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page 6 top left
opposite masthead

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PERSPECTIVE

It's Legally Perilous to Have a Commission Responsible for Election Laws

BY ROGER BENNET ADLER

The passage of legislation creating a New York State "Public Campaign Financing and Election Commission" to undertake election law reforms such as enacting public financing of state elections continues a worrisome and legally perilous practice of delegating the legislative function to a nine-member commission appointed by the governor and legislature.

What is significant is that this commission's authorizing powers allow it to both (1) enact, and (2) repeal, laws previously enacted unless the state Legislature overturns the commission's bills within a limited 20 day time period.

Rather than address legislative changes through "regular order" (i.e. a sponsor's bill which is referred to the appropriate legislative committee and passes both legislative houses and is signed by the governor) the commission has not been limited to merely recommending legislation—concededly an appropriate governmental function but has the power to repeal existing legislation. It is unclear if it could overturn prior Court of Appeals decisions upholding fusion voting (see *In re Callahan*, 200 N.Y. 59 [1910]; *Matter of Devane v. Touhy*, 33 N.Y. 2d 48 [1973]).

The attempt to empower an appointive commission to perform the "legislative function" of election law reform runs afoul of Article 3, Section 1 of the State Constitution, which reads: "The legislative power of this state shall be vested in the Senate and Assembly." No mention is made of the power to delegate this function. It contrasts with agency powers to enact regulations consistent with existing law, or to delegate to a commission regulations consistent with existing law and agency practice.

Of necessity, and based upon this constitutional foundation, it is solely the prerogative of the state Legislature to enact or repeal laws (*Bank of Chenango v. Brown*, 26 N.Y. 467). This, of necessity, places restraints on both the judiciary (*Hernandez v. Robles*, 7 N.Y. 3d 338, 366 [2006]) and executive branches of government, as a function of the "separation of powers."

When the "Salary Commission" raised the salaries of state legislators and statewide officeholders (without legislative approval), and imposed restrictions on earning

outside income as a condition of receiving a raise, it was also contrary to Article 3, Section 6 of the State Constitution. The delegation of "legislative functions" is clearly prohibited.

In *Delgado v. State of New York*, et. al., __ Misc. 3d __ [Sup. Ct. Albany County 6/7/19], Justice Ryba addressed the delegation of legislative power issue authorizing its exercise as long as the delegation was circumscribed by "reasonable safeguards and standards," but striking the Salary Commission's ban on outside income.

Simply put, there are no available legislative shortcuts around the State Constitution. The recent attempts to ignore it to raise legislative and executive salaries via an appointed commission is in clear violation.

She cited one Court of Appeals case (*Borreali v. Axelrod*, 71 N.Y. 2d 1 [1987]), and two Appellate Division decisions, (1) *Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D. 3d 1406, 1410 [2018], and (2) *Matter of Retired Public Employees Association, Inc. v. Cuomo*, 123 A.D. 3d 92, 97 [3rd Dept. 2014].

In *Borreali*, the Court of Appeals, in an opinion by Judge Titone, held that the "Public Health Council" overstepped its delegated authority when it promulgated a "comprehensive code" to govern tobacco smoking beyond its enabling statute (Public Health Law Section 225(5) (a), in enacting anti-smoking regulations, as a function of agency "rule-making powers." Only Judge Bellacosa dissented.

The *Matter of Retired Public Employees* case addressed a challenge to the application of Civil Service Law Section 167, construing a provision expressly authorizing the extension of modifications in contribution rates for health insurance payments by the state. Justice Peters noted that, while the Legislature cannot constitutionally delegate its legislative power to an agency or commission where there is a promulgate law, the power to adjust retirees' health insurance contribution rates was deemed not constitutionally infirm.

Finally, in the *Center for Judicial Accountability* case, the Appellate Division, Third Department, in an opinion by Justice Rumsey, upheld the delegation to the commission to increasing judicial salaries. The opinion noted the existence of a perceived "safeguard"—the Legisla-

ture's ability to reject any commission recommendations before the salary increases become effective.

More recently, the Appellate Division, Third Department, in *People v. Hodgson* __ A.D. 3d __ [3rd Dept. 2019] invalidated convictions secured by the "New York State Justice Center for People With Special Needs," rather than the duly elected county district attorney (County Law Section 700). Once again, the failure to scrupulously respect state law has ended poorly, potentially allowing wrongdoers to evade conviction.

Simply put, there are no available legislative shortcuts around the State Constitution. The recent attempts to ignore it to raise legislative and executive salaries via an appointed commission is in clear violation. Legislating is a time intensive undertaking, and frequently involves the powers of persuasion, patience and a willingness to compromise.

The notion that the legislative function can be conveniently "off-loaded" to a commission (thereby sparing some legislators a "hard vote") is a disingenuous and unconstitutional governing model. Political courage is not a large commodity. Indeed, John F. Kennedy's book "Profiles in Courage" did not have a large roster of profiles to discuss.

For those who subscribe to the "Rule of Law," the attempt to take what many perceive as cynical shortcuts, by ignoring the State Constitution, and legislating by proxy commissioners, is doomed to failure when judicially challenged. New York State must refrain from this cynical, and unlawful practice, which consciously avoids the State Constitution's clear and unequivocal words.

On July 22, 2019, the propriety of the commission was challenged in *Niagara County Supreme Court in Jastremski, et. al. v. the Public Campaign Financing and Election Commission of the State of New York*. We can likely anticipate a pre-answer motion to dismiss it. Nonetheless, the *Jastremski* case is an initial salvo in a legal struggle to vindicate the plain words of the State Constitution, and hold the Legislature constitutionally accountable.

Only time will tell if expediency will trump constitutional principal.

ROGER BENNET ADLER is a Manhattan-based solo practitioner and former counsel to the New York State Senate.

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New York City Bar (CLE)

Event Title: Residential Real Estate Closings: What You Need to Know From Pre-Contract to Closing (Day One) 6 p.m. - 9 p.m.

3 CLE Credits:

Location: 42 West 44th St.

Contact: Rosan Dacres

212-382-6630

rdacres@nycbar.org

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WEDNESDAY AUG. 14

Nassau Community College
Meet the New President of the
Nassau County Bar Association
On WHPC 90.3 FM Radio
3 p.m.
Voice stream or Podcast
www.NCCradio.org

WEDNESDAY AUG. 21

Nassau Community College
What Lawyers Need to Know
About QDRO Agreements
On WHPC 90.3 FM radio
3 p.m.
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MONDAY, SEPT. 9

New York City Bar (CLE)
Event Title: "Genocidal Intent"
and the Rohingya Refugee
Crisis
(originally scheduled for June 4)
6 p.m.-9 p.m.
3 CLE credits
Location: 42 West 44th St.
Contact: Rosan Dacres
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WEDNESDAY, SEPT. 11

Nassau Community College

MONDAY, SEPT. 16

New York City Bar (CLE)
Event Title: Residential Real
Estate Closings: What You
Need to Know From Pre-Con-
tract to Closing (Day One)
6 p.m.-9 p.m.
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Location: 42 West 44th St.
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TUESDAYS, SEPT. 17 & 24

New York City Bar (CLE)
Event Title: 16-Hour Bridge-the-
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Tuesday August 13, 2019
page 7
NYLJ

PERSPECTIVE

There's No Substitute for A Real Live Court Reporter

BY ERIC ALLEN

I am a very proud court reporter. I've been so for almost 31 years. Not only am I a court reporter, but I am also the president of the Supreme Court Reporters Association Within The City of New York. I will tell you that right up front, as opposed to the shrouded authors of so many digital recording articles who are naysayers and grey-sky portrait painters as regards the field of court reporting.

When I read about artificial intelligence being used out there, digital recordings of proceedings, it is just so fulfilling when I then read about how the attorneys hate it, cannot rely on it, are telling their agencies "Do not send a recorder! Send a real, live, breathing, skilled court reporter!" It makes me smile because we have known it all along and the bench and bar have known it all along: Court reporters are the gold standard of creating a record.

Does the field of court reporting/court stenography need more reporters? We sure do. Is there market turmoil as mentioned in the article? No, there is not turmoil. Words like "turmoil," "rapid decline" in the number of active court reporters are being espoused by special interest "authors" who produce articles for the legal field to change the way of thinking of potential clients; to garner business.

To garner business for who, you may ask. For the companies in which these authors have a financial interest. Such is the case with so many articles crying out about a shortage of court reporters and how artificial intelligence is the better, more technologically advanced method to use. Well, the New York Law Journal Commentary article by Steve Townsend is yet another example of misleading information.

Mr. Townsend is the CEO of The Record X-Change, a legal proceedings recording company. One could suppose a company such as The Record X-Change sees a court reporter as the competition. The American Association of Electronic Reporters and Transcribers (AAERT), who Mr. Townsend's article mentions as being formed because they "recognized the need to support electronic court reporting by establishing best practices and certification programs" finds itself in the same boat as The Record X-Change. It sees court reporters as the competition.

What do these companies do to try to defeat their competition? Make general comparisons where they look like a winner, they slant data, exaggerate their products, or just outright unfairly slant in the light most favorable to them. Sort of reminds me of the Chick-fil-A billboard advertisements where cows are imploring you to "EAT MOR CHIKIN" so they can flourish.

Let us look at a statement from Mr. Townsend's commentary, wherein he talks about an in-depth

study conducted in 1983 on the use of audio recording (tapes) to capture the official record of court proceedings in U.S. district courts. According to his article, the study concluded that:

"Given appropriate management and supervision, electronic sound recording can provide an accurate record of United States district court proceedings at reduced costs, without delay or interruption and provide the basis for accurate and timely, transcript delivery."

The article then goes on to state that since the 1983 study, recording technology has advanced dramatically. I'm sure it has. Let's talk about the technological capabilities of a court reporter and correct the misconceived notion that we are antiquated.

A trained court reporter (not court recorder) can produce a realtime verbatim transcript of proceedings with 99% accuracy. That is in realtime, instantaneously, immediately, as the proceedings are occurring. I think you get the picture. When providing realtime services, a court reporter streams

A trained court reporter (not court recorder) can produce a realtime verbatim transcript of proceedings with 99% accuracy. That is in realtime, instantaneously, immediately, as the proceedings are occurring.

their recordation of the proceedings directly to a user's laptop, desktop, iPad, tablet or smartphone. Artificial intelligence, while useful in many applications, just cannot stand up to the output a realtime reporter can produce.

Talk into your smartphone, Alexa or some other voice-to-text application in normal, conversational cadence and see how frustrating it can be. Now do that at speeds of up to 225 words per minute and see how disastrous it can be. Throw in some technical jargon, be it medical, industrial, etc. and the transcript would not be useful if voice recognition is used. The best thing we could have done, and are doing, is not fight technology, but advance with it. We can be sitting in a courtroom or a deposition room here in New York City and be remotely sending our realtime feed to an expert witness in Hong Kong. The field has changed and we have made the adjustments.

Before leaving school, a court reporting student must be able to write 225 words per minute. Additionally, a court reporter is present in the room and can clarify any discrepancies, inaudible words, phrases and adds priceless human interaction with the attorneys, witnesses, judges; whoever is part of the record.

I'd like to harken back to the U.S. district court study. In federal court proceedings in New York, a live court reporter (not court recorder) is used. In New York federal court, a recording is only used for civil matters such as during an initial pretrial conference where the

record is not of utmost importance. However, there are judges who require a court reporter for those hearings in lieu of a recording device. Arraignments by a federal judge, as opposed to a magistrate judge, are always taken by a live court reporter. In fact, all criminal proceedings before a federal judge are taken by a court reporter.

In magistrate court, a recording is sometimes used for initial presentments or arraignments, but court reporters are used for felony pleas due to the importance of the accuracy of the record.

Court reporting has long been an intriguing but little-known profession, but the bolstering of the number of court reporters has begun. State associations are becoming more involved in recruitment, in educating the public on the field, in educating reporters. Newscasts have been televised nationwide describing the field, its long history and the many areas of today's social and business world where court reporting is now used. New court reporting programs are starting in various parts of the country.

Things are progressing in terms of the numbers challenge. We are at a renaissance time period for court reporting. The public at large is being educated about the field, on just what we do, how technologically advanced we have become and what employment opportunities are available.

Let me touch on the employment aspect. I want to let you know something that was shared with me from The New York State Office of Court Administration. And this is a quote. This went out nationwide; not just in New York.

"I am requesting that you post notification to your court reporter students that there is, and will continue to be, a place for court reporters in the New York State Unified Court System. Following graduation with a certificate and a minimum of six months experience, the graduate is eligible to sit for the NYS Civil Service Exam for the title of court reporter.

Upon passing the exam and obtaining one year of court reporting experience they are eligible for appointment to a permanent position from the many and various employment opportunities available as an official court reporter for the New York State Unified Court System.

"New York State has made a commitment to continue to seek and employ court reporters, utilizing all the great services, such as realtime, CART, and paperless technology that only a court reporter can provide. A long and wonderful career awaits the court reporter graduate in New York State."

That is a promulgation by the New York State Court System. They are aware of the gold standard.

ERIC ALLEN is the president of of the Association of Surrogate & Supreme Court Reporters, New York.