



PROPOSAL FOR A FILING FEE ALTERNATIVE
FOR BALLOT ACCESS

Committee on Election Law

JULY 2010

NEW YORK CITY BAR
42 WEST 44TH STREET, NEW YORK, NY 10036

**NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON ELECTION LAW**

PROPOSAL FOR A FILING FEE ALTERNATIVE FOR BALLOT ACCESS

June, 2010

New York should adopt a filing fee alternative to the designating or nominating petition requirement for placement on the election ballot. Incremental reform of the petitioning process has not sufficiently lowered the barriers facing candidates for public office, particularly those who are insurgents.

An additional alternative is to guarantee a place on the ballot to candidates who have met the qualifying threshold for public funding by New York City's Campaign Finance Board. The two approaches are not inconsistent. The filing fee proposal has the advantage of being applicable to all candidacies and all public offices in New York City and New York State.

Although the Committee supports a filing fee as an alternative, it does not recommend a specific fee or formula; the Legislature should do so.

The Committee is mindful that a filing fee option, without a petition alternative, would not pass constitutional muster. *Lubin v. Panish*, 415 U.S. 709 (1974). The constitution mandates that any filing fee option be accompanied by an alternative method, specifically the opportunity to file a petition signed by voters. The attraction of a filing fee alternative stems from the Supreme Court's holding that states may require the putative candidate to obtain as many as five percent of the voters of a particular district to secure a place on the ballot. *Jenness et al. v. Fortson, Secretary of State of Georgia*, 403 U.S. 431 (1971). Indeed, New York has adhered to the *Jenness* standard of five percent. Thus, a candidate for New York City-wide office in a Democratic Party primary must obtain the signatures of the lesser of 5 percent of the registered Democrats in the City or 7,500. Election Law, Sec. 6-136. As there are some 3,072,170¹ enrolled Democrats in the City, candidates avail themselves of the 7,500 ceiling, which is only .245 percent of enrolled Democrats. The Republican Party has 501,333 members in the City, and thus 7,500 is only 1.50% of its members.

On the other hand, minor party candidates for citywide office would necessarily opt for the five percent threshold, in that 7500 is much higher than the five percent number. There are 20,151 Conservative Party members in New York City; 105,238 Independence Party members; and 13,043 members of the Working Families Party. Applying the five percent standard requires a citywide candidate for these parties to get 1,007; 5,262; or 653 signatures, respectively. Thus, candidates from each of the so-called "minor" parties are required to obtain signatures from a greater percentage of their membership than the Democrats and Republicans. Furthermore, given the small numbers of enrollees in the city, it is far more difficult to find these members to obtain their signatures. Street petitioning and door to door petitioning are ineffective. Instead, potential signers must be contacted and arrangements made to obtain his or her signature.

¹ NYS Board of Elections, April 1, 2010.

As a result of the disparity of the enrollment figures in the five political parties, the three smaller parties have a disproportionately more difficult task in obtaining signatures to place their candidates on the ballot. These problems are magnified when one takes into account the challenge process under the New York Election Law.² Insurgent candidates are often challenged by the incumbents or representatives of the political parties, and they can find themselves below the required amount for errors relating to dates or addresses, signers who are not registered or enrolled, or various mistakes in the Subscribing Witness Statement. If, for example, the witness is not an enrolled member of the relevant political party, all of the signatures collected by the witness are invalid. Candidates are routinely advised to obtain at least three times the number of signatures required because so many signatures can be lost to technical challenges. Furthermore, candidates with more than enough signatures have been disqualified by the Board of Elections for technical errors on their “cover sheets”; usually a court will discount this kind of error and put the candidate back on the ballot, but only if she has the wherewithal to retain an attorney with the experience and skill to effect such a reversal. *See Pearse v. New York City Board of Elections*, 10 A.D.3d 461 (2d Dep’t. 2004); Jerry H. Goldfeder, *GOLDFEDER’S MODERN ELECTION LAW* (2007), pp. 42-24.

Furthermore, such petition challenges can easily cost a candidate tens of thousands of dollars on legal fees and weeks of uncertainty until a final judicial determination as to whether she is on the ballot; the final appeal can be decided as late as a week before a primary election. Thus, even a candidate who survives a ballot challenge may find herself unable to effectively compete in the election. *See* DeNora Getachew and Andrea Senteno, “Understanding the Labyrinth: New York’s Ballot Access Laws,” *Gotham Gazette*, June 2008.

With a filing fee alternative, these problems could be avoided. A filing fee of \$2,500 would cost far less than the money required for a successful citywide drive. Even without a challenge, a filing fee may be the better alternative. The amount of money and volunteer time to petition could easily be applied to raise the \$2,500 if necessary. More importantly, once the fee is paid, the candidate is assured a place on the ballot and can go on to the next phase of the campaign. An added benefit would be the money saved by the courts and Board of Elections, each of which spend countless hours on petition challenges; indeed, instead of wasting administrative and judicial resources, the filing fees would add to the Board or court’s coffers.

Over half the states have filing fee alternatives. The fees range from \$50 in New Hampshire to \$2,500 in Texas for a Congressional race. In those states, the filing fee for Governor is, respectively, \$100 and \$3,750; in California, a fee equal to 2% of the first year’s salary for the office, \$952.91, is required.

While circumstances have somewhat improved for candidates as a result of the liberalization of ballot access laws by the state legislature in 1992 and 1996, the petitioning process is nevertheless still often an obstacle course for the unwary or inexperienced. The

² It has been estimated that New York is home to much of the country’s election law litigation. *See* Special Election Law Committee of the Association of the Bar of the City of New York, *Ballot Access in New York: The Petition Process* (Vol. 41 No. 6 *The Record* 1986).

adoption of a filing fee alternative would eliminate the problem for many, providing easier access to the ballot.

Committee on Election Law

Jerry H. Goldfeder, Chair
Jennifer E. Spain, Secretary

James H. Berkson	Laurence D. Laufer
Ira L. Blankstein	Robert J. Levinsohn
Clifford D. Bloomfield	Luke P. McLoughlin
Daniel M. Burstein	David Nir
David Cohen	Joshua Pepper
Alan Feldstein	Myrna Perez
Kenneth Gayle	Alexander Rabb
DeNora M. Getachew	Esther Roditti
Matthew Gewolb	Christopher Ronk
Prof. Joel Mark Gora	Hon. Michael David Stallman
Eric Hecker	Brian Turetsky
Peter C. Hein	Hillary Weisman
Benjamin Kallos	Paul Windels, III
Douglas A. Kellner	Laura J. Wood
David Kogelman	Ryan Wright
Harry M. Kresky*	

* Original drafter of the report.