

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a bold, serif font, centered between two horizontal blue bars.

**NEW YORK  
CITY BAR**

**Report by the Committee on State Affairs of  
The Association of the Bar of the City of New York**

**Supporting Legislative Rules Reform**

***“The Fundamentals”***

**May 2007**

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## EXECUTIVE SUMMARY

For the last century the New York Legislature has grappled with the issue of rules reform. Unfortunately, “[t]he only thing that ever changes in Albany are the faces. The system stays intact.”<sup>1</sup> The problem is, the system of state governance is controlled by three people (the Governor, the Senate Majority Leader and Assembly Speaker), “each getting a piece of the pie, and that’s it.”<sup>2</sup>

As a result, the Legislature is dominated by its two leaders and stripped of its ability to be a truly representative body. The negative effects are many, from the failure to enact or craft good public policy to a lack of accountability and transparency. Recently though, a wave of public discontent and newly found energy have created an opportunity to reform the system.

The Committee on State Affairs of the Association of the Bar of the City of New York (“Committee”) has recognized this opportunity and developed a package - “The Fundamentals” - of rules reform proposals that should be adopted by the Legislature, at the beginning of its next session in January of 2008. Specifically, the proposals address three fundamental areas that comprise the cornerstone of any meaningful reform and the foundation for future progress. They are, 1) Resource Allocation, 2) Committees and, 3) Member Items.

Under the current system, the leaders of the Assembly and Senate exercise complete control over the distribution (or not) of resources among their membership. In effect, silencing members – and by extension the public-at-large who they represent – from voicing any discontent with the current system. As such, the Committee recommends the following changes: 1) equal funding (i.e., “base amount”) for all members regardless of party affiliation or seniority, and 2) authorizing committee chairmen to hire their own professional staff.<sup>3</sup>

By providing a “voice” to individual members and committee chairmen, the Legislature’s committees can fulfill their proper role as the crucible in which good public policy is formed. To that end, the Committee recommends that: 1) all bills reported to the legislative floor be accompanied by a comprehensive committee report; 2) before bills are reported out of committee they are openly considered with an opportunity for amendment; 3) three or more members of a committee may petition for a hearing on a bill or for an agency oversight hearing and, 4) three or more members of a committee may petition for a vote on a bill pending before it.<sup>4</sup>

Compounding the inertia of the current committee structure are two other legislative mechanisms - the discharge motion and the conference committee. Instead of fostering progress and resolution of legislative issues, they have been transformed into procedural impediments.

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<sup>1</sup> Azi Paybarah, *News Flash: Albany Never Changes, Spitzers come and go, but Semineros are forever*, *The New York Observer*, April 8, 2007 (quoting Assemblyman Anthony Seminero (D-Queens), see generally <http://nyobserver.com>).

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* pp. 11-12.

<sup>4</sup> See *infra* pp. 12-14.

To restore their intended use and effectiveness, the Committee proposes that: 1) any member may petition for the discharge of a bill from committee without the sponsor's prior approval; 2) discharge motions shall be allowed 20 days after a bill has been referred to a committee and five days before the end of the session; 3) there shall be no limit on the number of discharge motions within a legislative session and, 4) when bills addressing the same subject have been passed by both chambers, a conference committee shall be convened at the request of the prime sponsor from each chamber or the Speaker and Majority Leader.<sup>5</sup>

Finally, member items are a set of appropriations singled out by members and the leaders for local pet projects. Not unlike congressional "earmarks," the funds are outside of the normal budgetary process and are used by the leadership to cement their control over the rank-and-file membership. To bring accountability and transparency to the system, the Committee proposes that all member items: 1) be disclosed in budget bills; 2) include the name of the sponsor, recipient of the funds and amount of funding; 3) be disclosed on the Legislature's website; and, 4) be directed to public non-profit entities only.<sup>6</sup>

At the dawn of the 21<sup>st</sup> century New York State faces some of the most complex issues it has ever had to face before. To meet these challenges the Legislature must be able to deliberate and thoroughly consider the options and implications of its actions. These "Fundamentals" are an integral part of strengthening the Legislature and making it more representative and deliberative so that it can solve the issues such as, health care, education, security and the environment.

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<sup>5</sup> See *infra* pp. 14-15.

<sup>6</sup> See *infra* pp. 15-17.

York formed the Reform NY coalition.<sup>38</sup> The Reform NY agenda includes not only rules reform but also, redistricting, budget, ethics and campaign finance/election reform proposals. On May 3, 2005 and thereafter on May 6, 2006 and April 23, 2007, the Reform NY coalition staged a “Reform Day” event in Albany to heighten public awareness of these issues.

While each of the reform proposals seeks a different goal, they share one common element – each requires legislative action<sup>39</sup> before they can be achieved. The Governor has recently sought to overhaul New York’s campaign laws. He “ha[s] made campaign finance reform one of the top priorities of his administration and ha[s] [been] negotiat[ing] the issue with legislative leaders for [the past few] months.”<sup>40</sup> Predictably, “[h]is failure to sway the Legislature on campaign finance could be viewed as his latest lesson in the intractable way of doing business in Albany.”<sup>41</sup>

Reform proposals are not the only policy casualties of the “dysfunctional legislature.” A flawed legislative process too often means inaction on important issues,

<sup>38</sup> The Reform NY coalition has included: Acorn, Amherst Chamber of Commerce, Association of the Bar of the City of New York, Brennan Center for Justice, Business and Professional Women/NY State, Business Council of Westchester, Capital Region Professionals for Spitzer/Democracy for the Hudson-Mohawk Region, CBGNY, Center for an Urban Future, Center for Constitutional Rights, Center for Governmental Research, Centerstate, Citizen Action, Citizens Budget Commission, Citizens of New York for Legislative Reform, Citizens Union, Common Cause/NY, community Service Society of New York, Democracy for America, Democracy for Hudson-Mohawk Region, Democracy for New York City, Democracy Matters, Demos, Empire Justice Center/Western NY Law Center, Exodus Transitional Community, Inc., Fifth Avenue Committee, Greater Syracuse Chamber Commerce, Headquarters Staff Union, HELP USA, Hudson Riverkeeper, Human Services Council of New York City, Inc., Hunger Action, Interfaith Alliance of Rochester, Interfaith IMPACT of New York State, KECLG, League of Women Voters of New York City, League of Women Voters of New York State, League of Women Voters of Bronxville, League of Women Voters of the Syracuse Metro Area, League of Women Voters of Utica/Rome, League of Women Voters of Westchester, Make the Road by Walking; Se Hace Camino al Andar, Metropolitan Council Housing and Redevelopment Authority (Metro HRA), Mohawk Valley Community College, Monroe County Independence Party, National Council of Jewish Women – NY Section, National Federation of Independent Business, National Federation of Independent Business – New York, National Nonpartisan Voter Education Campaign, Natural Resources Defense Council, New Democratic Majority, New Leadership Democratic Club, New York Civic, New York Lawyers for the Public Interest, New York League of Conservation Voters, New York State Business & Professional Women’s Club Inc., New York State Coalition Against Sexual Assault, New York State Tenants and Neighbors Coalition, New York Statewide Senior Action Council, Niagara USA Chamber of Commerce, Nonprofit Coordinating Committee of New York, Inc., New York Civil Liberties Union, New York Public Interest Research Group, Onondaga Citizens League, Otsego County Chamber of Commerce, Otsego County Democratic Committee, Plainville Farms, Printing and Imaging Association of New York State, Professional Staff Congress, Richmond Hill Quality of Life Commission, Rochester Business Alliance, Rochester Downtown Development Corporation, Rockland Business Association, Rome Area Chamber of Commerce, Safe Horizon, Save New York, Inc., SCAA, Sierra Cub/Atlantic Chapter, The Great Binghamton Chamber of Commerce, The Manufacturers Association of Central New York, The Voice: A monthly publication of the Chautauqua County Chamber of Commerce, Urban Justice Center, VOXPAX, Welfare Rights Initiative, Westchester County Association, Western New York Law Center, Women’s City Club of New York.

<sup>39</sup> Specifically, the Reform NY coalition sought: a hearing before the Legislature voted on the Governor’s bill to create a Commission on Public Integrity; amendments to the current campaign finance laws and a system of voluntary public financing for political campaigns; a statute adopting a single statewide voting machine; and, the creation of an independent redistricting commission.

<sup>40</sup> Danny Hakim, *Spitzer’s Campaign Reforms Stall as G.O.P. Senators Resist*, NY Times, April 24, 2007, at B2.

<sup>41</sup> Id.

or the enactment of policies that are bad for New York. One issue is wetlands protection, which has languished in the Senate for the past few years. In 2005, 49 of 62 senators supported a measure to address the problem; yet, it was precluded from reaching the floor for debate and a vote.<sup>42</sup> While inaction plagues wetlands protection, change (i.e., action) to New York's health care system, via the Berger Commission, has created other problems.

Specifically, in 2005 the Legislature decided to address the issue of New York's health care capacity and resource problem. The Legislature enacted Chapter 63 (Part K) of the Laws of 2005, which created the Commission on Health Care Facilities in the 21<sup>st</sup> Century ("Berger Commission" – named for the Chairman Stephen Berger). On November 28, 2006 the Berger Commission issued its final recommendations, including the closure of nine hospitals and seven nursing homes, along with the restructuring of approximately 50 other health care facilities, throughout the state.<sup>43</sup>

As a result of the Berger Commission's findings and recommendations, no less than seven lawsuits have been filed seeking to enjoin and/or invalidate the commission and/or its recommendations.<sup>44</sup> Indeed, the State Affairs Committee and the Health Law

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<sup>42</sup> Norden, Pozen & Foster, *supra* note 33, at 18. The Brennan Center report outlines an entire "Case Study" on the issue of wetlands protection and the struggles of St. Senator Carl Marcellino (Syosset) and Assemblyman Thomas DiNapoli (Great Neck) to amend New York's wetlands preservation laws. The reason given for inaction being the Senate Majority Leader's refusal to place the bill on the "Active List."

<sup>43</sup> New York Lawyers for the Public Interest, *Commission on Health Care Facilities in the 21 Century: How Not to Change Health Care in New York*, available at [http://www.nylnpi.org/pub/Berger\\_Media\\_Fact\\_Sheet.pdf](http://www.nylnpi.org/pub/Berger_Media_Fact_Sheet.pdf).

<sup>44</sup> The suits include: St. Joseph Hospital of Cheektowaga; New York and Catholic Health System, Inc., (Plaintiffs) v. Antonia C. Novello, as New York State Health Commissioner; New York State Commission on Healthcare Facilities on the 21<sup>st</sup> Century, and George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 11568/06, Supreme Court County of Erie (seeking injunctive relief under 42 U.S.C. §1983 to prevent implementation of the Berger Commission's recommendations as to the closing of St. Joseph Hospital); William E. Scheuerman, Individually and as President of United University Professions; United University Professions, and Dr. Umeshandra Patil, (Plaintiffs) v. State of New York; Eliot Spitzer, as Governor of the State of New York; Department of Health of the State of New York; Dr. Richard Daines, Individually and as Commissioner of Department of Health of the State of New York; Maryanne Gridley, Individually and as Executive Director of the Dormitory Authority of the State of New York; Commission on Health Care Facilities in the Twenty-First Century, and Stephen Berger, as Chair of the Commission on Health Care in the Twenty-First Century, (Defendants) and State University of New York; John R. Ryan, as Chancellor of the State University of New York; The Board of Trustees of the State University of New York; Thomas F. Egan, as Chairman of the Board of Trustees of the State University of New York; the State University of New York Health Science Center at Syracuse; Dr. David Smith, as President of the SUNY Health Science Center at Syracuse, and Crouse Hospital Inc., d/b/a Crouse Hospital, (Permissive Party Defendants), Index No. 2474/07, Supreme Court County of Albany; The Albert Lindley Lee Memorial Hospital, (Plaintiff) v. The Commissioner of the New York State Department of Health; the New York State Department of Health; Eliot Spitzer, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 07-0509, Supreme Court County of Oswego (challenging the constitutionality of the legislation that created the Berger Commission as well as the execution of its purported legislative mandate); Danny Donohue, Individually and as President of the Civil Service Employees Association, Inc., Local 1000; AFSCME, AFL-CIO; Civil Service Employees Association, Inc., Local 1000; AFSCME, AFL-CIO; Helen Czerwinski; David Quimby; Ralph Sorrentino, and Barbara L. Taylor, (Plaintiffs) v. Richard F. Daines, as Commissioner of the New York State Department of Health; New York State Department of Health; Eliot Spitzer, as Governor of the State of New York, and State of New York, (Defendants), Supreme Court County of Albany (Article 78 petition seeking to vacate and annul Defendants' actions involving the implementation of the Berger Commission recommendations); Mary McKinney and Mechler Hall

Committee of the Association of the Bar of the City of New York intend to file an Amicus Curiae brief on behalf of plaintiffs in McKinney, et al. v. Commissioner, et al..<sup>45</sup> Of particular note with respect to rules reform is the fact that the legislature never attempted to address the underlying policy issue of health care capacity and resources, prior to enabling and creating the Berger Commission in 2005.<sup>46</sup> Moreover, the Legislature never held any hearings with respect to the enabling legislation itself.<sup>47</sup> Note that, health care spending in New York State affects billions of dollars a year.

Indeed, the triggering provision of the enabling legislation required the Governor or the Legislature to specifically negate the recommendations of the Berger Commission, in order to prevent them from taking effect on December 31, 2006.<sup>48</sup> This is especially important as to the issue of rules reform because State Senator Jeffrey D. Klein and Assemblyman Peter M. Rivera have submitted affidavits complaining that they and their colleagues were never afforded an opportunity to vote on the Berger Commission recommendations.<sup>49</sup>

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Community Services, Inc. (Plaintiffs) v. The Commissioner of the New York State Department of Health; the New York State Department of Health and the State of New York, (Defendants), Index No. 6034/07, Supreme Court County of the Bronx (Order to Show Cause for temporary restraining order [TRO] enjoining Defendants from implementing the recommendations of the Berger Commission); Community Hospital at Dobbs Ferry, and St. John's Riverside Hospital, (Plaintiffs) v. Antonia C. Novello, as Commissioner of the New York State Department of Health; the New York State Commission on Healthcare Facilities in the 21<sup>st</sup> Century; Stephen Berger, as Commissioner of the New York State Commission on Healthcare Facilities in the 21<sup>st</sup> Century; George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 24650/06, Supreme Court County of Westchester (seeking to annul the actions of the Berger Commission pursuant to Article I, Section 6 of the New York State Constitution; the Fifth and Fourteenth Amendment of the U.S. Constitution; §107 of the Public Officers Law [POL]; Article I, Section 7 of the New York State Constitution; the New York State Administrative Procedure Act; Article III, Section 16 of the New York State Constitution and 42 U.S.C. §1983 & §1988); Cabrini Medical Center, (Plaintiff) v. Antonia C. Novello, as Commissioner of the New York State Department of Health; the New York State Commission on Healthcare Facilities in the 21<sup>st</sup> Century; Stephen Berger, as Commissioner of the New York State Commission on Healthcare Facilities in the 21<sup>st</sup> Century; George E. Pataki, as Governor of the State of New York, and the State of New York, (Defendants), Index No. 9015-06, Supreme Court County of Albany (seeking to annul the recommendations/actions of the Berger Commission pursuant to Public Officers Law [POL] §107; Article I, Section 6 of the New York State Constitution; the Fifth and Fourteenth Amendments of the U.S. Constitution; Article I, Section 7 of the New York State Constitution; the State Administrative Procedure Act; Article I, Section 10 of the U.S. Constitution; Article III, Section 1 of the New York State Constitution; Article IV, Section 7 and Article III, Sections 12, 13 and 14 of the New York State Constitution; Article III, Section 16 of the New York State Constitution and 42 U.S.C. §1983 and §1988).

<sup>45</sup> The caption is: Mary McKinney and Melcher Hall Community Services, Inc., (Plaintiffs-Appellants) v. The Commissioner of the New York State Department of Health; the New York State Department of Health and the State of New York, (Defendants-Respondents), No. CV01-1647-JO, Supreme Court of the State of New York, Appellate Division: First Department. The motion for leave to file the Amicus Curiae brief and all papers must be filed by May 11, 2007.

<sup>46</sup> Interviews with State Senator Eric Schneiderman and State Senator Jeffrey D. Klein, April 18, 2007 and April 19, 2007, respectively.

<sup>47</sup> Id.

<sup>48</sup> See generally, Chapter 63 (Part K) of the Laws of 2005.

<sup>49</sup> In McKinney, et al. v. Commissioner, et al., *supra* note 44, Senator Klein and Assemblyman Rivera submitted affidavits stating that: "No bill or resolution was voted upon in the Senate or the Assembly regarding the recommendations of the Berger Commission between December 1 and December 31, 2006. Legislators had no opportunity to accept or reject the findings of the Berger Commission before they became law." (Klein Aff. ¶6); "In the present case, both houses had no opportunity to accept or reject the findings of the Berger Commission, as no bill or resolution was adopted by December 31<sup>st</sup>." (Rivera Aff. ¶5).

Notwithstanding the outcome of the pending litigation, the point is clear – the legislative process in Albany is broken and in need of serious reform. As such, the following recommendations are put forth as a “fundamental” package upon which to build serious, credible and real reform for the Legislature and the way that Albany does business.

## **PROPOSED RULE CHANGES (“The Fundamentals”) – A Solution<sup>50</sup>**

The Committee has divided its “solution” into three equally important and fundamental areas that must be addressed, in order, to create real reform and sow the seeds for future change and progress. These areas are: Resource Allocation, Committees and Member Items.

### RESOURCE ALLOCATION

The intractability of the problem is clear; it is not so much the goal(s) (i.e., solution(s)) as it is where and how to begin. Any solution should begin with the issue of whether or not the Legislature (i.e., the individual members) is capable of effectuating change.

In short, do members (and more importantly, the people they represent) really have a voice when they arrive in Albany? Certainly members are allowed to vote on specific pieces of legislation, but do they really have the freedom to speak their minds and therefore, express the will of their constituents (i.e., the public’s voice)? Under the current system the answers would be a resounding - No.

The current rules give the Speaker and Majority Leader complete control over each member’s funding for staff and office operations. As such, the leaders exercise a latent ability to control individual members’ freedom to disagree with their wishes. In effect, “members are discouraged from challenging their leader’s approach to specific legislation or to procedural rules.”<sup>51</sup> Therefore, the members are prevented from advocating for any changes to procedural rules that could lessen the authority of the chambers’ leader – lest they are punished for their disloyalty.<sup>52</sup>

In 2000, Assemblyman Michael Bragman (D-Cicero) sought to unseat the Speaker. As a result he was stripped of his leadership post, “including the perks and an extra \$34,500 a year that [went] with the position.”<sup>53</sup> Other supporters were stripped of their committee chairmanships. In a floor speech Assemblyman Bragman asserted that, “[m]any, many more [supporters] would have come forward if they had not feared reprisals.”<sup>54</sup>

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<sup>50</sup> It should be noted that these proposed changes are meant to be a whole package. They should not be adopted piecemeal as was the case with the Brennan Center reforms of 2004, for example.

<sup>51</sup> Creelan & Moulton, *supra* note 8, at xiv.

<sup>52</sup> *Id.*

<sup>53</sup> Tom Robbins, *Rebellion of the Hollow Men*, *The Village Voice*, May 31-June 6, 2000, available at <http://www.villagevoice.com/news/0022.robbsins.15258.5.html>.

<sup>54</sup> *Id.*