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**REFORMING NEW YORK STATE'S
ETHICS LAWS THE RIGHT WAY**

**Report of the New York City Bar Association
Committee on State Affairs and
Committee on Government Ethics**

February 2010

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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I. EXECUTIVE SUMMARY

New York's state government is under intense scrutiny for its ethical shortcomings. A Governor, a State Comptroller, a former leader of the State Senate and numerous legislators and others have taken turns at center stage in a seemingly never-ending series of ethical scandals. It is little wonder that the New York Times editorial page described our state capital as "a swamp of intrigue and corruption" and 2009 as "New York's moment of shame."¹

Notably, these scandals frequently have exposed not only the personal misdeeds of the individuals involved, but systemic failings of the laws that should have prevented such misdeeds from occurring. Yet Albany so far has failed to enact full and bold ethics reforms. The New York State Legislature, on a rush basis, with no public hearings and minimal public debate, passed an ethics reform bill (A.9544/S.6457) on January 20, 2010 that even its proponents characterized as merely a "down payment on the ethics reforms that New Yorkers truly deserve."² Governor David Paterson vetoed the legislation on February 3, 2010 stating that "[w]hile there are positive aspects of this legislation, it does not go far enough in addressing the corrosive effects of outside influence and internal decay that have caused the people of New York to lose faith and trust in their

¹ "Fed Up With Albany," New York Times, Oct. 18, 2009, *available at* <http://www.nytimes.com/2009/10/19/opinion/19mon1.html>.

² Senate Press Release: "Senate Passes Strongest Ethics Reform in a Generation," January 20, 2010, *available at* <http://www.nysenate.gov/press-release/senate-passes-strongest-ethics-reform-generation>; David King, "Albany's Ethics Bill: First Step or Missed Opportunity?" Gotham Gazette, January 14, 2010, *available at* <http://www.gothamgazette.com/article/albany/20100114/204/3151>. ("Three of the four leaders of the Legislature and the heads of three major good government groups stood together in Albany on Wednesday morning and patted each other on the back for a job partly done.").

government."³ On February 8, 2010 the Legislature failed to override the Governor's veto.

The prospects for ethics reform during this legislative session are now unclear at best. In his State of the State and budget messages, the Governor proposed ethics reform measures that were substantially different from the legislation he vetoed. There is still time this legislative session for the Governor and Legislature to negotiate an ethics reform law.

The Association urges the Legislature and the Governor to promptly come together and, through a transparent and inclusive democratic process, enact a set of reform measures that are truly comprehensive and effective. The best ideas from all sources, including legislators, the Governor, good-government groups and other interested citizens, should be combined in a new omnibus bill. The Association believes that in the next 30 to 60 days such a bill could be developed, debated through open hearings to develop the necessary public understanding and support, and enacted into law.

The Association urges the Legislature and the Governor to seriously consider the following as the core principles of an omnibus ethics reform bill:

- A single independent agency should be principally responsible for overseeing and enforcing ethics laws for the executive branch, the Legislature and lobbyists alike.
- The independence and integrity of the ethics agency should be structurally safeguarded:
 - The power of appointment to the ethics agency's board should rest with a designating commission, rather than directly with the Governor or other elected officials.

³ "Veto: Ethics rot remains," Times Union, February 3, 2010.

- The power of appointment to the designating commission should be distributed and shared among multiple elected officials, none commanding a majority of the seats.
 - Seats on the designating commission and the ethics agency board should be held only by persons of independence and accomplishment, with current state officials and lobbyists being excluded from membership and former officials being allowed (and perhaps encouraged) to serve but only after a meaningful cooling-off period.
 - Members of the ethics agency board should serve fixed terms longer than the Governor's, and should be removable only for cause.
 - The ethics agency's policies and procedures should ensure due process for any individual who comes under the agency's scrutiny.
- The strength and effectiveness of the ethics agency also should be structurally safeguarded:
 - The ethics agency should have the power to conduct meaningful investigations, including via subpoena; the power to impose civil sanctions and to make criminal referrals; the power to audit the financial disclosure statements of all filers; and the power to give advisory opinions that will help public officials know the boundaries of the law.
 - The ethics agency should be well-funded and staffed, and protected against the vagaries of the annual budget process.
- Albany should completely close the so-called "Bruno Gap":
 - There should be full and meaningful disclosure of legislators' outside income – both the dollar amounts and their sources.
 - For legislators who practice law or act as consultants, this disclosure should include the identities of their clients and the nature of the work being done for them. The objection that such disclosure would violate legal privileges or confidences lacks merit; true concerns about client confidentiality should be dealt with through carefully limited, case-by-case exceptions to disclosure subject to independent review by the ethics agency.⁴

⁴ Financial disclosure by attorney-legislators is the topic of a separate report issued by the Association, which this report incorporates by reference and which is included as Appendix 1.

- The public should have ready Web-based access to the information being disclosed, without redaction.
- Legislators should be expressly forbidden to use their offices, staff or other public resources to support their private business endeavors.⁵
- Members of the Senate and Assembly should no longer be the principal police of their own ethics; that role should be assigned to the independent ethics agency. The Legislature should maintain some capacity – perhaps through standing committees on ethics – to look at specific cases involving its members and to refer more serious cases to prosecutors or to the ethics agency.

A word about process is in order. Proposals to bring sunshine to government should not be enacted in the dark of night. A reformed system cannot be effective without public understanding and support. The public should be provided a prompt and meaningful opportunity to comment on reform proposals through public hearings and other means.

A word about pragmatism and politics is in order too. The Association appreciates that the principles outlined above go beyond the bill recently passed by the Legislature but vetoed by the Governor. We also appreciate that the perfect should never be the enemy of the good. But New York's moment of shame is not a moment for half-measures. The current momentum and political capital for ethics reform should be spent on getting it right. The Association believes that enactment of a bill based on the principles discussed here will help deliver to New Yorkers the clean and open government they deserve. Additionally, it should be recognized that there are fiscal implications for any reform effort and reorganization of New York's ethics regime, and

⁵ See pp. 28 and 47, *infra*, for further discussion of A.9559/S.6439, signed into law by the Governor on February 12, 2010.

in this period of significant budget shortfalls now is not the time to invest in a system that is inadequate.

II. THE CURRENT SITUATION

What exactly are the problems that ethics reform should seek to solve? In this section we consider what some of the recent scandals reveal about specific gaps in New York's ethics laws and enforcement structures, and how the state's ethics regime currently is organized – the principal statutes, agencies, disclosure requirements and rules of conduct.

A. Some Recent Scandals and Their Lessons

The facts of New York's many recent scandals have been widely reported elsewhere, and will not be recounted in detail here. We will briefly recount a few recent events that especially highlight the need for legal reform.

The federal conviction of Joseph L. Bruno, the former Senate Majority Leader, on December 7, 2009 for concealing hundreds of thousands of dollars in payments from a businessman who sought help from the Legislature marked the nadir of the recent era of scandals involving Albany's political establishment. Mr. Bruno was found guilty of two felony counts of mail fraud and acquitted on five other counts of mail or wire fraud; and there was no verdict on another count. Andrew T. Baxter, the acting United States attorney for the Northern District of New York, said, "We established at this trial that Bruno exploited his office by concealing the nature and source of substantial payments that he received from parties that benefited from his official actions."⁶

⁶ Nicholas Confessore and Danny Hakim, "Bruno, Former State Leader, Guilty of Corruption," New York Times, December 8, 2009, *available at* <http://www.nytimes.com/2009/12/08/nyregion/08bruno.html>.

The federal statute under which Mr. Bruno was charged makes it a crime for officials to use wires or the mail to deprive constituents of their “honest services” by concealing conflicts of interest. Mr. Bruno was convicted of receiving \$200,000 in 2004 from consulting firms run by Jared E. Abbruzzese, an Albany-area businessman, and of benefiting through a horse-breeding partnership between Mr. Bruno and Mr. Abbruzzese, by having Mr. Abbruzzese forgive a \$40,000 debt owed by Mr. Bruno and paying him \$40,000 for a horse that was virtually worthless. Jurors found those payments were made in consideration for hundreds of thousands of dollars in state grants that Mr. Bruno had previously obtained for Evident Technologies, one of Mr. Abbruzzese’s companies. Mr. Bruno was not prosecuted under New York law, because under New York law, as it currently stands, his actions were not illegal.

Lest anyone believe that Mr. Bruno’s activities were an anomaly, consider the guilty plea of Anthony S. Seminerio, who served in the State Legislature for three decades before resigning in June 2009. Mr. Seminerio was arrested and accused of taking more than \$1 million in exchange for legislative favors covering almost a ten-year period. Mr. Seminerio subsequently pled guilty to a single charge of fraud and admitted that he was paid \$310,000, through a consulting firm, by Jamaica Hospital. He allocated that he “promoted the interests of Jamaica Hospital in connection to a New York State matter.”⁷ On February 4, 2010, Mr. Seminerio was sentenced to six years in prison.

The Bruno trial and Seminerio plea revealed much about the culture of Albany. Lawmakers are free to earn substantial private income but have been required to disclose

⁷ Colin Moynihan and A.G. Sulzberger, “Queens Assemblyman Pleads Guilty in Corruption Case,” New York Times, City Room Blog, June 24, 2009, *available at* <http://cityroom.blogs.nytimes.com/2009/06/24/seminerio-pleads-guilty-in-federal-court>.

very little about what they are paid to do. New York State's current financial disclosure requirements for state officials were simply inadequate to prevent the illegal behavior engaged in by Messrs. Bruno and Seminerio, or to give the public, press and prosecutors enough insight to readily detect their activities.

In addition, the Bruno trial revealed that the Legislative Ethics Commission ("LEC"), the "watchdog" agency established to monitor the ethical behavior of members of the State Senate and Assembly, is ineffective and needs to be substantially reformed if not abolished. The LEC lacks the structural independence that is intrinsically necessary to effective ethics enforcement: the legislative leadership appoints all nine of its members, and by law four of the nine slots are reserved for sitting legislators.

Historically the LEC (including its predecessor, the Legislative Ethics Committee) has never brought forward a single significant investigation of legislator misconduct, despite the recent years of repeated scandals. Currently only eight of the nine seats on the LEC are filled; the current makeup is four sitting legislators and four outside commissioners.⁸ In 2008, the LEC opened only two investigations, and one was still pending at the end of that year.⁹ Between the LEC's flawed structure and its history of inaction, New Yorkers should have little confidence in the capacity of the Legislature to police its own members.

It should be remembered that the current LEC was created less than three years ago as part of the Public Employee Ethics Reform Act of 2007 (PEERA), which then-Governor Eliot Spitzer and other state leaders characterized at the time as the most

⁸ See <http://www.legethics.state.ny.us/home.aspx>.

⁹ Legislative Ethics Commission Annual Report 2008, "Complaints and Investigations," April 2009, available at http://www.legethics.state.ny.us/Files/Public_Documents/FINALAR.pdf.

sweeping ethics and lobbying changes in state history.¹⁰ This may provide a useful reference point for evaluating the claims by some legislators that the bills passed on January 20, 2010 represent the “strongest ethics reform in a generation.”¹¹

The “Troopergate” affair likewise demonstrated serious flaws both in the ethics laws and in the mechanisms established to investigate violations of them. The affair had its roots in a disturbing practice: Senator Bruno used state resources for political travel, which was lawful so long as some minimal part of the travel involved official business. The Governor’s office then utilized the State Police in a politically motivated effort to challenge Senator Bruno’s conduct. What followed was a series of multiple and overlapping investigations by the Office of the Attorney General, the Albany County District Attorney’s Office, the New York State Ethics Commission and its successor agency, the Commission on Public Integrity (“CPI”), the New York State Inspector General, and the Senate Investigations and Government Operations Committee. The combination of the underlying misconduct with the competing and not entirely effective investigations seriously undermined public confidence in the ability of state government to rein in unethical behavior, not to mention the excessive expenditures of the State’s limited financial resources.¹²

The controversy over how the Governor’s office utilized the State Police has somewhat obscured the underlying issue of why state officials should be allowed to use any public funds whatsoever for political travel. The controversy over Troopergate also

¹⁰ Casey Hynes and Sarah Clyne Sundberg, “Little bite in ethics rules,” Albany Times Union, December 30, 2007.

¹¹ Senate Press Release, “Senate Passes Strongest Ethics Reform in a Generation,” January 20, 2010, available at <http://www.nysenate.gov/press-release/senate-passes-strongest-ethics-reform-generation>.

¹² Further factual details about Troopergate are found in Appendix 2 to this report.

shows the need for clearly defined jurisdictional authority over ethics matters. The spectacle of dueling ethics entities is not only ineffective and inefficient but may further erode public confidence in New York's public integrity system.

B. Current Ethics System

1. Scope and Mandate of Relevant Agencies

a. *Commission on Public Integrity*

On March 27, 2007 the Public Employee Ethics Reform Act of 2007 (PEERA) was signed into law by then-Governor Eliot Spitzer. In addition to strengthening existing ethics laws, PEERA merged and replaced the Temporary State Commission on Lobbying (Lobbying Commission) and the State Ethics Commission into the newly formed State Commission on Public Integrity (CPI).

Prior to PEERA, the enforcement of ethics and lobbying laws was divided among three separate entities. Ethics oversight of the executive branch was carried out by the State Ethics Commission. The Lobbying Commission was charged with enforcing lobbying laws, regardless of whether the lobbying activity was before a legislator or an executive branch employee. The Legislative Ethics Committee was tasked with monitoring and enforcing ethics laws as applicable to individuals in the Legislative branch of state government.

During the year leading up to PEERA, good governance groups began to call for badly needed ethics reforms. The 2006 conviction of Comptroller Alan Hevesi stemming from his misuse of state resources, the revelation that Senator Bruno was under investigation by the FBI in connection with his outside consulting work, and the indictment of Senator Efrain Gonzalez Jr. for the theft of over \$400,000 of state money contributed to popular support for reform. The Brennan Center for Justice at NYU

School of Law, Common Cause New York, the League of Women Voters and the New York Public Interest Research Group (“NYPIRG”) endorsed and circulated a model statute called “The Ethics In Government Act of 2006.” In addition to proffering substantive changes to the state’s ethics laws such as a ban on honoraria and gifts other than those deemed de minimis, the model act called for the creation of a single independent ethics agency to provide external oversight for both the executive branch and legislative branch of state government.

Eliot Spitzer made ethics reform a pillar of his 2006 gubernatorial campaign. His landslide election encouraged the reform climate and led to prompt passage of PEERA by the State Senate and, on a unanimous vote by the State Assembly, Governor Spitzer signed PEERA into law on March 27, 2007, after fewer than three months in office.

PEERA represented a compromise among Governor Spitzer’s campaign promises of ethics reform, the reform proposals of the various good-government groups, and the Legislature’s determination to continue self-policing. The call to strengthen the bans on honoraria and gifts was heeded, but the call to merge enforcement powers over the executive and legislative branches into a single agency was not. Instead, ethical oversight of the legislative branch was passed from the member-dominated Legislative Ethics Committee to the newly created LEC, with four members who would be sitting legislators and five who would not be. The newly formed CPI was charged with enforcing the newly strengthened lobbying laws and ethics laws as applied to employees of the executive branch.

The CPI is comprised of 13 commissioners. Seven of the thirteen commissioners are appointed and seated purely at the discretion of the Governor. Of those seven, only

four may be of the same political party. The remaining six commissioners are also appointed by the Governor, but must first be nominated, one each, by the Attorney General, Senate President, Assembly Speaker, Senate Minority Leader and Assembly Minority Leader.

The Governor selects the chairman of the CPI, who has the power to call meetings. Meetings may otherwise be called by seven commissioners. Seven commissioners constitute a quorum, and seven commissioners are required for the Commission to act on any given issue.

Section 94 of the Executive Law gives the CPI jurisdiction over certain defined classes of people (collectively, “regulated persons” hereinafter): (a) statewide elected officials, state officers and state employees; (b) candidates for statewide elected office; (c) political party chairman; (d) lobbyists and the clients of lobbyists; (e) individuals who have formerly held such [elected] positions; (f) former lobbyists or clients of lobbyists; and (g) and former candidates. “Statewide elected officials” are the Governor, Lieutenant Governor, Comptroller and Attorney General. “State officer or employee” is far more inclusive, bringing in the bulk of the employees of the executive branch, specifically, heads of state departments and their deputies, officers and employees of statewide elected officials, of state departments, boards, bureaus, divisions, commissions or councils, and the members or directors of public authorities. The CPI also has jurisdiction over “political party chairman.”¹³ This includes the elected chairman of the state committee of a party, and the elected chairman of a county committee, or the person designated as the county leader or chairman of the executive committee in certain circumstances.

¹³ As defined in Section 73 of the Public Officers Law.

The novelty of the creation of the CPI, and a source of controversy surrounding it at the time, was the inclusion under its jurisdiction of lobbyists and clients of lobbyists. “Lobbyist” is defined as every person or organization that engages in lobbying on behalf of a client. “Lobbying” is defined to include any attempt to influence legislation by either house, gubernatorial executive orders, rules or regulations or rate making of state agencies, or any procurement decision. Given the definition of “lobbying,” the CPI has jurisdiction over any lobbyist or client of a lobbyist regardless of whether they appear in front of the executive or the legislative organs of government.

The CPI may receive sworn complaints regarding non-compliance, by regulated persons, of certain sections of New York law. The CPI may receive and investigate complaints of violations of section 73 of the Public Officers Law, section 73-A of the Public Officers Law, section 74 of the Public Officers Law, section 107 of the Civil Service Law and Article 1-A of the Legislative Law. The CPI derives its lobbyist oversight functions from the requirements found in Article 1-A of the Legislative Law. The other sections of law shape the CPI’s activities as the executive ethics watchdog. Each will be addressed more specifically below.

b. *Legislative Ethics Commission*

The LEC was also created by PEERA. This legislation expanded the former Legislative Ethics Committee and revised the provisions of the Public Officers Law under the LEC’s jurisdiction. The LEC’s duties include administration and enforcement of sections 73, 73-a and 74 of the Public Officers Law for members and employees of the Legislature and candidates for state legislative office. The LEC is authorized to issue advisory opinions and adjudicate complaints on violations of these laws. The LEC also

maintains financial disclosure statements of those who serve or seek to serve in the Legislature.¹⁴

The LEC is comprised of nine members. Each of the four legislative leaders appoints one member of the LEC from among the members of the Legislature, and one non-legislative member. The fifth non-legislative member is appointed jointly by the Assembly Speaker and the Senate Majority Leader. The legislative members serve two-year terms concurrent with their legislative terms. The terms of the non-legislative members are staggered. As noted above, in their two decades of existence, the LEC and its predecessor organization have never publicly found a legislator guilty of wrongdoing.¹⁵

2. Substantive Rules

a. *Public Officers Law*

Section 73 of the Public Officers Law restricts public officers¹⁶ from performing certain business activities. Section 73 prohibits the direct compensation of a state officer or employee for his or her exercise of discretion in any particular fashion, or the appearance thereof. It also restricts business dealings to be performed between the state

¹⁴ A complete description of the duties and powers of the LEC can be found in section 80 of the Legislative Law.

¹⁵ Heather Senison, “Reforming Albany: Without Strong Watchdog, Ethics in Albany Go Unchecked,” The Journal News (Westchester County, NY), August 25, 2009.

¹⁶ “Public officers” include (1) statewide elected officials – i.e., the Governor, Lieutenant Governor, Comptroller and Attorney General; (2) state officers and employees – i.e., heads of state departments and their deputies and assistants; officers and employees of statewide elected officials; officers and employees of state departments, boards, bureaus divisions, commissions, councils or other state agencies other than those who receive no compensation or are compensated on a per diem basis, and members or directors of public authorities, other than multi-state authorities, public benefit corporations and commissions at least one of whose members is appointed by the Governor, who receive compensation other than on a per diem basis, and employees of such authorities, corporations and commissions; (3) political party chairmen at the state or county level; and (4) candidates for the above positions and individuals who formerly held such positions or were formerly candidates for such positions.

and any corporation, organization, or legal entity in which a covered individual has a “financial interest,” defined as 10% or greater ownership or control of the stock of an entity, or service as an officer, director or partner of such an entity.

Section 73(2) of the Public Officers Law prohibits statewide elected officials, state officers or employees, members of the Legislature or legislative employees to receive compensation for services to be rendered in relation to any matter before any state agency, whereby this compensation is to be dependent or contingent upon any action by such agency – however, “nothing in this subdivision shall be deemed to prohibit the fixing at any time of fees based upon the reasonable value of the services rendered.”

Section 73(3)(a) of the Public Officers Law prohibits statewide elected officials, members of the Legislature or legislative employees, full-time salaried state officers or employees from receiving compensation in any form for the appearance or actual rendition of services against the interest of the state in relation to any case before the Court of Claims. Under Section 73(3)(b), this prohibition also extends to state officers or employees who would normally not be subject to the Public Officers Law.

An individual who “knowingly and intentionally” violates section 73 of the Public Officers Law is subject to a civil penalty of up to forty thousand dollars and the value of any gift or benefit derived from such violation.¹⁷ Depending on the subsection violated, the case may be referred to a prosecutor for punishment as a class A misdemeanor in lieu of the civil penalty.

Section 73-A of the Public Officers Law creates the financial disclosure requirements for public officers. Statewide elected officials, state officers or employees,

¹⁷ Executive Law §94(13) and Public Officers Law §73(18).

members of the Legislature, legislative employees and political party chairmen and every candidate for statewide elected office or for member of the Legislature shall disclose in a form set forth by law, *inter alia*, the following information:

- Position of any nature at any organization other than the State of New York (but not uncompensated honorary positions), held by the reporting person and the reporting person's spouse or unemancipated child. Also requires listing of any state or local agency by which this organization was regulated.
- Any occupation, employment, trade, business or profession engaged in by the reporting individual and the reporting person's spouse or unemancipated child. Also requires listing of any state or local agency by which this activity was regulated.
- Income, deferred income or assignment of income (other than transfer to relative) in excess of \$1,000 by source for the reporting person, the reporting person's spouse or unemancipated child.
- Any interest in excess of \$1,000 held by the reporting individual and the reporting person's spouse or unemancipated child, or owns a business or 10% or more of the stock of an entity.
- Real property interest in excess of \$1,000 or real property owned by a corporation more than fifty percent of the stock of which is owned or controlled by the reporting person or such individual's spouse.
- List of liabilities of the reporting person or such individual's spouse, in excess of \$5,000 (other than to a relative).
- If the reporting individual practices or is a shareholder of a law, real estate brokerage or a profession licensed by the Department of Education, the individual is required to provide a general description of the principal subject areas of matters undertaken by such businesses. The individual is not required to list the names of individual clients, customers or patients.
- Source, nature and value of gifts in excess of \$1,000 (excluding campaign contributions and gifts from a relative) received by reporting person, the reporting person's spouse or unemancipated child.
- Any contract or promise for employment after the reporting individual leaves office.

Importantly, monetary values are not required to be disclosed in specific amounts, but rather in categories: Category A – under \$5,000; Category B – \$5,000 to under \$20,000; Category C – \$20,000 to under \$60,000; Category D – \$60,000 to under \$100,000; Category E – \$100,000 to under \$250,000; Category F – \$250,000 or over.

These annual financial disclosures are filed with the CPI. The CPI makes available for public inspection and copying the annual statement of financial disclosure, except the categories of value or amount, which are redacted and remain confidential.

A reporting individual who “knowingly and willfully fails to file,” or who “knowingly and willfully with intent to deceive makes a false statement” in a filing, may be subject to a civil penalty. Penalties for violations of § 73-A are limited to \$40,000 plus the value of any gift or benefit given. In lieu of a penalty, the CPI may refer the violation to an appropriate prosecutor. The violation is then punishable upon conviction as a class A misdemeanor.¹⁸

Section 74 of the Public Officers Law contains the state government’s Code of Ethics. The Code prohibits public officers from taking upon themselves additional employment or engaging in business that may cause them to disclose confidential information obtained by reason of official position, or which would impair their judgment in connection with their duties as public officers. The actual disclosure of such confidential information is prohibited too, as is the use of official positions to secure unwarranted privileges. Knowing and intentional violations of the provisions of this section of law are punishable by a civil penalty, which is capped at \$10,000 plus the value of any gift, compensation or benefit received for violations of the prohibitions

¹⁸ Public Officers Law §73-a (4).

above.¹⁹ In addition, section 74 prohibits: accepting other employment that may impair the public officer's independence; acting as an agent for the state in a transaction in which the officer has a "direct or indirect financial interest" that might conflict with the proper discharge of official duties; and making investments in enterprises which may be affected by decisions made by him in his official capacity. Violations of these prohibitions are capped at the value of any gift, compensation or benefit received as a result of the violation, with no additional civil penalty attached.

b. *Civil Service Law*

Section 107 of the Civil Service Law prohibits granting or withholding promotions based on political affiliation or actions, exerting influence over an officer or employee to compel political contributions, exerting other similar types of improper influence by one civil servant against another civil servant, and promising influence in order to secure a public office or employment. Again, "knowing and intentional" is the applicable standard of *mens rea*.²⁰ The civil penalty is capped at forty thousand dollars and the value of any gift, compensation or benefit received as a result of such violation. Violations of this subdivision may not be referred to a prosecutor by the CPI in lieu of a civil penalty.

c. *Legislative Law*

Section 1 of the Legislative Law, known as the "Lobbying Act," governs the activities of lobbyists and clients of lobbyists. It imposes regular disclosure and filing

¹⁹ Public Officers Law §74(4); Executive Law §94(13).

²⁰ The "knowing and intentional" language is found only in Executive Law §94, and not in §107 of the Civil Service Law itself. For each of the other sections of law forming the substantive investigative jurisdiction of the commission, the *mens rea* is found to originate in the substantive statutory sections of law, and is then repeated in Executive Law §94.

requirements. Annual registration is required by lobbyists who spend more than \$5,000 lobbying; they must make disclosures including details of their clients and any written agreement or retainer, a description of general lobbying subjects, and the names of persons or organizations expected to be lobbied. Various bi-monthly and semi-annual reports of actual lobbying activities are required as well, including disclosure of lobbying expenditures in detail, the relevant bills or legislative initiatives involved, and the clients, as well as the name of the person or organization lobbied on behalf of clients. Reports of lobbying involving disbursement of public monies are filed separately.

In addition to setting forth filing requirements, the Lobbying Act prohibits retainers that are contingent, in whole or in part, upon the passage or defeat of any bill or approval or veto of any legislation by the Governor. The statute also identifies prohibited activities by lobbyists and clients of lobbyists, such as gifts to officials and certain prohibited contacts. The CPI makes information furnished by lobbyists and clients available to the public for inspection and copying in electronic and paper formats, as well as through the Internet.

“Knowing and willful” violations of the Lobbying Act are class A misdemeanors and class E felonies if repeated within five years. Civil penalties are determined by the CPI and do not exceed \$50,000 for willful filing of false information. Repeated violations may also be punished, in the discretion of the CPI, to prohibition from engagement in lobbying activities.²¹

²¹ Useful comparisons to the New York structures and statutes described in Part II of this report can be found by looking at how other states have approached the same issues. Readers are referred to Appendix 3 for a detailed discussion.

III. ALBANY’S PROPOSALS FOR ETHICS REFORM

Multiple ethics reform proposals were advanced in Albany in 2009.²² Governor Paterson put forward the Governor’s Program Bill #31, the “State Government Ethics and Campaign Finance Enforcement Act of 2009” (the “Governor’s Program Bill”). During the 2009 session the Assembly passed legislation (A.9032) and the Senate introduced but did not vote on a companion bill (S.6064), as well as a chapter amendment (S.6157) (collectively the “Senate Bill”). None of these bills was enacted during the 2009 legislative session.

On January 20, 2010, an ethics bill largely identical to that offered by the Senate and the Assembly during 2009 was passed by overwhelming majorities of both houses of the State Legislature (A.9544/S.6457). A companion bill with the stated purpose of closing the so-called “Bruno gap” by expressly limiting the use of state resources to support a legislator’s private business interests was also passed (A.9559/S.6439).²³

A. Legislation Passed by the State Senate and Assembly, January 2010

1. A.9544 / S.6457

The legislation (A.9544/S.6457) that was passed on January 20, 2010 would maintain a bifurcated approach to ethics oversight. The legislation would abolish the CPI and the LEC, replacing them with several new entities with varying authority, including an Executive Ethics and Compliance Commission, a new Legislative Office of Ethics Investigations, and a Joint Legislative Commission on Ethics Standards, as well as a

²² In addition, we note that S.6794 and S.6795 were recently introduced, on February 9, 2010.

²³ The latter bill, addressing use of state resources for private purposes, was signed by the Governor on February 12, 2010. (See <http://www.timesunion.com/AspStories/story.asp?storyID=900422>)

Commission on Lobbying Ethics and Compliance and an Enforcement Unit within the State Board of Elections.

The new Executive Ethics Compliance Commission (the “Executive Commission”) would replace the current CPI and would oversee ethics compliance by the executive branch. It would have jurisdiction over current and former statewide elected officials and candidates for statewide office, state officers and employees defined by the Public Officers Law (*i.e.*, Executive branch), and political party chairs. The Executive Commission would be comprised of six members to be appointed by the Governor (two appointees of separate political parties), the Attorney General (two appointees of separate political parties), and the Comptroller (two appointees of separate political parties). The Executive Commission would name its own chair and would choose an Executive Director who would serve a three-year term and could be removed only for cause. The powers of the Executive Commission would include: managing and reviewing financial disclosure statements (including exemptions); receiving and acting on complaints concerning violations of the Public Officers Law; assisting in the establishment of rules concerning conflict of interests; preparing annual reports of activities; and preparing a report concerning the scope of financial disclosure and potential changes to the law. These powers and duties are not significantly different than those held by the CPI.

The Assembly’s sponsor’s memo²⁴ cites as a primary justification for the abolishment of the CPI the following:

On May 13, 2009, the New York State Inspector General issued a report detailing alleged ethics violations by certain

²⁴ See <http://assembly.state.ny.us/leg/?bn=A09544>.

members of the Commission on Public Integrity²⁵ and former Governor Spitzer's staff. The alleged violations arose from the Commission's investigation into the so-called "Troopergate" scandal.

The sponsor's memo does not persuasively establish that New York should move away from strong central ethics regulation. In many respects, the CPI's track record suggests that a strong central regulator can be effective. CPI was successful in identifying and penalizing those who committed ethics violations during the "Troopergate" scandal, and has been very active in issuing informal and formal opinions and in conducting enforcement actions regarding issues in ethics and lobbying. The Inspector General did not conclude that CPI was generally ineffective or that centralized ethics oversight was a bad idea. Rather, the Inspector General found that in a specific case, the CPI's executive director (since resigned) improperly shared information about the Troopergate investigation with the Executive Chamber, and that the CPI itself had failed to investigate when allegations of this misconduct came to the attention of commissioners. This latter finding has been vigorously disputed by Zachary W. Carter, Counsel for the Commission on Public Integrity.²⁶

The legislation that was passed on January 20th would also create a new New York State Commission on Lobbying Ethics and Compliance (the "Lobbying Commission") and remove lobbying oversight (currently part of CPI's function) from the

²⁵ In fact, the Inspector General did not address any allegation that certain Commission members (which is the statutory term for commissioner) committed an ethics violation, rather whether the Commission's Executive Director "leaked" information to the Executive Chamber.

²⁶ See <http://www.nyintegrity.org/pubs/other/statement.html>.

executive branch and attempt to return it to the status that existed before the Public Employees Ethics Reform Act of 2007.²⁷

The Lobbying Commission would consist of six members, two appointed by the Governor and one appointed by each of the Temporary President of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate, and the Minority Leader of the Assembly. Members of the Lobbying Commission would serve four-year terms and would be responsible for electing a chair and vice-chair through majority vote to serve one-year terms. The chair and vice-chair would be required to be of different political parties. The Executive Director would be elected by a majority vote of Commission members, would serve a fixed term and could only be removed for cause.

In support of re-creating the Lobbying Commission, the Assembly's legislative memo states:

In addition, it has become clear that the structure established in 2007 that joined the lobbying commission with the body that oversees ethics compliance by executive branch employees and gave control of that new entity to the appointees of one office (the Governor) was not as effective as the former independent commission on lobbying.²⁸

The memo does not cite to any analysis of CPI's oversight in this area that would support the conclusion that a separate commission on lobbying is more effective than a centralized approach. A brief review of the activities of the CPI reveals some facts that should be considered in evaluating the effectiveness of the centralized model. For

²⁷ The language of the bill as drafted does not include the specific statutory authority needed for the Lobbying Commission to investigate violations of Article 1-A of the Legislative Law ("Lobbying Act"). This matter is further discussed later in this report.

²⁸ See <http://assembly.state.ny.us/leg/?bn=A09544>.

example, the CPI has approved numerous settlements with lobbyists²⁹ who held legislative receptions that violated the gift ban because they offered complimentary attendance to public officials (legislators), the value of which was more than nominal, and the events did not qualify for the “widely attended” exception to the gift ban. Even though the CPI agreed to token financial penalties (\$250) in this first round of such charges, the CPI required the lobbyists to provide the CPI with lists of public official invitees and attendees and publicly announced that the CPI would forward and did forward those lists and the settlements to the Legislative Ethics Commission. It appears that this strategy is an effective way to raise the awareness of lobbyists and public officials about the gift ban in general and legislative receptions. CPI has announced that, for events occurring on or after January 1, 2010, the penalties will go up substantially. In addition, the CPI has approved settlements with high-profile lobbyists³⁰ for significant amounts of money and CPI has required a full admission of the ethical violations as part of the agreement. It appears that such an approach promotes compliance and establishes a valuable precedent that can be used when dealing with the same firms in the future.

Section 4 of the bill amends section 1-d of the Legislative Law, and in addition to creating the Lobbying Commission enumerates its powers and duties. The intent of the legislation appears to be that all the duties and powers of the CPI with respect to the lobbying would be shifted to the new Lobbying Commission. As written, however, the legislation does not provide explicit statutory authority for the new Lobbying

²⁹ The New York Laborers’ PAC, the Association of PBAs (Police Benevolent Associations), the State Trial Lawyers Association, and the Uniformed Firefighters Association. (*See* http://www.nyintegrity.org/pubs/2009/112009_press.html)

³⁰ Powers Crane & Company, LLC, Crane and Vacco, LLC and Crane Consulting, LLC. (*See* http://www.nyintegrity.org/pubs/2009/102209_press.html)

Commission to investigate violations of Article 1-A of the Legislative Law (the “Lobbying Act”). Under PEERA, the CPI has explicit statutory authority to investigate violations of the Lobbying Act under section 94(1), (9)(g), (12) and (16) of the Executive Law. These provisions authorize the CPI to receive complaints and referrals alleging violations of Article 1-A of the Legislative Law and to conduct investigations and adjudicatory proceedings. Without specific statutory language equivalent to the language authorizing the CPI to conduct investigations of the Lobbying Act, it appears that the proposed Lobbying Commission likely would be unable to conduct such investigations.

Under the new legislation, the proposed Joint Legislative Commission on Ethics Standards – a successor to, and with duties and powers very similar to, the existing LEC – would consist of eight members, instead of the nine members³¹ authorized under existing law, who are all appointed by legislative leaders. The bill states that four of the members “shall be” members of the Legislature, but that the other four may not be current or former members of the Legislature, legislative candidates or legislative employees. The Joint Legislative Commission on Ethics Standards would be responsible for preparing advisory opinions, overseeing financial disclosures, providing ethics training and education, and imposing penalties for violations of Public Officer’s Law §§ 73, 73-1 and 74. This newest legislation thus continues the current system in which sitting elected officials effectively control the ethics panel that monitors their own behavior and that of their colleagues and employees.

The proposed new Legislative Office of Ethics Investigation would be authorized to investigate violators of ethics laws and would be able to receive complaints from the

³¹ It should be noted that the LEC currently has only eight members and listed the same eight members in its 2008 Annual Report.

public and referrals from the Joint Legislative Commission on Ethics Standards and from Senate and Assembly ethics committees. Each legislative leader would have two appointments to the new office, none of whom could be legislators or legislative staff. The addition of an enforcement office might well improve legislative ethics oversight, especially in light of the fact that the Legislative Ethics Commission opened but two investigations during 2008 and one was still pending at the end of that year.³² But the creation of such an office does not address the fundamental conflict inherent in the Legislature attempting to police its own ethical conduct. A similar initiative in the United States Congress has been criticized as ineffective.³³

The Commission on Lobbying Ethics and Compliance would consist of six members, two appointed by the Governor and one appointed by each of the Temporary President of the Senate, the Speaker of the Assembly, the Minority Leader of the Senate, and the Minority Leader of the Assembly. Members of the Commission on Lobbying Ethics and Compliance would serve four-year terms and would be responsible for electing a chair and vice-chair through majority vote to serve one-year terms. The chair and vice-chair would be required to be of different political parties. The Executive Director would serve a fixed term and could only be removed for cause. The Executive Director would be elected by a majority vote of Commission members.

³² 2008 Annual Report of the Legislative Ethics Commission.

³³ “Two years ago, after a scandal that centered on the lobbyist Jack Abramoff, the House created an independent ethics office as part of what Speaker Nancy Pelosi called an effort to end the ‘culture of corruption’ in Washington. The Senate also took action, setting up what it described as tough new regulations. Since then, however, no member of Congress has been censured, the toughest punishment short of expulsion, despite a number of recent scandals involving sexual impropriety, financial dealings and conflicts of interest. The record illustrates how Congress has struggled to police itself after years in which its ethics committees were often derided as ineffectual.” New York Times, Oct. 18, 2009, p 21.

The State Board of Elections Enforcement Unit, established within the State Board of Elections, would be headed by the Enforcement Counsel. The unit would be comprised of the enforcement counsel, a special counsel, a deputy enforcement counsel (a member of a different major political party than the enforcement counsel) and a deputy special counsel (a member of a different major political party than the special counsel). These officers would be appointed by the Board of Elections. The enforcement counsel and the special counsel would serve terms of four years and be removable only for cause. This unit would have exclusive jurisdiction within the State Board of Elections over alleged violations of Article 14 of the Election Law and could institute investigations of alleged violations. The State Board, on belief that the allegations are not supported by credible evidence or that “the equities” favor a dismissal, could overrule the enforcement counsel’s finding that an investigation is warranted.

In addition to the significant structural problems discussed earlier in this report, the legislation passed on January 20, 2010 raises a number of other concerns:

- The Joint Legislative Commission on Ethics Standards would be exempted from the requirements of the State Administrative Procedure Act.
- The legislation includes a “sunset” provision stating that a large number of the salient provisions of this act, such as the establishment of the new commissions, “shall expire and be deemed repealed 4 years after such effective date.” This provision appears to be a concession that the legislation is, as noted above, no better than a “down payment” on further reforms that it is generally acknowledged are still needed. Rather than force a reconsideration of these issues in four years, it is reasonable to ask why Albany does not simply take the necessary measures now.
- The creation of three new oversight commissions with an even number of commissioners is an invitation for inaction because it could lead to determinations that are supported by half of the members and opposed by the other half. It is also an invitation to overlapping bureaucracies, increased costs, and confused and competing jurisdictions – the very scenario seen in Troopergate.

The recently passed legislation would rectify a problem we identified in an earlier report regarding the legislation (A.9032) the Assembly passed during the 2009 session and the companion bill (S.6064) the Senate introduced but did not vote on. In an earlier report by our Association, we noted that as a result of the legislation, the Executive Ethics and Compliance Commission could only impose penalties for “knowingly and willfully” violating Public Officers Law §73, §74 and Civil Service Law §107, in contrast to the current “knowingly and intentionally” standard. The substitution of “willfully” for “intentionally” heightened the showing of *mens rea* needed to establish a violation, because “willfully” requires specific intent to violate the law. The legislation that passed both houses on January 20, 2010 retains the “knowingly and intentionally” standard.

Despite the concerns expressed above, the legislation provides some clear improvements over the current ethics regime. For example, the legislation ends the practice of redacting categories of value on legislative financial disclosure forms, and provides for a new category of value to better identify higher-level financial interests. In addition, the legislation:

- requires commissioners and commission staff to sign non-disclosure or confidentiality agreements, to prevent the leaking of information and the resulting undermining of investigative effectiveness (an apparent response to the concerns that arose in Troopergate about whether CPI staff had shared information about that investigation with allies of Governor Spitzer);
- restricts who can be members of the commissions, to avoid public and party officials and lobbyists exercising control over these bodies;
- provides a greater emphasis on enforcement in the legislative area, acknowledging that ethics enforcement in the legislative area has been deficient;
- requires that proceedings be stayed where there is a criminal/prosecutorial inquiry;

- expands the scope of lobbying covered by the law to include legislative resolutions and other actions;
- promulgates guidelines for random audits of annual financial disclosure statements; and
- expands financial disclosure by legislators, executive officials and lobbyists, including disclosure of business dealings between lobbyists, legislators and public officials.

2. A.9559 / S.6439

This bill, conceived in the aftermath of the Bruno trial and signed into law by the Governor on February 12, 2010, amends the Public Officers Law by prohibiting the use by public officers and employees of property, services or other resources of the state for private business or other compensated non-governmental purposes.

This act also amends the Penal Law to make a violation of this prohibition a class E felony. This will enhance the ability of state prosecutors to investigate and prosecute, if warranted, the types of behavior revealed during the Bruno trial. Conviction of the felony charge will result in automatic removal from office by operation of law under Section 30(1)(e) of the Public Officers Law.

B. Governor Paterson’s Proposed “Reform Albany Act”

In his January 6, 2010 State of the State Address, Governor David Paterson set out his version of core principles for ethics reform, echoing many of the objectives set out in last fall’s Governor’s Program Bill, and identifying the goal of the legislation as “to bring fairness and openness to government.”³⁴ Governor Paterson prefaced his discussion of the new draft legislation, the Reform Albany Act (the “Act”), by noting that his plan for comprehensive ethics reform is “not driven by the illegal acts of any one

³⁴ Governor David Paterson, “A Time to Rebuild,” State of the State Address, January 6, 2010, available at http://www.state.ny.us/governor/keydocs/speech_0106101.html.

person, but instead by what is legal and rampant in our entire system of government.”³⁵

An independent ethics commission is the foundation of the Reform Albany Act.

The Act is intended to: “significantly drive down campaign contributions; require openness of outside income; strip public officials who commit felonies of their pensions; gradually phase in public campaign finance; and impose term limits on State officeholders by constitutional amendment.”³⁶ The Governor cites the public’s demand for “bolder and more decisive initiatives” to win back its trust.³⁷

The Act seeks to address the inherent problems that arise as a result of the self-oversight under existing law. Such self-regulation has been widely criticized by good government organizations and the public as ineffective. According to a Fact Sheet released by Governor Paterson’s office, the Act proposes the replacement of the thirteen-member CPI with a five-member agency to be called the Government Ethics Commission (the “GEC”).³⁸ A ten-member Designating Commission, modeled on the Commission on Judicial Nomination, would appoint the five members of the GEC, upon concurrence of seven members of the Designating Commission. No single branch of government would control the appointment of the ten members of the Designating Commission. Four commissioners would be appointed by the Governor and one each by the Attorney General, the State Comptroller, the Speaker of the Assembly, the Temporary President of the State Senate, the Minority Leader of the State Senate and the Minority

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Office of the Governor of New York, Reform Albany Act Fact Sheet, January 2010, *available at* <http://www.state.ny.us/governor/press/factsheet2010.html#reform>.

Leader of the Assembly. The Act provides that no two of the Governor's appointees to the Designating Commission could be from the same political party, and at least one would have to be a former judge or justice.

As proposed in the Act, the GEC would have broad jurisdiction over the ethics laws applicable to the executive and legislative branches of state government, and would have both advisory and enforcement authority over financial disclosure by state officers; complaints associated with lobbying violations in the legislative and executive branches; state open meetings; and campaign finance. This approach would eliminate the use of multiple bureaucratic entities to regulate in the same area of law, reduce redundancy and concentrate expertise in ethics under a single administrative roof.

The Act would also mandate increased oversight and enhanced reporting for both lobbyists and state officers, and improve guidance for the sake of identifying and preventing conflicts of interest. The mandates for increased disclosure are broad and varied in the Act. They would require state officers: to disclose all outside business activities, including consulting services; to report all business dealings with lobbyists and vendors; to identify their income and clients on the annual financial disclosure statement where they have legal or other professional practices.³⁹ They would prohibit state officers from benefiting financially from state contracts during their terms of office.⁴⁰ The Act would also expand the prohibition on contingent retainer agreements, applying the restriction to other inducements or payments to an agent on behalf of a client, and would establish a "pay-to-play" ban, prohibiting placement agents, consultants, financial

³⁹ Exceptions to this requirement will only be permitted upon review and approval by the GEC.

⁴⁰ Office of the Governor of New York, Reform Albany Act Fact Sheet, January 2010, *available at* <http://www.state.ny.us/governor/press/factsheet2010.html#reform>.

advisors and lawyers from soliciting the State or New York City Comptrollers and prohibiting the Comptrollers from investing pension funds with registered lobbyists.

Under the Act, lobbyists would be required to disclose all private business relationships with state public officials, in addition to any business or appearances they may have before state agencies, public authorities and other quasi-governmental entities. Lobbyists would be required to report all solicitations of public officers, in addition to all lobbying for grants, loans, other disbursements of public funds, and all other inducements of agency or public authority actions that would be of benefit to lobbyists or their clients.

The Act also addresses the goal of enhancing enforcement, providing the proposed GEC with the right to refer violations to the Attorney General, who may pursue civil or criminal penalties. Increased penalties would serve as a further deterrent to violation of the ethics laws: the first criminal offense would constitute a class A misdemeanor, and each subsequent offense during a five-year period would constitute a class E felony. Notably, maximum civil penalties would be increased from \$10,000 per violation to \$25,000 per violation.

The Act does not identify particular categories of persons who would be ineligible to serve on the GEC. Rather, the bill simply provides that the Designating Commission shall establish outreach procedures to encourage the most qualified candidates to apply for commissioner positions, and consider and evaluate the qualifications of candidates for appointment to the GEC. This leaves open at least the theoretical possibility that the Designating Commission could select current or recent elected officials or government employees as appointees to the GEC.

C. Views of Good Government Groups

Good government groups expressed a range of reactions to the State Legislature's sudden passage of ethics legislation on January 20th.

The Brennan Center had this to say:

Whether or not the bill is enacted into law, we hope that the Legislature will continue its efforts to reform state government, its ethics and disclosure laws, and its campaign finance rules. The public would be right to be skeptical of a bill negotiated in secret and passed so quickly that claims to bring greater disclosure, openness, and ethics to Albany. Governor Paterson has a proposal which would bring much greater, needed change to Albany. Other legislators have indicated they would like to see more done, one way or another. Next time, let's have a hearing or two that allows experts and the public to comment on bill language.⁴¹

NYPIRG was supportive of the January 20th bill, calling it "a package worthy of support" though imperfect.⁴² Common Cause opposed enactment of the bill, while the League of Women Voters endorsed it as "not the best thing since sliced bread [but] a good loaf of bran."⁴³ Citizens Union acknowledged that "there is more work to be done on ethics reform, but what remains unfinished should not stop the progress that is being achieved today."⁴⁴

⁴¹ Reform NY, "Brennan Center's Statement on the Passage of the Legislature's Ethics Bills," January 21, 2010, available at <http://reformny.blogspot.com/>.

⁴² Blair Horner, "Support Ethics Reform," Blair Horner's Capital Perspective, January 18, 2010, available at <http://www.nypirg.org/goodgov/blair/>; Jimmy Vielkind, "Ethics bill faces veto pen," Times Union, January 21, 2010, available at <http://www.timesunion.com/AspStories/story.asp?storyID=891370>.

⁴³ Lenina Mortimer, "Lawmakers unveil 'sweeping' ethics, campaign reform plan," Legislativegazette.com, January 19, 2010, available at http://www.legislativegazette.com/Articles-c-2010-01-19-64865.113122_Lawmakers_unveil_sweepingethics_campaign_reform_plan.html.

⁴⁴ Citizens Union, "Citizens Union Commends Ethics Reform Bill Passed Today by the New York State Legislature," January 20, 2010 available at

Prior to the January 20th bill passage, good government groups had strongly advocated various reforms:

- In response to the Inspector General’s report on Troopergate, NYPIRG advocated that the Governor’s control of the state’s top ethics and lobbying oversight agency should end.⁴⁵ Among NYPIRG’s recommendations were: to eliminate the CPI and create a new independent ethics watchdog which is not controlled by any elected official; to bolster the independence of the new commission’s Executive Director by giving him or her a term of office to further ensure independence; and to establish a watchdog for the watchdog.
- The Brennan Center has long advocated strengthening ethics oversight and independence of any body charged with such oversight, as well as more stringent financial disclosure requirements. In 2006, the Brennan Center, along with other good government organizations, urged the following reforms: creating an independent state ethics commission; limiting contributions from public contractors and lobbyists; banning gifts and honoraria; strengthening the ban on using campaign contributions for personal use, and on the “revolving door” between government and the private sector; imposing more stringent financial disclosure; and mandating ethics training for lobbyists and public officials.⁴⁶
- In 2009 testimony before the Assembly’s Standing Committee on Governmental Operations, Standing Committee on Election Law, and Standing Committee on Ethics and Guidance, the League of Women Voters recommended the consolidation of ethics oversight functions into one new entity, the establishment of a separate commission to appoint members to the oversight entity, the appointment of an executive director for a fixed term, and the authorization of any oversight entity to conduct random audits and investigations, and to issue subpoenas.⁴⁷

http://www.citizensunion.org/www/cu/site/hosting/Statements/01_20_09_CUstatement_legislative_et_hics.html.

⁴⁵ Blair Horner, “Another Albany Ethical ‘Train Wreck,’” Blair Horner’s Capitol Perspective, May 18, 2009, *available at* <http://www.nypirg.org/goodgov/blair/051809blair.html>.

⁴⁶ The Brennan Center for Justice at NYU School of Law, Common Cause/NY, League of Women Voters/N.Y.S., NYPIRG, “Strengthening Ethics in New York: Ethics in Government Act of 2006,” January 2006, *available at* http://www.brennancenter.org/content/resource/strengthening_ethics_in_new_york.

⁴⁷ League of Women Voters, Testimony before the NYS Assembly Standing Committee on Governmental Operations Standing Committee on Election Law Standing Committee on Ethics and Guidance, June 9, 2009, *available at* www.lwvny.org/advocacy/legAction/Testimony_EthicsReform060909.pdf.

- The League of Women Voters, Citizens Union and Common Cause in advocating for creating a new, independent ethics oversight agency with jurisdiction over both the executive and legislative branches, imposing more stringent requirements for financial disclosure for public officers, strengthening prohibitions on personal use of campaign contributions and restrictions on campaign contributions from lobbyists and those receiving government contracts, and calling for greater transparency of such proceedings.

IV. THE ASSOCIATION’S PROPOSED CORE PRINCIPLES OF ETHICS REFORM

A. Enhancements to Agency Structure

1. Creation of Single Agency

The Association recommends the consolidation of the two current ethics commissions – the CPI and the LEC – into a single entity that will oversee and enforce ethics for both the executive and legislative branches of state government, as well as for lobbying and campaign finance. The merits of this approach have been persuasively advocated by a number of thoughtful good-government organizations.⁴⁸ In addition, a similar approach has been adopted by several other states, including Massachusetts and Arkansas, as discussed in Appendix 3 to this report. The use of a single agency seems advisable if not necessary for a number of reasons, including to avoid a double standard, with the Legislature subject to one ethics regime and the rest of state government to another, and to increase public confidence.

A single ethics commission should have broad jurisdiction over ethics laws applicable to the executive and legislative branches of state government, as well as ethics laws relating to lobbyists and campaign finance issues. This approach would eliminate the use of multiple bureaucratic entities to regulate in the same area of law, reducing

⁴⁸ New York Public Interest Research Group, “Ethics Reform Act of 2009,” Briefing Papers for Policy Makers, February 2009, available at www.nypirg.org/goodgov/2009ethics_report.pdf.

redundancy and usefully concentrating expertise in ethics under a single administrative roof.

This sort of central system also would address the inherent conflicts of interest that arise as a result of self-regulation/self-oversight that is currently utilized by the system and that would continue under the ethics reform bills proposed by the Senate and the Assembly. The use of self-regulation has been widely criticized by good government organizations and the public as being intrinsically ineffective and troubling.⁴⁹ The Association agrees that oversight by a commission appointed by and/or consisting of members of the very group being overseen necessarily lacks the independence and perspective required for effective ethics policing. Self-regulation also is bound to perpetuate the low public esteem in which the Legislature is currently held.

It has been suggested that the separation of powers doctrine might bar the Legislature from creating a single entity to conduct ethics oversight of the Legislative and Executive branches of State government.⁵⁰ We have reviewed this argument and believe it lacks merit. The Legislative branch is not hermetically sealed from its coordinate branches. “[S]ome overlap between the three separate branches does not violate the constitutional principle of separation of powers,” and “common sense and the necessities of government do not require or permit a captious, doctrinaire and inelastic classification of governmental functions.”⁵¹

⁴⁹ David King, “A Call for Tighter Ethics Laws,” *Gotham Gazette*, February 11, 2009, *available at* <http://www.gothamgazette.com/article/albany/20090211/204/2826>.

⁵⁰ See D. Hakim & N. Confessore, “Speaker Raises Doubt on Ethics Overhaul,” *New York Times* (June 2, 2009) (“‘There are some serious questions about separation of powers,’ [Assembly Speaker Sheldon Silver] said about the notion of combining oversight of the executive branch and the Legislature in a single commission”).

⁵¹ See *Clark v. Cuomo*, 66 N.Y.2d 185, 189 (1985) (citations omitted).

In New York, oversight of official misconduct by legislators has never been the sole province of the Legislature. For example, the New York Constitution, Article I, § 6, vests in grand juries “[t]he power . . . to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.” The Legislature has plenary power to delineate the incidents of public offices of the Legislature’s own creation, including the powers of a government ethics commission. Such plenary power includes the Legislature’s full authority “[a]bsent any express constitutional limitation . . . to abolish an office of its creation or to modify its term or other incidents attending it, in the public interest.”⁵² Nothing in the State Constitution forecloses the single entity approach to government ethics in New York, because oversight of legislative ethics is not a core function that is exclusively assigned to the Legislative Branch by the State Constitution.⁵³

As a matter of public policy, the “necessities of government” justify a single ethics oversight entity.⁵⁴ This approach would be more economical than splintered oversight. A single entity would prevent the possibility of conflicting opinions in the interpretation of relevant law by multiple agencies. The structure would enhance independent decision-making by preventing any single branch, or political party, from

⁵² *Lanza v. Wagner*, 11 N.Y.2d 317, 324 (1964); *see also Michaelis v. Long Beach*, 46 A.D.2d 772, 773 (2d Dep’t App. Div. 1974) (reversing the lower court’s order of a preliminary injunction where an ordinance changing the selection pattern of zoning board members and terminating the tenure of current members was a lawful action of the legislative body).

⁵³ *See Note, Conflicts of Interest of State Legislators*, 76 Harv. L. Rev. 1209, 1231 n.163 (1963) (“there is no insuperable constitutional objection to the Legislature’s investing power in nonlegislative agencies to control the relationship between each member’s official and private activities”).

⁵⁴ *See Clark*, 66 N.Y.2d at 189.

dominating the process, the appointees or both. The single entity approach would be properly viewed as a “cooperative venture” embodying a “blending of powers” that would not constitute a violation of the “separation of powers doctrine.”⁵⁵

Historically, it was the position of the New York Legislature that the separation of powers issue is triggered by the “qualifications” clause of the State Constitution, which provides that “Each House shall . . . be the judge of the elections, returns and qualifications of its own members.”⁵⁶ On its face, nothing in the “qualifications” clause of the State Constitution bars the delegation of legislative ethics oversight to a single commission. Indeed, the Legislature has already made a delegation to the Courts.⁵⁷ Accordingly, the separation of powers doctrine does not preclude the creation of a single ethics commission with jurisdiction over both the Legislative and Executive branches.

2. Appointment and Removal of Ethics Agency Board Members; Use of Designating Commission

To create a truly independent ethics agency, the power to appoint board members must be removed to the extent possible from those officials that the commission will have jurisdiction over. The Governor’s Reform Albany Act advocates the use of a

⁵⁵ See *Parcell v. Government Ethics Commission*, 639 F.2d 628, 633-634 (10th Cir. 1980) (internal citations omitted).

⁵⁶ See N.Y. Const., art. III, § 9; see also Note, Conflicts of Interest of State Legislators, 76 Harv. L. Rev. 1209, 1231 n.163 (1963) (noting assumption of New York legislative committee that “disciplinary action or even review or referring would necessarily involve the question of ‘qualification’”) (citation omitted).

⁵⁷ See *Scaringe v. Ackerman*, 119 A.D.2d 327, 330 (3d Dep’t 1986) (“[t]he Constitution gives each house of the Legislature the exclusive power to “be the judge of the * * * qualifications of its own members” (NY Const, art III, § 9) [and] [t]his authority has been *delegated* to the judiciary in proceedings brought pursuant to Election Law article 16”) (emphasis added), *aff’d for the reasons stated in the opinion by Justice John T. Casey at the Appellate Division* (119 A.D.2d 327), 68 N.Y.2d 885 (1986); see also *Matter of Rice v. Power*, 19 N.Y.2d 106, 108 (1967) (New York City Board of Elections has the duty of determining and certifying which candidate received “the greatest number of votes” for the office of delegate to the Constitutional Convention, despite the constitutional directive that makes the Convention the ultimate “judge of the election, returns and qualifications of its members”).

“Designating Commission,” similar to the system that has long been used to recommend potential nominees to the Court of Appeals. The Association regards this as an attractive and effective mechanism for creating the necessary distance between the regulators and the regulated.

Central to this mechanism is that no single branch of government should control the appointment of the members of the Designating Commission. The Reform Albany Act, for example, provides for a ten-member body with four members being appointed by the Governor, and one each by the Attorney General, the State Comptroller, the Speaker of the Assembly, the Temporary President of the Senate, the Minority Leader of the Senate, and the Minority Leader of the Assembly. This distribution of the appointment power ensures that a majority of seats are not controlled by either the Governor or the Legislature. This is an important protection of the independence of the Designating Commission and, in turn, of the persons it appoints.

Further restrictions on eligibility to serve on the Designating Commission are also desirable. The Governor’s bill provides that no more than two of the Governor’s appointees could be from the same political party, and at least one would have to be a former judge or justice. With respect to the other members, none could be members of the Legislature, employees of state government, hold office in any political party or be a lobbyist. These are clearly sensible provisions, and the enacting legislation should include them or similar provisions.

These additional restrictions would bolster the independence of the Designating Commission, as the members would be removed from current government service or direct involvement with state government. Additional independence would be provided

by the establishment of fixed four-year terms for the appointed members of the Designating Committee, without vesting any removal powers in the appointing officials. The election of the chairperson by a majority of members of the Designating Commission, rather than appointment by the Governor or another state government official, would further strengthen the body's independence.

The Association recommends that similar criteria be extended to the appointees of the commissioners of the single ethics commission as well. The Association supports the requirement that at least one of the members appointed to the GEC be a former judge or justice and that no member be a current elected official, government employee or lobbyist or have held such position for a substantial period of time prior to appointment. (The Association is neutral as to whether the proposal of seven years as the cooling-off period or some other time period is appropriate, so long as the period is substantial.) Including such restrictions and criteria would serve to ensure independence and perspective for GEC members and distance from the individuals and events that the GEC members will regulate.

While under the January 20th legislation no single official or group of officials from either branch could select the majority of the members of its ethics oversight commission, members of the Legislature would make up four of the eight members of the proposed Joint Legislative Commission on Ethics Standards. This legislation thus would continue the current system in which sitting elected officials are responsible for monitoring their own colleagues' behavior. This system has proved ineffective, and damaging to public confidence. It should not be continued.

The Association supports the provision that commissioners should serve fixed five-year terms and be removable only by application and motion of the Attorney General for substantial neglect of duty, gross misconduct in office, inability to discharge their powers and duties, or violation of law. The Attorney General should also be empowered to seek the court-ordered recusal of a commissioner with respect to a specific issue before the ethics commission. This structure would provide the commissioners with independence from the influence of elected officials, as no single official could engineer the removal or recusal of commissioners who are pursuing sensitive investigations. Additionally, the term of the commissioners would be longer than that of the Designating Commission members and the Governor, allowing for increased independence.

3. Authority of Single Agency

The Association recommends that the single ethics agency should have the ability to initiate and conduct investigations of suspected ethical misconduct. Subpoena power is essential to a credible investigative capacity. Also essential to a credible enforcement regime are powers to impose administrative sanctions and to refer more serious cases to an appropriate prosecuting authority. A truly effective reform bill should give the new ethics agency all these tools.

An appropriate reform bill also should enhance the penalties that the agency can impose for civil violations of ethics laws. Maximum fines are currently set at \$10,000, an amount that has been in place since early in the last century. In modern times such a low amount does not provide sufficient deterrence. The Association takes no position as to the specific monetary maximum that should be set, but believes that a significant increase to the current limit is clearly needed.

As the Bruno case and other scandals have made clear, there is a compelling need for a more robust disclosure regime. The ethics agency should have the power to audit all financial disclosure statements filed by legislators, those in executive positions, and lobbyists.⁵⁸ The audit power should include the authority to compel participation in the audit process by the person under review. Where there are gaps in initial filings, the agency should have the authority to compel amended filings. Similarly, the agency should be permitted to compel filings and institute sanctions where individuals who are required to file have failed to do so.

The agency should also have the authority to maintain financial disclosure forms and other records relevant to the public interest in a manner readily accessible to the press and the public, with the objective of serving the public interest. In the 21st century, internet-based distribution of this information seems likely to be the best way of providing for public scrutiny. Redactions for cause could be solicited from the agency in order to protect bona fide privacy concerns.

The agency should also have the authority to issue and publish advisory opinions. The Association appreciates that the application of the ethics laws in specific cases may not always seem clear to the persons being regulated. Ethics regulation should not be strictly a matter of post hoc enforcement. Rather, individuals who are making a good-faith effort to comply with the law prospectively should be able to obtain up-front guidance from the agency. This would be in keeping with the long tradition of administrative agencies issuing “no-action letters” to regulated persons and entities.

⁵⁸ The proposed Senate and Assembly bills include authority for the ethics agency to conduct random reviews and audits of financial disclosure statements. The Association supports the audit and review function but sees no reason why it should be random rather than comprehensive.

Publication of these advisory opinions, on the agency's website or elsewhere, would help develop a broader public understanding of what conduct is and is not permitted under the ethics laws. As with no-action letters, advisory opinions would not restrict the agency from taking enforcement action or making a criminal referral if the facts stipulated in the request for the opinion proved not to be true.

4. Protections of Agency's Independence and Funding

The ethics agency will operate best, and do the most to restore public confidence, to the extent it is free from political pressures. The Association recommends that the enabling legislation include provisions to maximize this independence.

As noted above, the Association supports the requirement that no member be a current elected official, government employee or lobbyist or have held such position for a period of time prior to appointment. The Association also supports criteria that would enhance the diversity of backgrounds on the ethics oversight body, such as a requirement that at least one member be a former judge or justice, prosecutor, elected official or senior executive branch official. While active legislators or executive officials should not sit in judgment on their colleagues or each other, the Association appreciates the value that the experience of having served in those capacities might bring to the ethics board. Additionally, a majority of the agency's board seats should not be held by registered members of a single party.

The Association recommends that commissioners of the ethics oversight body should serve fixed terms of at least five years, so that that their terms will outlast those of the elected official who appointed them. Commissioners should be removable only for substantial neglect of duty, gross misconduct in office, inability to discharge their powers and duties or violation of law. The power to seek removal should be vested with the

Attorney General, to be exercised on motion for good cause. The Attorney General should also be empowered to seek the court-ordered recusal of a commissioner with respect to a specific issue before the ethics oversight body. As noted above, this structure would provide the commissioners with independence from the influence of elected officials, as no single official could cause the removal or recusal of commissioners.

The Association recommends that the enabling legislation provide for appointment of an executive director and other senior staff by the commissioners of the ethics oversight body (not the Governor or any other official). The power to remove these individuals likewise should lie with the board and not with the Governor or any other official.

In addition to the structural protections described, budgetary protections also are essential. Without the funding to hire appropriate staff and to actually carry out its duties, the ethics agency will be a paper tiger. It might be impossible, or even undesirable, to entirely insulate the ethics agency from the budget process. The ethics agency, like any other part of government, should have to periodically demonstrate to the public what resources it needs and why, especially in times of fiscal crisis. Still, given its mission, the ethics agency seems destined to be particularly at risk for retaliatory treatment in the budget process. The enabling legislation therefore should, to the extent feasible, guard against this risk by creating mechanisms to safeguard the agency's funding stream. Options to consider include a check off on state income tax forms, designating a percentage of a particular income stream (*e.g.*, property taxes) to support the agency's operations, a requirement that the Legislature make specific findings in support of any budget reductions, or a provision allowing the agency to seek judicial

review and reversal of such reductions. The particular mechanism is less important than the principle that the ethics agency be held to some degree above the annual budget fray.

5. Maintaining an Ethics Review Capacity in the Legislature

As discussed above, the Association supports consolidation of ethics enforcement within a single agency. This would entail disbanding the LEC, which currently oversees ethics matters for the Legislature and candidates for the Legislature. This is essential to establishing a truly independent ethics watchdog. It will also help centralize expertise and resources, and avoid duplicative bureaucracy.

To say that the LEC should be disbanded, however, is not to say that the Legislature should have no capacity to police itself. On the contrary – it clearly should. Members of the Senate and Assembly have a powerful interest in reviewing the conduct of their colleagues to ensure compliance with high ethical standards. The concern is how to maintain an ethics review capacity within the Legislature, while no longer maintaining a duplicative and insufficiently independent commission.

One logical approach would be to follow the lead of the U.S. Congress by maintaining a standing committee on ethics in each of the Assembly and the Senate. A standing committee could review specific cases involving legislators, and refer those cases, as appropriate, to prosecutors or the central ethics agency. But the new central ethics agency, not the legislative committee, should have principal responsibility for the core regulatory functions: receiving and reviewing legislators' financial disclosure forms; following up on cases of incomplete or troubling disclosures by demanding that legislators file or amend forms; conducting investigations; imposing administrative sanctions in less serious cases; making referrals to law enforcement in more serious

cases; maintaining a system whereby disclosure forms are routinely and easily available to public and press; and issuing advisory opinions.

The recent reform legislation passed by the Assembly and Senate does not go far enough. Under that legislation, members of the Legislature would make up four of the eight members of the “Joint Legislative Commission on Ethics Standards,” the proposed entity that would replace the current Legislative Ethics Commission. This would perpetuate the system whereby sitting elected officials are principally responsible for monitoring the ethical conduct of their own colleagues and employees. Members of the Legislature should recognize that their public standing will only rise to the extent that they cede this authority to an independent agency.

6. “Watching the Watchdog”

The record of ethics enforcement agencies in New York State is not without fault. We take no position on the merits of the Inspector General’s criticisms of how the CPI handled the Troopergate investigation. But it is fair to say that the Troopergate situation taken as a whole has probably diminished public confidence in ethics watchdogs. Certain legislators have cited the fear of politically motivated ethics investigations as grounds to oppose centralizing the enforcement power into a new single agency.

Accordingly, a mechanism should be in place to allow for oversight of a new single ethics agency. Such scrutiny would help ensure that the lessons of the Troopergate investigation are absorbed, and that the work of the ethics agency is not undercut by the interests of a single individual or faction. Reasonable options for oversight include: mandating the creation of an inspector general within the agency; periodic review by the designating commission; and empowerment of the Attorney General to receive or review complaints about the ethics agency and to take action in cases of exceptional misconduct.

The ethics agency also could be mandated to provide a periodic report of its activities to the public and the Legislature.

Of course, guarantees of due process for persons and entities under scrutiny by the ethics agency are essential. Those under review deserve to know that their cases will be handled fairly, professionally and promptly. The public, too, will have more confidence in the ethics regime if this is the case. The enabling legislation accordingly should mandate that the ethics agency implement policies and procedures to provide for such fair, professional and prompt handling of enforcement matters. The policies and procedures should be publicly available. Their particulars may be left to the agency to determine in the first instance.

B. Enhancements to Ethics Rules

1. Defining Violations of the Law

One healthy consequence of a well-functioning central ethics agency is that the persons being regulated would have a single source to turn to for a clear understanding of what does and does not conform with the law. This does not require – although it could involve – vesting the agency with the authority to issue formal regulations that flesh out the general restrictions imposed by statute.

Even without regulatory authority, simply by doing its job the ethics agency could promote a robust understanding of the law as the agency builds up a body of civil enforcement actions, advisory opinions, criminal referrals and audits of disclosure statements, and – importantly – as the agency communicates its actions to the public in appropriate ways. The Association recommends that this sort of development of clear public understanding of the ethics laws be a statutorily mandated purpose of the new central ethics agency.

2. Financial Disclosure

The Association has issued a separate report⁵⁹ urging expanded financial disclosure requirements for the State Legislature. Specifically, the Association urges that members of the Legislature who also maintain private law or consulting practices be required to disclose the identities of their clients, the amount of money they are earning from these clients and the nature of the work they are doing for them. These disclosures presumptively should be made to the public without redaction. The topic is significant, given that nearly one out of every five of New York's current legislators maintains a private law practice.

The focus of the separate report is whether increased disclosure along these lines would violate attorney-client privilege, client confidentiality or other obligations under the Code of Professional Responsibility. (For convenience, we refer to these concerns collectively as "legal privilege"). Some in Albany have argued that legal privilege prevents the sort of increased disclosure being argued for here. As set forth more fully in the separate report, the Association has reviewed these arguments and concluded that they are overstated. Any valid concerns about increased disclosure can be addressed through narrowly tailored exceptions. The Association hopes that future debate on this issue will not be clouded by broad-brush assertions of legal privilege.⁶⁰

3. Closing the "Bruno Gap"

Stronger measures, above and beyond the bill signed by the Governor on February 12, are needed to prevent the abuses that emerged to public view during the

⁵⁹ Attached as Appendix 1.

⁶⁰ See, Editorial, N.Y. Times, "The Privilege To Serve" at A20 (Feb. 8, 2010) ("Any law must have a requirement that all lawmakers – lawyers included – tell the public exactly how they earn their outside income.")

recent trial of Senator Bruno. Evidence at trial showed not only that he earned substantial sums for his dubious duties as an “introducer,” but that he used his office at the Capitol to conduct his private business affairs, and that he asked his Senate staff, including Senate lawyers, to help him handle assorted tasks with business associates for which he was paid privately.⁶¹ Senator Bruno was also alleged to have used state troopers and state aircraft to chauffeur him to political fund-raising activities, with taxpayers picking up 100 percent of the travel and security cost so long as even a small amount of official business was on the itinerary.⁶² Such practices do not serve the public interest. They raise the obvious risk of causing legislators to put the interests of private clients ahead of the public interest as well as the risk of diversion of public funds to private interests. A sound reform bill should firmly eliminate such potential abuses.

The Association recommends that legislators be barred from engaging in outside employment when the principal purpose of that employment is to directly or indirectly exploit or monetize their status as elected officials. The conduct that came to light at Senator Bruno’s trial was unseemly to say the least. It should be made clearly illegal under state law, and disclosure requirements should be expanded to allow the public and press to monitor more effectively for such misconduct. The new central ethics agency could be given authority to review a legislator’s proposed employment, or proposed engagement by a new client, and advise as to whether it is consistent with the current law.

⁶¹ James M. Odató, “Did Bruno have two careers but one staff?” Times Union, November 16, 2009, available at <http://blog.timesunion.com/capitol/archives/20058/did-bruno-have-two-careers-but-one-staff/>.

⁶² Geoffrey Gray, “The Un-Reformed,” New York Magazine, March 1, 2008, available at <http://nymag.com/news/features/44755/>.

The Association also urges that ethics reform legislation generally forbid any expenditure of government staff, office space or similar services for political ends. The bill signed on February 12 is at the least a strong step in the right direction; in connection with omnibus ethics legislation, it may be advisable to look at taking additional steps in this area. Exceptions could be permitted where the expenditure is de minimis, or where the ethics agency opines in advance that it is acceptable *and* the official involved provides actual reimbursement to the state. For example, if a senator went on a trip that was 10 percent official and 90 percent political campaigning, it might be acceptable to use state transportation and security services if campaign funds are used to repay the state 90 percent of the actual cost. Senate staffers currently are required to submit time sheets every two weeks. Such time sheets should adequately specify the nature of the work completed while on the public payroll and public premises; the new central ethics agency should be authorized to review those timesheets and conduct such other investigations as are necessary to root out potential abuses.

It is worth addressing briefly the objection that tougher ethical standards along these lines somehow might clash with New York's "citizen-legislator" model. During his recent trial, Senator Bruno spoke from the courthouse steps and suggested that his prosecution was an attack on this model.⁶³ The simple response is that true citizen-legislators – those engaged in private businesses that are truly unrelated to their government functions – have nothing to fear from disclosure or reform. The ideal of the citizen-legislator contemplates someone who periodically leaves their farm or hardware store to do the public's business at the capital – not a legislator who runs a multimillion-

⁶³ Jim Dwyer, "Citizen Bruno, Unbound," The New York Times, November 20, 2009, *available at* <http://www.nytimes.com/2009/11/22/nyregion/22about.html>.

dollar “consulting” business out of his government offices in order to exploit the influence that comes with his legislative role. The ideal of the “citizen-legislator” is more of a myth than reality in any event – according to 2007 statistics, about 60% of New York’s legislators are self-reportedly full-time, ranking third behind California (80% full-time legislators) and Pennsylvania (77.5% full-time legislators).⁶⁴ Perhaps this is not a bad thing in an age where government service is increasingly complex and demanding. In any event, the data support what is clear enough regardless: the objection that ethics reforms threaten the “citizen legislator” ideal is meritless.

Significantly, all federal and state legislators are allowed by law to engage in some amount of outside work for pay, and the Association does not urge any change in that basic approach. That is, neither U.S. federal law nor any state’s law currently requires that legislative service be full-time to the exclusion of any other employment. With proper disclosure, legislators should be free to run legitimate businesses, nonprofit organizations and law and consulting practices that are unrelated to their government service. New York should be able to solve its ethical problems without becoming the first jurisdiction to mandate full-time legislative service.⁶⁵

⁶⁴ National Conference of State Legislatures, Full and Part-Time Legislatures, June 2009, *available at* <http://www.ncsl.org/?tabid=16701#Red>; <http://www.ncsl.org/default.aspx?TabId=18248>.

⁶⁵ If the currently contemplated reforms prove ineffective for New York, then in time it may be worth considering tougher restrictions along the lines of federal law. U.S. representatives and senators are not, strictly speaking, barred from holding other employment. But they cannot hold employment involving “a fiduciary relationship,” except for the practice of medicine, and outside earned income is capped at 15% of the congressional salary. A fiduciary relationship is deemed to arise in the practice of law and the sale of insurance or real estate, financial services, consulting or advising. Ethics Reform Act of 1989, 5 U.S.C. App. §§ 501-505, *available at* http://www.uscourts.gov/library/conduct_outsideemployment.html.

V. CONCLUSION

New York State government faces many urgent problems that are beyond the scope of this report. These obviously include the fiscal crisis and the need for structural reforms to make government generally more transparent, the budget process more effective and the legendary powers of the “three men in a room” more evenly distributed to other leaders. Campaign finance reform is needed too.

The ethical crisis is as real and as urgent as any of these other problems. It can be addressed at relatively low cost. By tackling it effectively, our leaders may well build up the public goodwill and confidence necessary to address the state’s broader difficulties.

The Association hopes that the Governor, the State Senate and the Assembly will carefully consider the recommendations outlined in this document, solicit meaningful input from the public and other concerned reform groups, and swiftly enact robust legislation that actually cleans up the ethical mess in Albany.

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Government Ethics Committee
Gregory G. Ballard, Chair

State Affairs Committee
Loren Gesinsky, Chair

February 18, 2010

* The Committees wish to acknowledge Jeremy Feigelson and Dennis Hawkins, who chaired the subcommittees of the Government Ethics Committee and State Affairs Committee, respectively, that drafted the report.

**APPENDIX 1: Reforming New York State's Financial Disclosure
Requirements for Attorney-Legislators**

**NEW YORK
CITY BAR**

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**REPORT ON LEGISLATION BY
THE COMMITTEE ON STATE AFFAIRS,
THE COMMITTEE ON GOVERNMENT ETHICS AND
THE COMMITTEE ON PROFESSIONAL RESPONSIBILITY**

**REFORMING NEW YORK STATE'S FINANCIAL DISCLOSURE
REQUIREMENTS FOR ATTORNEY-LEGISLATORS**

Introduction

In light of the recent honest-services-fraud conviction of Joseph L. Bruno, the former Senate Majority Leader, New York's ineffective ethics laws have been under increasing scrutiny⁶⁶ and a new reform ethics bill (S.6457/A.9544) was passed by the Legislature on January 20, 2010. Bruno was found guilty of concealing substantial payments from a businessman who sought Bruno's help on a number of ventures. Earlier in 2009, former Queens Assemblyman Anthony Seminerio pled guilty to charges of corruption, having disguised illegal payments from various sources as income from his

⁶⁶ See, e.g., Nicholas Confessore and Danny Hakim, Bruno, Former State Leader, Guilty of Corruption, N.Y. Times, December 7, 2009, at A1, *available at* <http://www.nytimes.com/2009/12/08/nyregion/08bruno.html>; Glenn Blain, On Heels of Joe Bruno Conviction, Governor Paterson Ripped for Not Cleaning Up Albany, N.Y. Daily News, December 10, 2009, *available at* http://www.nydailynews.com/news/2009/12/10/2009-12-10_cmon_gov_get_going_on_cleanup.html; James Odat, Conviction Offers Material for State Ethics Law Reform, Times Union, December 8, 2009, *available at* <http://blog.timesunion.com/bruno/conviction-offers-material-for-state-ethics-law-reform/2181/>.

“consulting” practice.⁶⁷ These events underscore the need for reforming mandatory personal financial disclosures for those individuals covered by Section 73-A of the Public Officers Law, especially legislators, who are allowed to maintain personal business alongside their official duties. Lawmakers should be required to disclose sources and amounts of outside income⁶⁸ including the identity of paying clients, and provide a description of the services rendered.⁶⁹ Such disclosure is necessary to restore public confidence in New York’s governing process and the impartiality of its lawmakers.

While we believe that mandatory personal disclosures should apply to a broad range of legislators and other public officers, the purpose of this report is to highlight the need and justification for including attorney-legislators in any disclosure system. Attorney-legislators make up 17.4% of the current New York Legislature, and many earn outside income as attorneys.⁷⁰

There is no basis for excluding lawyers from the public scrutiny to which legislators should be held. Requiring attorney-legislators to make these disclosures will not violate the rules governing attorney conduct and will go a long way toward restoring

⁶⁷ See, e.g., Colin Moynihan, Democratic Assemblyman Pleads Guilty to Soliciting Payments, N.Y. Times, June 25, 2009, at A20, *available at* http://www.nytimes.com/2009/06/25/nyregion/25fraud.html?_r=1; Elizabeth Benjamin, Seminero Pleads Guilty, Faces 20 Years Behind Bars, N.Y. Daily News, June 24, 2009, *available at* <http://www.nydailynews.com/blogs/dailypolitics/2009/06/seminerio-pleads-guilty-faces.html>.

⁶⁸ In other states, “sources” is defined to include the names of clients.

⁶⁹ In many states, a large group of people, including state and local elected officials, appointees and professional staff members are required to file financial disclosure statements. For simplicity’s sake, in this report, we refer only to changing disclosure requirements for lawmakers, the largest group of officials in New York State with significant sources of outside income causing conflict issues, but it is our recommendation that the disclosure requirements be extended beyond lawmakers after a public discussion.

⁷⁰ Telephone Interview with Morgan Cohen, Policy Specialist, National Conference of State Legislatures (December 22, 2009).

public confidence in New York State's governing process and the independence of legislators. Similar financial-disclosure requirements have applied to legislators, including those who are attorneys, for decades in other states.⁷¹ The type of information we believe should be disclosed is not, in the ordinary situation, entitled to protection under either a claim of privilege or confidence, and in any event a system can be designed to address particular situations where the public's interest in disclosure is outweighed by a client's interest in secrecy.

For the reasons set forth in this report, we urge that Section 73-A of the Public Officers Law require attorney-legislators to disclose, subject to the limited exceptions that we discuss later in this report, the following information with regard to all clients:

- client identity;
- the amount and nature of all fees and income above a minimum threshold; and
- a clear description of services provided in exchange for the fees.

The law should (i) apply prospectively, i.e. only to new clients and new matters for existing clients as of the law's effective date, and (ii) direct that attorney-legislators inform clients in writing of their disclosure obligations under Section 73-A.

The disclosures we advocate are required, in our view, to protect the public interest. The law governing lawyers presents no obstacle to such disclosures.

⁷¹ At least four states have a disclosure requirement that extends to attorneys: Washington, California, Alaska and Louisiana. Washington and California adopted such requirements through referenda. In 2007 and 2008, the Alaska and Louisiana legislatures respectively passed ethics reform bills. Due to how recently these statutes passed, this report does not discuss Alaska and Louisiana. Both states require public officials, including attorneys, provide detailed disclosure of outside income, including client names.

Current Law and Legislation

Section 73-A of the Public Officers Law creates the financial disclosure requirements for public officers.⁷² Section 74 of the Public Officers Law contains the State government's Code of Ethics.⁷³ Under New York's current financial disclosure requirements, legislators who are attorneys are only required to give a "general description of the principal subject areas of matters undertaken by such individual."⁷⁴

The recently-passed legislation requires "consultants" (an undefined term) to report the names of clients who provide compensation in excess of \$1,000, but exempts attorneys from any disclosure, and requires only limited disclosure by those who are covered.⁷⁵

The legislation does not go far enough in requiring more robust disclosure of the economic activities of legislators, including attorney-legislators.⁷⁶ The gravity of recent breaches of public trust in New York State and the failure of the existing ethics structure necessitate a simple, transparent system of disclosure that applies to all officials with private sources of income, even income from law practices.

⁷² See Appendix A for a summary and discussion of the current financial disclosure requirements.

⁷³ See Appendix A for a summary and discussion of the Code of Ethics.

⁷⁴ N.Y. Pub. Off. §73-A(3) Annual Statement of Financial Disclosure, Item 8(a)

⁷⁵ The new legislation also exempts real estate brokers and many others from such disclosures. While the City Bar opposes such additional exemptions, this report focuses on attorney-legislators.

⁷⁶ The new legislation provides separate rules requiring registered lobbyists to make certain disclosures when they or their clients have a business relationship with a legislator. Section 3, S.6457/A.9544. These new rules do not accomplish what our proposals do for at least three reasons. First, they shift responsibility for meaningful personal financial disclosure from our elected public officials to "registered lobbyists." Second, legislators who accept paid work and whose outside employer fails to file the proper forms will face no consequences, presumably even if they have knowledge of this failure. Third, there are many corporations and individuals who have a vested interest (financial and otherwise) in actions of the State Legislature who are not registered lobbyists, and who have not hired lobbyists but they do retain or consult attorney-legislators.

The Recommendations

A. Required Disclosures

Subject to certain limited exceptions discussed below, New York should establish a system in which all lawmakers, including attorney-legislators, are required to disclose with respect to each client (i) client identity, (ii) the amount of the income over a minimum threshold from each such client (description should be by category of value), and (iii) a meaningful description of the services rendered in exchange for such income (including the making of referrals). With regard to lawyers, disclosure should specify whether the fee arrangements are based on hours worked or contingency, whether a referral fee is involved, and whether any premium or other add-ons are involved. This requirement should also apply to candidates for the Legislature who are attorneys.

B. An Independent Commission Should be Established to Grant Exceptions

There will be limited circumstances when the public interest in disclosure required by Section 73-A should yield to a client's interest in confidentiality with regard to a particular matter. So, for example, when family, criminal, or transactional matters (e.g., a planned hostile take-over) that have not been revealed in the public records are involved, such matters could be shielded from disclosure.⁷⁷ In addition, exceptions would be made in the exceptional circumstance where disclosure of the fact of representation itself is privileged, or where disclosure is likely to be embarrassing or detrimental to the client.

⁷⁷ While we conclude that there are likely to be few areas of representation that should be entitled to blanket exceptions, this list is not necessarily meant to be exhaustive.

An independent commission should be established to determine whether an exception is warranted under particular cases or whether certain information should be kept confidential in a case of extreme hardship that would not violate the public interest.⁷⁸ As discussed below, other states such as Washington and California have established such regimes and provide guidance in setting up such a commission. However the commission is established, the legislation must ensure a process that is independent from the Legislature itself.⁷⁹

C. Prospective Application

To protect clients involved in existing relationships with an attorney-legislator, the disclosure statute should operate prospectively. It should apply to new clients and to new matters undertaken by the attorney for existing clients. Attorney-legislators should be required to inform any new client or any existing client seeking to retain the lawyer on a new matter of the disclosure this statute would require, and have the client consent to the disclosure in writing, such as by signing an engagement letter. There should be a reasonable period of time between the passage of the statute and the enactment date to allow for the education of both clients and legislators, and to allow for the establishment of the independent commission.⁸⁰

⁷⁸ For the purposes of the report, we have only provided the bare outlines for how such a process might work; the legislature may want to explore whether clients have an opportunity to participate in claims of privilege or confidence where appropriate. The City Bar would be pleased to participate in the development of such a Commission.

⁷⁹ See descriptions of California and Washington State Commissions below.

⁸⁰ We note that where the lawyer has a business relationship that is not an attorney-client relationship, there should be full disclosure, as the concerns we outline above do not apply.

In making these recommendations, we are sensitive to the attorney-client privilege and to lawyers' ethical responsibilities with regard to clients' confidential information. As discussed below, our proposals do not impinge on those important interests, but rather accommodate those interests while meeting the important need for public disclosure of legislators' business dealings.

This Approach is Consistent with the Rules Governing
Attorney-Client Privilege and Confidentiality

Arguments by some legislators that, as attorneys, they cannot reveal such information because of the attorney-client privilege and the restriction in New York's Rules of Professional Conduct⁸¹ should be rejected. Under existing law, the identity of an attorney's clients and his or her sources and amounts of income are almost always subject to disclosure. While the content of the lawyer's communications with clients are afforded far greater protection, the disclosures we support do not include privileged attorney-client communications.

A. Attorney-Client Privilege

In New York, CPLR 4503(a) defines an attorney-client privileged communication as "a confidential communication made between the attorney or his employee and the client in the course of professional employment." Generally, the privilege covers communications made in confidence by the lawyer to the client (or vice versa) for the purpose of giving or receiving legal advice. Courts have routinely held that the identity

⁸¹ During the January 13, 2010 press conference on the new legislation, it was asserted that legislators in "protected" professions (including the practice of law) would be exempted from disclosure requirements because of privilege or ethical considerations. See also Danny Hakim, Regulator Criticizes Ethics Plan, N.Y. Times, December 19, 2009, at A20 (reporting Speaker Silver's belief that listing attorney clients would be inconsistent with legal ethics).

of a client does not come within the purview of the attorney-client privilege, because the disclosure of representation does not reveal the substance of any such communications between the attorney and client.⁸² Courts have limited the attorney-client privilege to encompass only confidential communications, and have consistently held that, absent special circumstances, client identity and fee arrangements are not considered privileged communications.⁸³

B. Confidentiality

Rule 1.6 of the New York Rules of Professional Conduct requires attorneys to preserve the confidences of their client. Rule 1.6(a) defines confidential information as “information gained during or relating to the representation of a client, whatever its source, that is protected by the attorney-client privilege, likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential.”⁸⁴ Rule 1.6 (b) permits an attorney to “reveal or use confidential

⁸² See e.g., *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962); *U.S. v. Pape*, 144 F.2d 778, 782 (2nd Cir. 1944); *United States v. Hunton & Williams*, 952 F. Supp 843 (D.C. 1997); *Dietz v. Doe*, 935 P.2d 611 (Wash. 1997); *Splash Design Inc. v Lee*, 14 P.3d 879 (Wash. App. 2001). See also *Hays v. Wood*, 25 Cal.3d 772 (Cal. 1979) (holding that requirements to disclose sources in financial-disclosure statutes do not dilute attorney-client privilege).

⁸³ See e.g., *In Re Kaplan*, 168 N.E.2d 660, 661 (N.Y. 1960) (stating that great weight of authority does not recognize client’s identity within scope of confidential communications and will not treat identity as privileged information); *Colton*, 306 F.2d at 637 (stating that, even though “communications” must be interpreted broadly, privilege extends only to those matters communicated to attorney in professional confidence); *Lefcourt v. U.S.*, 125 F.3d 79, 86 (2nd Cir. 1997) (stating that client identity and fee information are not, absent special circumstances, privileged because privilege is defined to encompass only confidential communications); *United States v. Goldberger & Dubin, P.C.*, 935 F.2d 501 (2nd Cir. 1991) (holding that outside of special circumstances, identification of clients who make substantial cash payments is not disclosure of privileged information); *United States v. Liebman*, 742 F.2d 807 (3rd Cir. 1984); *Reiserer v. U.S.*, 479 F.3d 1160, 1165 (9th Cir. 2007) (stating that attorney-client privilege ordinarily protects neither client’s identity nor information regarding fee arrangements reached with that client).

⁸⁴ 22 NYCRR 1200.1.6(a) (April 1, 2009).

information...to comply with other law or court order.”⁸⁵ Existing law and practice is entirely consistent with a financial-disclosure law that requires attorney-legislators to disclose client identity, fee information and a description of services that we advocate.

In the vast majority of circumstances, identifying the name of a client will not breach a client-confidence.⁸⁶ While “information” may include the identity of a client,⁸⁷ courts have found that revealing client identities does not breach ethical obligations because attorneys may be obligated or permitted by law to provide this information.⁸⁸ Indeed, Rule 1.6(b)(6) permits a lawyer to reveal information when required to comply with a law and courts have noted that such a legal obligation would override any claimed ethical duty of secrecy to a client.⁸⁹ Furthermore, such information is regularly disclosed during the course of civil-litigation discovery and criminal investigations.

In addition, as a practical matter, the existence of the attorney-client relationship is most frequently a matter open to the public through any number of means, such as court documents, administrative and other public hearings, real estate transactions, and even promotional materials from law firms including websites. This reality lowers the client’s expectations that identity will be kept private.⁹⁰

⁸⁵ 22 NYCRR 1200.1.6(b) (April 1, 2009).

⁸⁶ 22 NYCRR 1200.1.6(a)-(b) (April 1, 2009).

⁸⁷ *See* American Bar Association, *Annotated Model Rules of Professional Conduct*, 6th Ed. (2007).

⁸⁸ *U.S. v. Legal Services for New York City*, 100 F. Supp 2d 42, 47 (D.D.C. 2000).

⁸⁹ *U.S. v. Hunton & Williams*, 952 F. Supp. 843, 856 (D.D.C. 1997).

⁹⁰ *See e.g. Monnat*, 853 F. Supp. 1304, 1306 (D. Kan. 1994); *1st Technology, LLC v. Rational Enterprises Ltd.*, 2008 WL 4571258, *4 (D. Nev. 2008).

C. Client Consent

Where particular disclosures are required by law, courts have typically found that it is the attorney's duty to explain this to clients.⁹¹ Consistent with those decisions, our proposal requires attorney-legislators to disclose in writing to a client what would have to be disclosed under the law. This could easily be done in an engagement letter, which is already required by Court rule.⁹² And, a client's consent to that disclosure provides a separate and independent ground for legitimate disclosure under Rule 1.6.⁹³

Our proposal to mandate disclosure for attorney-legislators explicitly recognizes all the exceptions and protections of existing law. Thus, the only additional requirement we propose is that such disclosure be automatically required of attorney-legislators on a periodic basis. In recognition of the change this reporting requirement will represent, we propose that it apply only to the future representation of and receipt of income from new clients and new matters with existing clients, all of whom shall be informed in writing of this requirement and their need to provide informed consent in writing in order to begin or continue to utilize for a new matter the services of the attorney-legislator. No client should have a reasonable claim that he or she is being unlawfully harmed by such disclosure because he or she will have been given the choice beforehand to either agree to such disclosure or engage an attorney who is not also a legislator.

⁹¹ U.S. v. Monnat, 853 F. Supp. at 1307 (D. Kan. 1994).

⁹² See, 22 NYCRR § 1215.

⁹³ Rule 1.6 permits disclosure with client consent. See also, NY State Op. 645 (1993) (before attorney member of Town Board of Assessment Review could comply with town disclosure requirements that covered privileged or confidential information, lawyer could obtain client's consent, withdraw from representation, petition court or commission for relief from disclosure, or decline appointment to public office). NYS Op 645 implicitly endorses the kind of system we propose. Providing prior notice to clients would also preclude circumvention of the disclosure law by arguing that client identity must not be disclosed solely because the client requested that it be treated as confidential information.

D. A Public Body to Grant Exemptions in Exceptional Circumstances

As we have discussed, we propose that a separate, independent administrative body or commission be established to review claims that the public's interest in disclosure must yield to the particular client's interest in secrecy. Such public bodies have successfully been established in California and Washington. We discuss those regimes briefly below. New York should look to those models for guidance.

Washington and California Have Long and Successfully Required Client Disclosure

A number of states have put in place effective systems of financial disclosure for legislators that encompass private law practices. These states have rigorous financial disclosure systems that do not create special exceptions for attorneys, yet manage to protect the relevant privileges and sections of the ethics code in the rare instances in which an attorney would have a legitimate reason to not reveal the identity of a client. New York similarly should construct a system that requires attorney-legislators to disclose client information names without violating the relevant privileges or ethical principles.

The type of system we advocate has been in place for over 30 years in Washington and California. Both states require attorneys to disclose their client names without forcing attorney-legislators to violate the Code of Professional Conduct. Washington's disclosure requirement, which passed in 1972 by 73% of Washington State voters, extends to attorney-legislators because the commission and the State Bar Association agree that the fact of disclosure does not violate any secret or confidence.⁹⁴

⁹⁴ Telephone Interview with Nancy Krier, General Counsel, Washington Public Disclosure Commission (December 15, 2009). California successfully implemented this disclosure regime notwithstanding the fact that until 2004 California's statute obligating lawyers to keep client information confidential contained no exceptions. The exception adopted in 2004 permits disclosure only "to prevent a

California's disclosure requirement, which passed in 1974 as a ballot initiative by California voters, extends to attorneys, as long as it does not violate a recognized privilege under California law.⁹⁵

Washington State's disclosure statute requires the reporting of "the name of each governmental unit, corporation, partnership, joint venture, sole proprietorship, association, union, or other business or commercial entity from which such entity has received compensation in any form in the amount of ten thousand dollars or more during the preceding twelve months and the consideration given or performed in exchange for such compensation."⁹⁶ This requires filers, including attorneys, to identify all reportable business clients, which are non-individuals (only business, corporate and government clients) providing compensation of \$10,000 or more during the reporting period.

Under a very narrow set of circumstances, attorney-legislators in Washington State may receive exemptions from the disclosure requirements for "undue hardship." The Washington Public Disclosure Commission, which is made up of five members from different political parties, is authorized to allow modification or suspensions of these reporting requirements in a particular case when it finds that "literal application" of the chapter "works a manifestly unreasonable hardship" and that the suspension or modification of the reporting requirements "will not frustrate the purpose of the chapter."⁹⁷ No commission member may hold or campaign for elective office, serve as

criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual." *See* California Business and Professions Code § 6068(e)(2).

⁹⁵ Telephone Interview with Roman Porter, Executive Director, California Fair Practices Commission (December 16, 2009).

⁹⁶ Wash. Rev. Code § 42.17.241(1)(g)(ii) (1973).

⁹⁷ Wash. Rev. Code § 42.17.370(10) (1973).

an officer of any political party or political committee, solicit or make contributions to a candidate or in support or opposition of a candidate, or lobby.⁹⁸ Any modification should only be to the extent necessary to relieve the hardship.⁹⁹ The standard of proof is clear and convincing evidence of undue hardship.

The commission issued an interpretation outlining how it will generally consider modification requests from attorneys. The commission's interpretation states that the identity of a client does not fall within the purview of the attorney-client privilege unless there is a "strong probability" that the disclosure would convey the substance of a confidential communication between client and attorney.¹⁰⁰ This interpretation firmly relies on well-established law stating that, absent special circumstances, identity of a client of an attorney or law firm is not protected by attorney-client privilege.¹⁰¹

California's system is similar to that of Washington State. California's statute provides that, when required to report, the filer's "statement shall contain: (1) the name, address, and a general description of the business activity of the business entity and (2) the name of every person from whom the business entity received payments if the filer's pro rata share of gross receipts from that person was equal to or greater than ten thousand dollars during a calendar year."¹⁰² This requires filers, including attorneys, to report

⁹⁸ Wash. Rev. Code § 42.17.350 (1973).

⁹⁹ Id.

¹⁰⁰ Washington Public Disclosure Commission 02-03, Requests for Modification of the Requirements to Report Information on the Personal Financial Affairs Statement for Lawyers and Law Firms, (January 28, 2003), available at <http://www.pdc.wa.gov/archive/guide/pdf/02-03.pdf>.

¹⁰¹ Id. (citing *Splash Design Inc. v Lee*, 14 P.3d 879 (Wash. App. 2001); *Dietz v. Doe*, 935 P.2d 611 (Wash. 1997); *United States v. Hunton & Williams*, 952 F. Supp 843 (D.C. 1997)).

¹⁰² Cal. Gov. Code §87207(b)(1)-(2) (1974).

business and individual clients who provide compensation of at least \$10,000 in a reportable cycle.

Officials may request exemptions from the Act's requirement if the disclosure would violate a legally recognized privilege under California law.¹⁰³ Based on California law, the California Fair Practices Commission, which is also an independent, non-partisan body of five members, does not consider a client's identity or fee arrangements to be protected by the attorney-client privilege.¹⁰⁴ Similarly to Washington State, a limited exception to this rule exists where disclosure of representation could implicate the client in unlawful activities.¹⁰⁵

¹⁰³ Cal. Code of Regulation § 18740.

¹⁰⁴ Hays, 25 Cal. 3d at 772.

¹⁰⁵ Hays, 25 Cal. 3d at 785.

Conclusion

In order to restore public confidence in the New York governing process, all lawmakers, including attorney-legislators, should be required to disclose information about their sources of outside income, including the identity of their clients, their fees and a clear description of the services rendered. There should be no blanket exception for attorney-legislators. Such disclosures generally do not violate ethical codes and privileges, except in limited instances, and specific and appropriate exceptions should be provided, along with a mechanism, fully independent from the Legislature, for individual consideration of those cases where the attorney-client privilege or client confidential information is implicated, or in cases of extreme hardship that would not violate the public interest.

State Affairs Committee
Loren Gesinsky
Chair

Government Ethics Committee
Gregory G. Ballard
Chair

Professional Responsibility
Committee
Jeffrey A. Udell
Chair

January 2010

Appendix A - Section 73-A of the Public Officers Law

Statewide elected officials, state officers or employees, members of the legislature, legislative employees and political party chairmen and every candidate for statewide elected office or for member of the legislature shall disclose in a form set forth by law, *inter alia*, the following information:

- i. Position of any nature at any organization other than the State of New York (but not uncompensated honorary positions), held by the reporting person and the reporting person's spouse or unemancipated child. Also requires listing of any state or local agency by which this organization was regulated.
- ii. Any occupation, employment, trade, business or profession engaged in by the reporting individual and the reporting person's spouse or unemancipated child. Also requires listing of any state or local agency by which this activity was regulated.
- iii. Income, deferred income, or assignment of income (other than transfer to relative) in excess of \$1,000 by source for the reporting person, the reporting person's spouse or unemancipated child.
- iv. Any interest in excess of \$1,000 held by the reporting individual and the reporting person's spouse or unemancipated child, or owns business 10% or more ownership or control of the stock of an entity of that business.
- v. Real property interest in excess of \$1,000 or real property owned by a corporation more than fifty percent of the stock of which is owned or controlled by the reporting person or such individual's spouse.
- vi. List of liabilities of the reporting person or such individual's spouse, in excess of \$5,000 (other than to a relative).
- vii. If the reporting individual practices or is a shareholder of a law, real estate brokerage, or a profession licensed by the Department of Education, the individual is required to provide a general description of the principal subject areas of matters undertaken by such businesses. Not required to list name of individual clients, customers, or patients.
- viii. Source, nature, and value of gifts in excess of \$1,000 (excluding campaign contributions and gifts from a relative) received by reporting person, the reporting person's spouse or unemancipated child.

- ix. Contract or promise for employment after reporting individual leaves office.

Importantly, monetary values are not required to be disclosed in specific amounts, but rather in categories: Category A-under \$5,000; Category B- \$5,000 to under \$20,000; Category C- \$20,000 to under \$60,000; Category D- \$60,000 to under \$100,000; Category E- \$100,000 to under \$250,000; Category F- \$250,000 or over.

These annual financial disclosures are filed with the Commission on Public Integrity (“CPI”). The CPI makes available for public inspection and copying the annual statement of financial disclosure, except the categories of value or amount, which shall remain confidential.

A reporting individual who “knowingly and willfully fails to file,” or who “knowingly and willfully with intent to deceive makes a false statement” in a filing, may be subject to a civil penalty. Penalties for violations of § 73-A are limited to forty thousand dollars plus the value of any gift or benefit given. In lieu of a penalty, the CPI may refer the violation to an appropriate prosecutor. The violation is then punishable upon conviction as a class A misdemeanor.¹⁰⁶

Section 74 of the Public Officers Law

The Code prohibits public officers from taking upon themselves additional employment or engaging in business which may cause them to disclose confidential information obtained by reason of official position, or which would impair their judgment in connection with their duties as a public officers. The actual disclosure of such confidential information is prohibited too, as is the use of official positions to secure

¹⁰⁶ Public Officers Law §73-a (4).

unwarranted privileges. Knowing and intentional violations of the provisions of this section of law are punishable by a civil penalty, which is capped at ten thousand dollars plus the value of any gift, compensation, or benefit received for violations of the prohibitions above.¹⁰⁷ In addition, section 74 prohibits accepting other employment which may impair the public officer's independence, acting as an agent for the state in a transaction in which the officer has a "direct or indirect financial interest" that might conflict with the proper discharge of official duties, and making investments in enterprises which may be affected by decisions made by him in his official capacity. Violations of these prohibitions are capped at the value of any gift, compensation, or benefit received as a result of the violation, with no additional civil penalty attached.

¹⁰⁷ Public Officers Law §74(4); Executive Law §94(13).

APPENDIX 2: Troopergate

On July 1, 2007, the Albany Times Union newspaper published an article claiming that then-Senate Majority Leader Joseph Bruno used a taxpayer-funded New York state aircraft to fly to political fundraisers. The Times Union article stated that it obtained records substantiating this claim based on the Freedom of Information Law. Days later, Senator Bruno alleged that then-Governor Eliot Spitzer improperly had required the New York State Police to conduct surveillance in order to discredit Bruno.

On July 23, 2007, the New York Attorney General issued a report stating that because Bruno conducted at least some “legislative business” during each trip, there was no legal violation. The report also stated that Darren Dopp, the Governor’s Communications Director, caused the State Police to create documents on Bruno’s activities in a manner that was outside of the usual course of the State Police’s operations. Ultimately, the Attorney General’s report concluded that, although no crimes had been committed, there had been inappropriate – though not unlawful – conduct by Mr. Dopp, Preston Felton, Acting Superintendent of the State Police, and William Howard, the Executive Chamber’s liaison for the State Police and Assistant Deputy Secretary for Homeland Security.

The New York State Inspector General conducted an investigation mirroring that conducted by the Attorney General, but never issued a formal report. Instead, the Inspector General issued a statement advising that it concluded its investigation regarding the alleged use of the State Police to conduct surveillance of Senator Bruno and that it concurred with the Attorney General’s findings. The Inspector General’s statement further advised that it did not review Senator Bruno’s use of the State aircraft.

On September 21, 2007, the Albany District Attorney issued a report concluding that the officials of the Executive Chamber and Felton did not commit any crime, and opining that they acted within the scope of their duties in investigating the use of the State aircraft and in providing information to the media. The Albany District Attorney advised, however, that the resolution of factual issues evidenced by inconsistencies in statements provided to the District Attorney was more appropriately reserved for other agencies.

The State Ethics Commission began an investigation which eventually was transferred to its successor agency, the CPI. Prior to the CPI's assuming responsibility for the investigation, the State Ethics Commission determined that the Executive Chamber had improperly asserted claims of privilege, made misrepresentations to the State Ethics Commission regarding information produced and withheld relevant computer-generated information (metadata) that indicated that Mr. Dopp created key documents.

The CPI's investigation indicated Mr. Dopp might have committed perjury; therefore, the CPI referred this information to the Albany District Attorney, who opened an investigation to review whether a crime had been committed, and granted Dopp immunity in exchange for his truthful testimony. The District Attorney issued a report on March 28, 2008, ultimately concluding that it did not have statutory authority to address possible transgressions by individuals who are no longer public servants. The District Attorney further concluded that although Mr. Dopp may have committed misdemeanors, a successful prosecution was "highly unlikely" and would not serve the interest of justice. The District Attorney therefore closed its investigation.

On July 24, 2008, the CPI issued a Notice of Reasonable Cause charging that Richard Baum, Secretary to the Governor, and Messrs. Dopp, Felton and Howard, had violated provisions of the Public Officers Law when they used the State Police to gather travel documents they hoped would tarnish Senator Bruno's reputation. Messrs. Baum, Felton and Howard have executed Disposition Agreements in which they admit to having violated Section 74 of the Public Officers Law. Mr. Dopp is contesting the charges. On October 7, 2009, the CPI announced that it had fined Mr. Dopp \$10,000, the maximum allowed and twice the amount recommended by an administrative law judge who presided over a public hearing on the episode, for his role in disseminating the travel records of Bruno. Mr. Dopp said that he planned to sue the CPI, on the ground that the investigation was tainted by improper conduct by current and former Commission staff members.

Complicating matters further, allegations surfaced that the then-Executive Director of the CPI, Herbert Teitelbaum, had improperly shared information about the CPI's Troopergate investigation with a member of the Spitzer Administration. Mr. Teitelbaum and the CPI firmly denied any wrongdoing. The Inspector General issued a report criticizing Mr. Teitelbaum and calling for his resignation. He did resign but issued a statement "categorically den[ying] having violated his public trust." Governor Paterson called for the resignation of the entire CPI, a demand that all the commissioners rejected.

APPENDIX 3: Ethics Enforcement in Selected Other States

In developing recommendations regarding ethics reform in New York, an examination of the ethics oversight mechanisms in other jurisdictions is useful. Most states manage ethical oversight through a combination of committees and commissions, while a few states also provide for oversight responsibilities by other agencies.¹⁰⁸ There is wide variation in the manner in which states provide ethical oversight of legislators and/or members of the executive branch of state government. Many states have both legislative ethics committees and ethics commissions (which generally have jurisdiction over both the executive branch and the legislative branch), while other states have established committees with jurisdiction over both the legislative and executive branches.

Legislative ethics committees provide internal oversight of only the legislative branch of government. The majority of states have at least one standing committee, generally in the Senate. Members may be elected by the full Senate, chosen by leadership of the majority and minority in the House and Senate, appointed by the Speaker, appointed by the President Pro Tempore of the Senate, Speaker of the Senate, the majority leader of the Senate, the minority leader of the Senate, and/or the Governor. In some states, committee members are selected based on seniority. The form of committee also varies among states: ten states have joint ethics committees in which both Senate and House members participate; another ten states have only an ad hoc committee, which meets if violation of an ethics law has potentially occurred; and ten

¹⁰⁸ For example, in Arizona, Colorado, Idaho, Illinois, New Hampshire, New Mexico, North Dakota, South Dakota, Vermont and Wyoming the Secretary of State is also charged with external oversight of ethics, while in Utah this responsibility falls to the Attorney General. (*See* www.ncsl.org/Default.aspx?TabID=15354)

states have no legislative committee that focuses solely or primarily on ethics oversight.¹⁰⁹

Ethics commissions are another manner in which states provide oversight of potential ethical violations. Ethics commissions have been established in all but ten states.¹¹⁰ The majority of state ethics commissions have jurisdiction over both the Legislative and Executive branches. Eleven state ethics commissions have jurisdiction for adjudication over only the executive branch.¹¹¹ Illinois, Kentucky and Washington have a bifurcated system, with both a legislative ethics commission and an executive ethics commission.¹¹²

The size of the commissions varies, but is generally between five and nine members.¹¹³ Commission members are generally citizens or public officials (although several states prohibit public officials from serving on ethics commissions). Twenty-eight states have commissions with an odd number of members, while eleven states have commissions with an even number of commissioners.¹¹⁴ Although the method of

¹⁰⁹ See www.ncsl.org/Default.aspx?TabID=15354.

¹¹⁰ The following states do not have ethics commissions: Arizona, Idaho, New Hampshire, New Mexico, North Dakota, South Dakota, Utah, Vermont, Virginia and Wyoming. (See www.ncsl.org/Default.aspx?TabId=15348)

¹¹¹ The following states' ethics commissions have jurisdiction for adjudication over only the executive branch: Alaska, Indiana, Iowa, Maine, Maryland Michigan, New Jersey, New York, North Carolina, Ohio, and South Carolina. (See www.ncsl.org/Default.aspx?TabId=15361)

¹¹² See www.ncsl.org/Default.aspx?TabId=15361.

¹¹³ Louisiana, West Virginia, and New York are notable exceptions with ethics commissions comprised of 11, 12 and 13 members, respectively. (See www.ncsl.org/Default.aspx?TabId=15331)

¹¹⁴ The following states' ethics commissions contain an odd number of commissioners: Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington. The following states' ethics commissions contain an even number of commissioners: Iowa, Minnesota, Mississippi, Missouri, Nevada, North Carolina, Ohio, Tennessee, Texas, West Virginia

determining membership varies from state to state, members may be appointed by the Governor, Speaker of the House, Attorney General, Chief Justice of the State Supreme Court, President Pro Tempore of the Senate, the Secretary of State, the House majority leader, the House minority leader, the Senate majority leader, and the Senate minority leader. In some states, members must be confirmed by the Senate.¹¹⁵ The ethics commissions in thirty-eight states have the power to issue subpoenas, and in eleven states the commissions' orders are enforceable in the courts.¹¹⁶

Below is a discussion of the ethics commissions in three states that have enacted some or all of the core principles of ethics oversight recommended in this report. This discussion is not an exhaustive analysis of the ethics oversight mechanisms; instead, it serves to illustrate the extent to which the recommendations contained herein have been implemented in connection with ethics commissions in other jurisdictions.

Massachusetts

The Massachusetts State Ethics Commission was established by statute in 1978.¹¹⁷ The Massachusetts Ethics Commission has jurisdiction over both the Legislative and Executive branches of government, but does not have jurisdiction over lobbyists.¹¹⁸ As recommended, it consists of an odd number (five) of members, no more

and Wisconsin. Interestingly, Illinois has a legislative ethics commission with eight commissioners and an executive ethics commission with nine members. (See www.ncsl.org/Default.aspx?TabId=15331)

¹¹⁵ See www.ncsl.org/Default.aspx?TabId=15331.

¹¹⁶ See www.ncsl.org/Default.aspx?TabId=15348.

¹¹⁷ Mass Gen Laws Ann. Chapter 268B

¹¹⁸ Mass. Gen. Laws. C. 268B, § 3

than three of whom may be from the same political party.¹¹⁹ However, contrary to this report's recommendations, the Governor appoints a majority (three) of the members, one of whom is designated as chairman; the secretary of state appoints one member; and the Attorney General appoints one member.¹²⁰ No member may hold or be a candidate for any other public office; hold office in any political party or political committee; or participate in or contribute to the political campaign of any candidate for public office.¹²¹ Also as recommended, the members' terms of five years exceed the Governor's term.¹²² The commission may employ and executive direct and a general counsel.¹²³ Subject to appropriation, the commission may also employ other staff, including clerks, accountants, and investigators.¹²⁴ The budget for fiscal year 2009 was \$1,782.433.¹²⁵

The Massachusetts Ethics Commission's powers and duties include prescribing and publishing rules and regulations to carry out the Financial Disclosure Law (MGLA chapter 268B) and the Conflict of Interest Law (MGLA Chapter 268A) and acting as the primary civil enforcement agency for violations of all sections of the Financial Disclosure Law and the Conflict of Interest Law.¹²⁶ In conducting an investigation, the

¹¹⁹ Mass. Gen. Laws. C. 268B, § 2(a)

¹²⁰ Mass. Gen. Laws. C. 268B, § 2(b)

¹²¹ Mass. Gen. Laws. C. 268B, § 2(f)

¹²² Mass. Gen. Laws. C. 268B, § 2(c); (See <http://www.mass.gov/legis/comm/s29.htm>; <http://www.mass.gov/?pageID=ethsubtopic&L=3&L0=Home&L1>About+the+Commission&L2=Organizational+Structure&sid=Ieth>)

¹²³ Mass. Gen. Laws. C. 268B, § 2(m)

¹²⁴ Mass. Gen. Laws. C. 268B, § 2(m)

¹²⁵ See http://www.mass.gov/bb/h1/fy2009h1/brec2_09/act09/h09000100.htm.

¹²⁶ Mass. Gen. Laws. C. 268B, § 3(a) & (i)

Massachusetts Ethics Commission may require by summons the attendance and testimony of witnesses and the production of books, papers and other records related to the matter being investigated.¹²⁷ Any justice of the superior court may, upon application by the commission, in his discretion issue an order requiring the attendance of witnesses summoned and the giving of testimony or the production of books, papers and other records before the commission.¹²⁸ Upon a finding of a violation of the Financial Disclosure Law or the Conflict of Interest Law, the commission may issue an order requiring the violator to: (1) cease and desist such violation; (2) file any report, statement or other information as required by the Financial Disclosure Law of Conflict of Interest Law; or (3) pay a civil penalty of not more than \$2,000 for each violation.¹²⁹ The commission may file a civil action in superior court to enforce such order.¹³⁰

Pennsylvania

The Pennsylvania Ethics Commission was established by statute effective 1979.¹³¹ The Pennsylvania Ethics Commission has jurisdiction over the executive and legislative branches, including public officials, public employees, nominees and candidates.¹³² Consistent with this report's recommendations, there are an odd number (seven) of Commissioners: one each appointed by the President Pro Tempore of the Senate, the Minority Leader of the Senate, the Speaker of the House, and the Minority

¹²⁷ Mass. Gen. Laws. C. 268B, § 4(d)

¹²⁸ Mass. Gen. Laws. C. 268B, § 4(e)

¹²⁹ Mass. Gen. Laws. C. 268B, § 4(j)

¹³⁰ Mass. Gen. Laws. C. 268B, § 4(j)

¹³¹ 65 Pa CSA § 1106

¹³² See http://www.portal.state.pa.us/portal/server.pt/community/ethics/8995/who_does_the_act_cover_/.

Leader of the House, and three appointed by the Governor, only two of whom may be of the same political party.¹³³ Contrary to this report's recommendations, however, the Commissioners' terms of three years are shorter than the Governor's term.¹³⁴

No individual while a member or employee of the commission shall: hold or campaign for any other public office; hold office in any political party or political committee; actively participate in or contribute to any political campaign; directly or indirectly attempt to influence any decision by a governmental body, other than a court of law or as a representative of the commission on a matter within the jurisdiction of the commission; or be employed by the Commonwealth or a political subdivision in any other capacity, whether or not for compensation.¹³⁵

In line with this report's recommendation, the Pennsylvania Ethics Commission has a significant staff of twenty-one including the Executive Division, the Office of Chief Counsel, the Investigations Division and the Administration Division.¹³⁶ For the 2008-2009 year, the Pennsylvania Ethics Commission's total budget was \$2,195,000.

The powers and duties of the Pennsylvania Ethics Commission include:

- rendering advisory opinions to present or former public officials and public employees, or their appointing authorities or employers, regarding such individuals' duties and responsibilities under the Ethics Act;
- prescribing Statement of Financial Interests forms for filing; accepting and reviewing statements of persons required to file; and inspecting such statements to ascertain whether any reporting person has failed to file such statement or has filed a deficient statement;

¹³³ 65 Pa CSA § 1106

¹³⁴ 65 Pa CSA § 1106

¹³⁵ 65 Pa CSA § 1106

¹³⁶ See http://www.ethics.state.pa.us/portal/server.pt/community/the_commission/8994/the_staff/539244.

- accepting and filing information voluntarily supplied that exceeds the requirements of the law;
- preserving statements and reports filed with the Commission for a period of five years, maintaining a master index of statements filed with the Commission, and making statements available for public inspection and copying;
- instructing other state and local agencies in the maintenance of systems which facilitate public access to such statements;
- investigating alleged violations of the Ethics Act; holding hearings, taking testimony, issuing subpoenas, and compelling the attendance of witnesses; and issuing decisions and civil penalties in relation to investigation;
- preparing and publishing an annual report, special reports, educational materials, and technical studies to further the purposes of the Ethics Act;
- prescribing rules and regulations to implement the provisions of the Ethics Act; and
- holding at least two public hearings each year to seek input from persons and organizations which represent individuals subject to the Ethics Act and from other interested parties.¹³⁷

Arkansas

The Arkansas Ethics Commission was established pursuant to the voters' approval of Initiated Act I of 1990.¹³⁸ As recommended in this report, the Arkansas Ethics Commission has jurisdiction over both the legislative and executive branches of government, as well as lobbyists¹³⁹ and is comprised of an odd number (five) of members.¹⁴⁰ Members' five-year terms are longer than that of the Governor.¹⁴¹

¹³⁷ 65 Pa. CSA § 1106; 65 Pa CSA § 1109(f)

¹³⁸ The Arkansas Ethics Commission's stated mission statement is "to serve as the compliance and enforcement agency under Arkansas' standards of conduct and disclosure laws concerning candidates for public office, state and local public officials, lobbyists and committees, and individuals involved with initiatives, referendums and other matters referred to the voters. (*See* www.arkansasethics.com/commission.htm)

¹³⁹ ACA 7-6-217

¹⁴⁰ *See* www.arkansasethics.com/commission.htm.

Members are appointed by the Governor, the Lieutenant Governor, the Attorney General, the President Pro Tempore of the Senate, and the Speaker of the House. Also as recommended, members may not be a public official, elected official, candidate, lobbyist, or an officer or employee of a political party.¹⁴² Members serve without compensation, although they may receive reimbursement for expenses occurred as a result of their official duties.¹⁴³ Once appointed, the members elect the Chair of the Commission.¹⁴⁴ The Arkansas Ethics Commission also has the following staff: one Executive Director; two Staff Attorneys; two Directors of Compliance; one Systems Administrator; one Fiscal Officer; and two Administrative Assistants.¹⁴⁵ For the fiscal year 2010-2011, the Arkansas Ethics Commission requested a budget of \$694,233.¹⁴⁶

In line with recommendations in this report, the Arkansas Commission's authorities and responsibilities include, in part: drafting or reviewing and approving disclosure forms used by public officials, lobbyists, political action committees, candidates for office, and ballot and legislative question committees; monitoring compliance with disclosure requirements; issuing advisory opinions interpreting the ethics law assigned to its jurisdiction; investigating alleged violations of the law and determining whether a violation has occurred; issuing disciplinary action for violations of the law, or referring its findings to a prosecuting attorney for criminal proceedings; and answering questions regarding Arkansas ethics laws on a

¹⁴¹ See www.arkansasethics.com/commission.htm

¹⁴² ACA 7-6-217

¹⁴³ See www.arkansasethics.com/commission.htm

¹⁴⁴ ACA 7-6-217(d)(1).

¹⁴⁵ See www.arkansasethics.com/commission.htm

¹⁴⁶ See http://www.dfa.arkansas.gov/offices/budget/budgetRequests/0238_ethics_commission.pdf.

daily, informal basis.¹⁴⁷ In addition, the Arkansas Ethics Commission may subpoena witnesses.¹⁴⁸

¹⁴⁷ ACA 7-6-217 & -218

¹⁴⁸ ACA 7-6-217