Election Law §14-124(3). In contrast, the unlimited contributions that parties may raise for "housekeeping" purposes may not be used to help candidates. *See id.* In other words, most contributors to a political party committee's campaign account would understand that the full amount of their contributions may be used by the political party committee recipient to help candidates. (Indeed, the only time a contributor would have a reasonable expectation that his contribution to a political party committee would not be used to support candidates is when that contribution is made to a housekeeping account. *See id.*) Such contributor knowledge or intent that her contributions would be used to benefit a candidate in no way turns a permissible contribution to a political party committee into a criminal act.

What can a political party committee do with the contributions it receives into its campaign account? It can make transfers of funds to candidate-authorized committees. In fact, the political party committee can transfer these funds in response to a candidate's request for help or based on the advice of any person or entity.

The law states that political party committees may make unlimited monetary transfers to candidate committees from their campaign (*i.e.,* non-housekeeping) accounts to candidate authorized committees, which the candidate committees may use for any campaign purpose they choose. *See* Election Law §14-100(10) (defining "transfer") and §14-100(9)(2) (excluding transfers from the definition of "contribution"). Thus, the overall monetary support a political party committee may provide to a candidate is not limited as a contribution, a result that is identical to the unlimited overall monetary support that a candidate may receive from a political committee he or she has authorized.

But here's the difference between what a candidate can do for herself and what a political party committee can do for a candidate -- and it's a big one. Election Law §14-114(1) sets forth limits on contributions to candidates. These limits extend to "all contributions to political committees working directly or indirectly with any candidate to aid or participate in such candidate's nomination or election, other than any contributions to any party committee or constituted committee." Election Law §14-114(1) (emphasis added). This exclusion of political party committees from candidate contribution limits creates a distinction between monetary transfers by authorized candidate committees and transfers by party or constituted committees, which are by definition monetary. Whereas the funds an authorized committee chooses to transfer likely derive from contributions subject to the candidate contribution limits of Election Law §14-114(1), those candidate contribution limitations do not apply to funds received by political party committees. *See* Election Law §14-114(10) (setting forth different limitations on contributions to political party committees). Thus, the funds a political party committee chooses to transfer are not subject to the candidate contribution limits of Election Law §14-114(1) and, as noted above, such transfers are not contributions. *See id., and* Election Law §14-100(9)(2), *and*

§14-114(3) (political party committees are deemed not to be contributors when supporting a candidate of such party).

As a result, both authorized candidate committees and political party committees may give unlimited financial support to candidates through monetary transfers, except that in the case of an authorized candidate committee the ability to transfer is indirectly constrained by the duty to comply with the candidate contribution limits that apply to both transferor and transferee committees authorized by the same candidate. In either case, the transferee committee makes full public disclosure of both the transfer it has received and the expenditures it makes from all funds received. See Election Law §14-102.

Thus, in the 2014 State Senate races, when a political party committee was "working directly or indirectly" with a candidate and transferred any amount of funds raised under the $102,300 limit applicable to the political party committee to that candidate's authorized campaign committee, there would be no violation or evasion of the $10,300 contribution limit then applicable to the candidate's general election campaign since that lower limit was expressly inapplicable to both funds received and funds transferred-out by the political party committee.

It is hard to conceive how a political party committee choosing to participate in the party's coordinated statewide effort to help elect the party's slate of candidates to the State Senate could be characterized as a mere straw donor in a conspiracy – unless you found evidence that the committee's officers and members were held hostage and forced to deposit and disburse funds at gunpoint. I'm guessing that's unlikely.

There is no provision of the Election Law that would preclude a campaign consultant or volunteer from both raising funds and providing advice to the funds-recipient regarding the optimal campaign use of the funds raised. I daresay this happens in every political campaign. Thus, nothing illegal occurs when consultants or volunteers raise contributions for political party committees for the express purpose of enabling those political party committees to help elect the party's candidates in the context of the party's coordinated State-wide campaign, including by making such monetary transfers to candidate authorized committees as the political party committee deems necessary and appropriate. And nothing illegal occurs when candidates request and accept such financial assistance from a political party committee. Election Law Article 14 authorizes all of these political campaign strategies.

New York is not unique. Federal law, to take just one example, sets high contribution limits for political party committees and generous ceilings for the financing of those party committee's coordinated activity with candidates. *See* 11 C.F.R.§§109.30 - 109.34 (limits on political party committee coordinated expenditures for federal candidates); 110.1(c) (limits on contributions to political party committees), 110.2(e) (limits on contributions by political party committees to Senatorial candidates).

In sum, New York law sets different contribution limits for the same election: (i) a comparatively low limit on contributions to candidates versus (ii) a higher limit on contributions to political party committees working directly or indirectly with any candidate, which funds may be transferred in unlimited amounts to such candidates. Given this differentiation, due process requires a visible line between, on the one hand, conduct that is a robust exercise of a political party's speech and associational rights under the constitution and the statute and conduct that is a

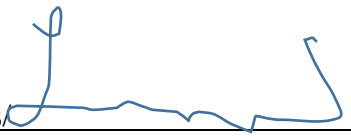
crime, on the other hand. At a minimum, this requires clear and public notice of what conduct is actually prohibited.

In the American system of justice, law enforcement officials do not have authority to set or re-set standards of conduct retroactively. Were that the case, you, as enforcement counsel could retroactively close the so-called and infamous "LLC loophole" simply by saying it is so – regardless of the views of the State Legislature or the State Board of Elections. But a cop simply can't issue a red light ticket for driving through a green light.

For all of the reasons discussed above, I am deeply troubled that your office made a criminal referral that was based on a complete misreading and utter disregard of the state's unambiguous election laws, and that your blatantly political document was leaked to the press. In addition, I specifically reserve all of my clients' rights and remedies to pursue action against you and your office for all of your known and unknown conduct relating to the events referenced in this letter.

Sincerely yours,

KANTOR, DAVIDOFF, MANDELKER,
TWOMEY, GALLANTY & KESTEN, P.C.



/s/
LAURENCE D. LAUFER

cc: Hon. Cyrus R. Vance, Jr.
John W. Conklin, Director of Public Information, New York State Board of Elections