NEW YORK STATE WHIFFS ON ETHICS REFORM

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Despite the rousing pronouncements by the governor, the legislature, and even civic groups that New York State has dramatically improved its ethics laws[1] with the passage of the Public Integrity Reform Act of 2011 (Reform Act),[2] in fact elected officials in Albany have done no such thing. They have blown a lot of smoke and erected a lot of mirrors; but significant, substantive ethics reform continues to elude them. This essay will, first, lay out the requirements for an *effective* government ethics law; second, measure the Reform Act against those standards; and, third, recommend a bare-based reform.[3]

INTRODUCTION

At the outset, one must emphasize two points. First, in ethics reform one must never let the perfect be the enemy of the good.[4]

[1] *See* Danny Hakim & Thomas Kaplan, *Though Hailed, Albany Ethics Deal Is Seen as Having Weaknesses*, N.Y. TIMES, June 7, 2011, at A24 ("[G]ood-government groups almost universally endorsed it, saying that it was a major improvement."); Press Release, Andrew M. Cuomo, Governor of N.Y., Governor Cuomo Signs Ethics Reform Legislation (Aug. 15, 2011), *available at* http://www.governor.ny.gov/press/08152011EthicsReformLegislation (announcing that legislation creates "unprecedented transparency, strict disclosure requirements, and a strong independent monitor with broad oversight of New York State government," and is "a major step forward in restoring the people's trust in government and changing the way Albany does business . . . [by bringing] an aggressive new approach to returning integrity to the halls of our Capitol"); Press Release, Sheldon Silver, N.Y. State Assembly Speaker, Speaker Silver Statement on Assembly Passage of Historic Ethics Reform Legislation (June 13, 2011), *available at* http://assembly.state.ny.us/Press/20110613/ (announcing the passage of "historic ethics reform legislation"); Press Release, N.Y. State Senate, Senate Passes Public Integrity Reform Act of 2011 (June 13, 2011), *available at* http://www.nysenate.gov/press-release/senate-passes-public-integrity-reform-act-2011 (characterizing this "major ethics reform legislation . . . [as] a big step forward to restore the public's trust in state government"). The Reform Act followed on the heels of Governor Paterson's veto—overridden by the Assembly but sustained by the Senate—of an even weaker ethics bill. *See* S. 6457, 2010 Leg., 233d Reg. Sess. (N.Y. 2010); Jeremy W. Peters, *Legislature Approves Ethics Bill, but Few Cheer*, N.Y. TIMES, Jan. 21, 2010, at A34; Jeremy W. Peters, *Paterson Vetoes Ethics Bill, Saying It Isn't Real Reform*, N.Y. TIMES, Feb. 3, 2010, at A23; Jeremy W. Peters, *Paterson's Ethics Veto Survives Override Vote*, N.Y. TIMES, Feb. 9, 2010, at A24.

[2] Ch. 399, 2011 N.Y. Sess. Laws 1178–1222 (McKinney 2011).

[3] Note that this essay expresses no opinion on the other issues addressed by the Act, namely: lobbying disclosure (Part B of the Act), pension forfeiture for public officials (Part C), the lobbyist gift ban (Part D), and campaign finance enforcement (Part E). *See* Sponsor's Memorandum from Dean G. Skelos, N.Y. State S., in Support of S. 5679, 2011 Leg., 234th Reg. Sess. (N.Y. 2011), *in* Bill Jacket, L. 2011 c. 399.

[4] The admonition is attributed to VOLTAIRE, LA BÉGUEULE, at A3 (1772)

Thus, for example, one should not refuse to support an ethics law merely because it permits relatively small gifts to officials by those doing business with others in their government agency, even though the better practice would call for an outright prohibition on all such gifts. That said, no ethics reform is better than ethics reform that violates the most fundamental principles of government ethics; bad ethics reform is worse than no ethics reform at all. Sadly, measured by that standard, the Reform Act fails.

Second, few of the players in ethics reform at the state level—not the media, not the civic groups, not the governor, not the legislature, and not the public—appear to understand the purpose and function of ethics laws. That ignorance dooms any attempt at an Albany ethics fix because the parties involved erect their reform efforts not upon the foundation of the purpose and principles of an effective government ethics law, but upon the shifting sands of conflicting political arguments and agendas. The debate *should* center upon how and why one proposed provision promotes that purpose and those principles better than an alternative provision. For example, the debate over the appointment process for ethics commissioners should focus upon which method best promotes the independence, integrity, and efficiency of the ethics commission. But the debate chronically does not. Instead, it focuses upon protecting elected officials against partisan political vendettas. Yet one cannot thus pin the ethics reform tail to a political donkey. As the Reform Act itself demonstrates, that approach does not work. Accordingly, one must first understand the purpose, principles, and content of an effective government ethics law before one can even consider any effort at ethics reform.

("*Dans ses écrits, un sage Italien / Dit que le mieux est l'ennemi du bien*." ("In his writings, a wise Italian said that the best is the enemy of good.")).

I. THE PURPOSE, PRINCIPLES, AND CONTENT OF AN EFFECTIVE GOVERNMENT ETHICS LAW[5]

A. The Purpose and Principles

The purpose of government ethics laws lies in promoting both the reality *and the perception* of integrity in government by *preventing* unethical conduct (conflicts of interest violations) *before* they occur. A number of principles undergird this purpose. Specifically, an effective government ethics law:

- Promotes not only the reality but also the perception of integrity in government, for no matter how honest the government is in fact, it cannot function effectively if the citizenry believes its officials to be self-serving and corrupt;[6]
- Focuses on prevention, not punishment;
- Recognizes the inherent honesty of public officials;
- Seeks thus to guide those honest officials, not imprison dishonest ones;
- Is, therefore, not intended to (and will not) catch crooks, which is the province of penal laws, law enforcement agencies (including inspectors general), and prosecutors; and
- Ensures that the public has a stake in the ethics system.

As a matter of fact, the vast majority of public servants, including, indisputably, the vast majority of those in the state

[5] *See generally* Mark Davies, *Considering Ethics at the Local Government Level*, *in* ETHICAL STANDARDS IN THE PUBLIC SECTOR 145–76 (Patricia E. Salkin ed., 2d ed. 2008) [hereinafter *Considering Ethics*]; Mark Davies, *Ethics in Government and the Issue of Conflicts of Interest*, *in* GOVERNMENT ETHICS AND LAW ENFORCEMENT: TOWARD GLOBAL GUIDELINES 97–122 (Yassin El-Ayouty et al. eds., 2000); Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 181–83 (1995).

[6] Corruption may engender serious political and societal consequences, as the targets of the Arab Spring have learned. *See* Juergen Baetz, *Watchdog: Corruption Ignited This Year's Protests*, BOS. GLOBE, Nov. 30, 2011; *see also* Press Release, Transparency International, 2011 – A Crisis in Governance: Protests That Marked 2011 Show Anger at Corruption in Politics and Public Sector (Dec. 1, 2011), *available at* http://cpi.transparency.org/cpi2011/press ("[P]rotests around the world, often fuelled by corruption and economic instability, clearly show citizens feel their leaders and public institutions are neither transparent nor accountable enough. . . . Most Arab Spring countries rank in the lower half of the [Transparency International Corruption Perceptions Index 2011] . . . . Before the Arab Spring, a Transparency International report on the region warned that nepotism, bribery and patronage were so deeply engrained in daily life that even existing anti-corruption laws had little impact.").

legislature, are honest and want to do the right thing. They are the ones who require not excoriation but guidance, by a clear and effective ethics law, for bribe takers and kickback receivers will never be deterred by any ethics law. Suggesting that ethics laws will prevent criminal or dishonest conduct by legislators will only ensure that those laws fail.

Indeed, most so-called government ethics laws are really conflicts of interest laws that regulate not right and wrong or morality and immorality, but rather conflicts of interest, that is, conflicts (usually, though not always, financial conflicts) between an official's public duties and his or her private interests, in short, divided loyalty.

Accordingly, a government "ethics" law may be either values-based or compliance-based. A values-based (ethics) law promotes positive conduct but may lack sufficient specificity to permit civil fines and other enforcement (except disciplinary action). Such a law might provide, for example, that "public officials shall place the interest of the public before themselves."[7]

By contrast, a compliance-based (conflicts of interest) law provides bright-line, civilly and criminally enforceable rules but focuses on negative conduct and interests. For example, such a law might provide that "a public official shall not accept a gift from any individual or firm doing business with the government agency served by the official."[8] New York Public Officers Law section 73 contains such a conflicts of interest code for New York State officers and employees.[9] Best practice mandates that the government ethics law first set forth ethical precepts (a code of ethics), and then from those precepts draw out compliance-based rules (a conflicts of interest code).

[7] Portions of N.Y. PUB. OFF. LAW § 74, though written in the negative, may be said to constitute ethics code provisions. *See, e.g.*, N.Y. PUB. OFF. LAW § 74(3)(h) (McKinney 2008) ("An officer or employee of a state agency, member of the legislature or legislative employee should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust."). No civil fine, however, may be imposed for a violation of that provision. *See* N.Y. PUB. OFF. LAW § 74(4); N.Y. EXEC. LAW § 94(14) (McKinney 2010).

[8] *Cf.* N.Y.C. CHARTER § 2604(b)(5) (prohibiting a public servant from accepting a valuable gift, as defined by the city's ethics Board, from any person or firm that the public servant knows is or intends to become engaged in business dealings with the city); 53 RULES OF THE CITY OF N.Y. § 1-01 (defining "valuable gift" and setting forth exceptions to the prohibition).

[9] N.Y. PUB. OFF. LAW § 73.

B. Content: The Three Pillars Upon Which an Effective Government Ethics Law Rests

An effective government ethics law must rest upon three pillars. Failure to establish, or removal of, *any* of these pillars inevitably causes the entire structure to collapse. These three pillars are:

(1) A simple, comprehensive, and comprehensible *code of ethics* (technically, a conflicts of interest code)
(2) Sensible *disclosure* and
(3) Administered by an *independent ethics commission* with full authority to interpret and enforce the ethics law for *every* public official subject thereto.

1. Code of Ethics

A simple, comprehensive, and comprehensible code of ethics forms the heart and soul of an ethics law. Critical prohibitions include:

- Using one's government office for private gain, and recusal when any such conflict of interest arises;
- Using government resources for private purposes;
- Soliciting gifts or accepting gifts from persons doing business with the government;
- Seeking or accepting private compensation for doing one's government job (tips, honoraria, and gratuities);
- Soliciting political contributions or political activity from subordinates or from those with whom one deals as part of one's government job;
- Disclosing confidential government information or using that information for a private purpose;
- Appearing before government agencies on behalf of private interests or representing private interests in government matters;
- Seeking a job from a private person or firm with which one is dealing in one's government job;
- After leaving government service,
  - Appearing on behalf of a private employer before one's former government agency for a specified period, such as one year (revolving door);
  - Working on a matter on behalf of a private employer on which one worked personally and substantially while in

government service;
    - Revealing or using confidential government information; and
- Inducing other government officials to violate the conflicts of interest code.

Other common, though less critical,[10] prohibitions may include:

- Having a position or an ownership interest in a firm doing business with the government;
- Purchasing one's government office or position;
- Coercing others (not just subordinates, government contractors, or lobbyists) to make political contributions or engage in political activity;
- Holding certain political party offices (two-hats);
- Engaging in partisan political activity (a little Hatch Act);[11]
- Entering into or maintaining a financial relationship with a superior or subordinate;
- Soliciting subordinates to engage in any non-governmental (not just political) activity or make any non-governmental contributions (e.g., charitable solicitations);
- Engaging in conflicts of interest generally; and
- Engaging in improper conduct generally (appearance of impropriety).

2. Disclosure

Sensible disclosure forms the second pillar upon which an effective government ethics law rests. Such disclosure consists of transactional disclosure, applicant disclosure, and annual (financial) disclosure.

Transactional disclosure, the most critical type of disclosure, occurs when a potential conflict actually arises; transactional disclosure is accompanied by recusal, except perhaps in the case of members of a legislative body.[12] For example, an employee

[10] Less critical does not necessarily mean less important. Rather, the prohibition may be addressed in other statutes, including penal statutes, or may impose too great a burden in the particular jurisdiction subject to the ethics law. *See, e.g.*, N.Y. GEN. MUN. LAW § 801 (McKinney 2010); *Temporary State Commission on Local Government Ethics*, 21 FORDHAM URB. L.J. 1, 8, 9 (1993) (severely criticizing N.Y. GEN. MUN. LAW § 801).

[11] *Cf.* 5 U.S.C. §§ 1501–1508 (2006) (restrictions on political activity of certain state and local employees), §§ 7321–7326 (restrictions on political activity of federal employees).

[12] Unlike in the case of appointed officials and executive branch elected officials, no one may step into the shoes of a recused legislator, whose recusal

may state that "one of the potential bidders on this contract is a company partially owned by my brother, and therefore I recuse myself from working on this RFP." Since transactional disclosure acts directly to avoid a conflict of interest violation, it constitutes the most important form of disclosure—and the least controversial. But transactional disclosure can meet that purpose *only* if it is public, to enable other government officials, the public, and the media to ensure that the recusal is adequate and to reassure the citizenry that the conflicted official will in fact have no impact upon the matter.

Applicant disclosure, in broad-based form relatively rare in most states, requires private citizens and firms seeking government business or a government license or benefit to disclose in the application the interests of officials in the applicant or the application, to the extent the applicant knows.[13] Applicant disclosure acts as a check on transactional disclosure and thus must also be public.

Annual (financial) disclosure remains the most controversial form of disclosure—and justifiably so—largely because of its misuse by elected officials, who often present it to the public as the silver bullet that will cure all ethical ills. The purpose of annual disclosure, like that of ethics laws generally, lies in preventing conflicts of interest violations (unethical conduct) from occurring in the first place.[14] Annual disclosure accomplishes that purpose by disclosing to supervisors, co-workers, the public, the media, and the filer himself or herself where the filer's potential conflicts of interest lie—and by doing so helps prevent those potential conflicts from becoming actual conflicts.[15] For example, if a senior official in a transportation agency discloses on her annual disclosure statement that her sister holds a senior position with a truck manufacturer, then everyone knows that the official has a potential conflict of interest anytime her agency

thus disenfranchises his or her constituents. Furthermore, since a body must act by a majority of the whole number of its members and since a recused legislator, like an absent legislator or a vacant seat, is counted toward that whole number, a recusal effectively acts as a negative vote. N.Y. GEN. CONSTR. LAW § 41 (McKinney 2010). For these reasons, mandating that legislators recuse themselves from voting on a matter raises significant policy issues, at least where the legislator is elected by district rather than at large.

[13] *Considering Ethics*, *supra* note 5, at 163. N.Y. GEN. MUN. LAW § 809 requires a limited form of applicant disclosure in certain municipal land use matters. Lobbyist disclosure may be viewed as a form of applicant disclosure.

[14] *Considering Ethics*, *supra* note 5, at 164.

[15] *Id.*

deals with her sister's company. In addition, annual disclosure should force filers to focus, at least once a year, on the requirements of the applicable ethics code.

But annual disclosure laws, like ethics laws generally, do not catch crooks. No one has yet seen "bribes accepted: $10,000" reported on a financial disclosure statement. Criminal financial disclosure cases invariably arise not from what is reported but from what is not reported.[16] Furthermore, while civic groups raise the shibboleth of "the public's right to know," in fact the public has no more right to know financial information about a public official that cannot produce a conflict of interest than to know the names of officials' paramours or the details of officials' medical conditions. Indeed, paramours and medical conditions appear far more relevant to an official's ability to perform his or her official duties than financial information divorced from an ethics code;[17] all such information should be off limits to disclosure.

Accordingly, the questions on a financial disclosure form *must* reveal potential conflicts of interest under the ethics code. For example, if the ethics law would permit a public servant to take an official action that might benefit a company in which he or she owns less than $10,000 in stock, then the financial disclosure form should not request disclosure of stockholdings under $10,000 because they cannot result in a violation of the ethics law. Unfortunately, many, if not most, annual disclosure laws violate this most fundamental purpose of annual disclosure.

3. Administration

The success of an ethics law rests, first and foremost, upon the quality, integrity, and efficiency of the body that administers it. And that body *must* be independent of all public officials subject

[16] *See, e.g.*, William K. Rashbaum, *Admitting Free Work on Apartment, Kerik Pleads Guilty to Accepting Gift*, N.Y. TIMES, July 1, 2006, at B3 (reporting that Bernard Kerik pleaded guilty to failing to report a loan, in violation of New York City's financial disclosure law, and, while serving as the New York City Police Commissioner, accepting a gift from a firm doing business with the city, in violation of the city's ethics law).

[17] *See* Colin Moynihan, *Key Witness Inconsistent During Trial of Official*, N.Y. TIMES, Nov. 29, 2011, at A30 (reporting allegations that a New York City councilmember had used the executive director of three nonprofit groups, a woman with whom the councilmember had a sexual relationship, to funnel money to himself and others); Sheryl Gay Stolberg, *Bachmann Says Migraines Won't Be a Problem if She's Elected President*, N.Y. TIMES, July 19, 2011, at A18.

to its jurisdiction; or its actions will always be suspect, countermanding the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in qualified, volunteer commission members of high integrity, with fixed terms, removable only for cause, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity. Split appointments—that is, appointments by multiple officials—should be avoided because they inevitably produce factions (and not infrequently leaks), as the old New York City Board of Education so dramatically demonstrated.[18] In this author's experience with various ethics bodies, a five-member commission appears the optimal size. Smaller endangers quorums; larger encourages leaks and impedes the efficient disposition of business. The best practice provides for appointment of ethics commissioners by the chief executive with advice and consent of the legislative body. The commission should have a protected budget and a staff accountable solely to the commission itself and should be vested with the sole authority to authoritatively interpret the ethics law, subject to court review.

An ethics commission performs four primary duties: legal advice, ethics training, administration of disclosure, and enforcement. To enable officials to determine whether their conduct violates the ethics code, the commission must provide timely legal advice on the legality of all future conduct and interests under the code. It must also have the ability to grant waivers of the provisions of that code, after sign-off by the affected agency, where the commission determines that the proposed conduct would in fact not conflict with the purposes and interests of the jurisdiction. All requests for advice and all responses thereto must be confidential, lest public officials avoid requesting advice out of fear their supervisor or political opponents may take retaliatory action. Waivers, precisely

[18] *See* Conflict of Interest Bd. v. Kuntz, Case 2008-227 (2009) (finding member of Civilian Complaint Review Board, whose members are appointed by police commissioner, mayor, and city council, in violation of New York City's ethics law for transmitting confidential documents to the New York Civil Liberties Union, with copies to his appointing authority, the New York City Council); Anemona Hartocollis, *Second School Board Member Is Asked to Resign in Fight Over Political Control*, N.Y. TIMES, Apr. 19, 2001, at B1.

because they permit otherwise prohibited conduct, must be public, to enable interested parties to review the factual predicate of the waiver.

The ethics commission must train every official on the requirements of the ethics law. An unknown law cannot be obeyed. The commission must also administer the disclosure system, collecting, reviewing, and making public disclosure statements.

Finally, the commission must have the authority to enforce the ethics law against every official or other person subject to its jurisdiction. An ethics commission without such power will remain a toothless tiger, raising expectations it cannot meet and thus undermining public confidence in government integrity. Enforcement power requires complete control of investigations and prosecution, the ability to commence investigations on the commission's own initiative, subpoena power, and a broad range of penalties (e.g., civil fines, discipline, censure, damages, disgorgement of ill-gotten gains, and debarment), some imposed by the commission, some by the employing agency, and some by the courts. In addition, to protect officials against unfounded accusations while reassuring the public that the government takes violations of the ethics law seriously, enforcement activity prior to the issuance of a formal complaint should remain confidential while proceedings thereafter should be public.

II. AN ASSESSMENT OF THE PUBLIC INTEGRITY REFORM ACT IN LIGHT OF THE STANDARDS FOR AN EFFECTIVE ETHICS LAW

Although one may criticize the failure of the Reform Act to address certain deficiencies in the codes of ethics, found primarily in sections 73 and 74 of the Public Officers Law, for state officers and employees, in fact those provisions, taken as a whole and as interpreted by the Commission on Public Integrity and its predecessor, the State Ethics Commission, provide a reasonably comprehensive code of ethics for those officials. Similarly, one may level substantial criticism at the financial disclosure law, found in section 73-a of the Public Officers Law, because it violates virtually every one of the precepts for annual disclosure laid out above.[19] Yet, even the relatively simple task of revising the financial disclosure form to tie it directly to the code of ethics

[19] N.Y. PUB. OFF. LAW § 73-a (McKinney 2010 & Supp. 2012).

would entail eliminating some of the information called for by the form, a politically insurmountable hurdle in the toxic atmosphere surrounding ethics reform in Albany. That said, the Reform Act's requirement that filers report their major clients,[20] while not a common requirement in the United States, addresses a substantial area of concern about legislative ethics in Albany.[21] So, too, the requirement that the financial disclosure statements of elected officials be posted on the ethics commission's website[22] ensures the ready availability of those reports throughout the state. Finally, the increase in the civil fine for non-disclosure or false statements on a financial disclosure report from $10,000 to $40,000[23] matches the penalty for other ethics violations.[24]

Thus, the real problem with the Reform Act lies overwhelmingly in its administrative provisions. That problem, however, is manifold, specifically in the structure and powers of the Legislative Ethics Commission (LEC) and of the Joint Commission on Public Ethics (JCOPE), each of which is discussed below.

A. Deficiencies in the LEC

The Reform Act maintains the charade, albeit in diluted form, of the legislature overseeing the ethics of its own members and staff.[25] Under the Act, the LEC, four of whose nine members

[20] *Id.* § 73-a(3)(8)(b).

[21] *See* ASS'N OF THE BAR OF THE CITY OF N.Y., REFORMING NEW YORK STATE'S ETHICS LAWS THE RIGHT WAY, at A-3 n.71 (2010), *available at* http://www.abcny.org/pdf/report/uploads/20071860-ReformingNYSEthicsLaws theRightWay.pdf ("At least four states have a disclosure requirement that extends to attorneys . . . ."); Editorial, *Governor Paterson's Turn on Ethics*, N.Y. TIMES, Jan. 24, 2010, at WK0 (asserting the failure to require lawyers to disclose their clients if they have no business with the state "is unfair to the public and to lawmakers who would have to reveal other clients in detail"); Editorial, *One Star for Ethics Reform*, N.Y. TIMES, Jan. 19, 2010, at A0 (stating that the failure to require listing of lawyers' clients "is wrong").

[22] N.Y. PUB. OFF. LAW § 73-a(2)(k).

[23] *Id.* § 73-a(4).

[24] *See* N.Y. EXEC. LAW § 94(14) (McKinney 2010 & Supp. 2012); N.Y. LEGIS. LAW § 80(9)(a) (McKinney 2010 & Supp. 2012); N.Y. PUB. OFF. LAW § 73(18). Most violations of section 74 of the Public Officers Law carry a $10,000 penalty. *See* N.Y. PUB. OFF. LAW § 74(4); N.Y. EXEC. LAW § 94(14).

[25] In February 2011, the Brennan Center for Justice concluded that:

> The Legislative Ethics Commission has proven to be a failed experiment. . . . The bifurcated system has created the perception of special treatment for legislators. . . . One prominent press report of the more lenient interpretation by the LEC verged on mockery. . . . There

must be state legislators, retains *sole* responsibility for:

- Promulgating rules and regulations governing extensions of time to legislators and legislative staff for filing financial disclosure statements;
- Promulgating guidelines to determine which legislative staff are policymakers for financial disclosure purposes;
- Promulgating guidelines on how to segregate conflicted legislators and legislative staff from their private employer's net revenues generated by the conflict;
- Collecting and reviewing financial disclosure statements filed by legislators and legislative staff before passing those statements on to JCOPE;
- Issuing advisory opinions to legislators and legislative staff, opinions that divest JCOPE of jurisdiction to investigate the recipient of the opinion for potentially violating the ethics laws by conduct permitted by the opinion;
- Developing educational materials and training legislators and legislative staff in the ethics laws; and
- Ultimately determining whether an accused legislator or legislative staff member violated the ethics laws and, if so, for imposing penalties for that violation.[26]

Each of these deficiencies is considered below.

Including legislators on the LEC destroys the independence of the LEC, discouraging legislators and staff from seeking opinions or filing complaints, for fear of breaches of confidentiality and retaliation. Curiously, the Reform Act does not subject LEC members to the non-disclosure requirements, and attendant penalties, to which JCOPE members are subject.[27] Furthermore, the appointment process—one legislative member appointed by each of the four leaders[28]—virtually guarantees a politicization of

> are many good examples of unitary, independent ethics commissions. . . . 33 of the 40 states that have ethics commissions give these commissions jurisdiction over both the executive and legislative branches.

BRENNAN CTR. FOR JUSTICE, MEANINGFUL ETHICS REFORMS FOR THE "NEW" ALBANY 2–3 (2011) [hereinafter MEANINGFUL ETHICS REFORMS], *available at* http://brennan.3cdn.net/2c769a401fbe4d30c2_48m6ibx6j.pdf (citations omitted).

[26] N.Y. LEGIS. LAW § 80(1), (7)(e)–(l), (9)(a), (10); N.Y. EXEC. LAW § 94(10)(d), (14-a), (16). Note that, in regard to financial disclosure statements, JCOPE possesses sole authority to grant privacy requests, exemptions from reporting specified information, including the identity of clients, and exemptions from filing. N.Y. EXEC. LAW § 94(9)(h)–(m); *cf.* N.Y. LEGIS. LAW § 80(7).

[27] *Compare* N.Y. EXEC. LAW § 94(9-a), *with* N.Y. LEGIS. LAW § 80(7).

[28] N.Y. LEGIS. LAW § 80(1).

the process, politicization that, however prevalent in Albany, is anathema to an effective ethics system.

So, too, authorizing the LEC to review financial disclosure statements before transmitting them to JCOPE breaches the confidentiality of those statements; and permitting the LEC to grant extensions of time to file such statements, pursuant to LEC-adopted rules, and to determine, in effect, who is and is not a policymaker for financial disclosure purposes risks the adoption of rules and guidelines not only inconsistent with but also more lenient than JCOPE's rules and guidelines, thus further undermining the independence of the financial disclosure system in the legislature. Similarly, empowering the LEC to promulgate guidelines for segregation of conflicted legislators and staff from their firm revenues in cases of conflict of interest, guidelines possibly more lenient than JCOPE's guidelines, permits the legislature to improperly insulate individuals and firms from prosecution for violation of section 73(10) of the Public Officers Law.[29] All of these special provisions for the state legislature conflict with the purpose of ethics laws to promote both the reality and the perception of government integrity.

Authorizing the legislature to issue advisory opinions to its members and staff, opinions that may permit conduct and interests expressly prohibited by JCOPE opinions, not only allows a double (and inconsistent) standard for legislators and executive branch officials but may serve to insulate legislators and staff from investigation and enforcement by JCOPE since "[t]he joint commission on public ethics shall not investigate an individual for potential violations of law based upon conduct approved and covered in its entirety by such an opinion" by the LEC.[30] Permitting the LEC to develop its own ethics training materials and train legislators and staff[31] similarly invites inconsistent interpretations of critical ethics provisions. Indeed, the Reform Act expressly ousts JCOPE of jurisdiction to conduct training of legislators and legislative staff once the LEC has adopted a training program.[32] Yet, in this author's personal experience, reliance upon agencies to train their own employees on ethics laws risks inconsistent and inaccurate training and, as with

[29] N.Y. PUB. OFF. LAW § 73(10).

[30] N.Y. LEGIS. LAW § 80(7)(i).

[31] *Id.* § 80(7)(k).

[32] N.Y. EXEC. LAW § 94(10)(d). Mandated coordination is minimal. *See* N.Y. EXEC. LAW § 94(10)(e).

advisory opinions, may impede the enforcement of the ethics laws by effectively insulating legislators and legislative staff from investigations of conduct that, while violative of the law as interpreted by JCOPE, accords with LEC training.

Finally, and perhaps most egregious, the LEC possesses the power to nullify a finding by JCOPE that a legislator or legislative staff member has violated an ethics law.[33] Specifically, the Reform Act provides that, upon receipt of a written report by JCOPE finding that a substantial basis exists to conclude that a legislator or staff member violated an ethics law, the LEC:

> [Shall] dispose of the matter by making one or more of the following determinations:
>
> a. whether the legislative ethics commission concurs with the joint commission's conclusions of law and the reasons therefor;
>
> b. whether and which penalties have been assessed pursuant to applicable law or rule and the reasons therefor; and
>
> c. whether further actions have been taken by the commission to punish or deter the misconduct at issue and the reasons therefor.[34]

The presence of legislators on the LEC renders this provision particularly offensive, as legislators will be passing (or, one may fear, not passing) judgment upon the actions of their colleagues. As a result, whenever the LEC rejects a JCOPE finding of a violation, even for good and sufficient reasons, the clear import of that exoneration, justified or not, will be that "the fix was in." Moreover, the requirement that JCOPE turn over its entire case file with its report to the LEC[35] further discourages complainants and witnesses from approaching JCOPE about a possible ethics violation by a member or staff member of the legislature. One should again note that the members of the LEC are not even subject to the misdemeanor non-disclosure provision to which JCOPE members are subject.[36]

In addition, upon receipt of a report from JCOPE finding a substantial basis for concluding that a legislator or legislative staff member has violated an ethics law, the LEC has ninety days in which to act.[37] Within the first forty-five days, the LEC can

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[33] *See* N.Y. LEGIS. LAW § 80(10).

[34] *Id.* This provision cross-references N.Y. PUB. OFF. LAW § 73(14-a), a typographical error; the correct cross-reference is N.Y. EXEC. LAW § 94(14-a).

[35] N.Y. EXEC. LAW § 94(14-a).

[36] *Compare id.* § 94(9-a)(c), *with* N.Y. LEGIS. LAW § 80(9)(a).

[37] N.Y. LEGIS. LAW § 80(10).

refer the matter back to JCOPE for additional investigation.[38] These provisions may well result in a substantial delay in the public release of JCOPE's report, perhaps until after an election, and in any event permit the LEC to put the legislators' spin on JCOPE findings at the time they are made public.

The fact is that legislative bodies throughout the United States and abroad have repeatedly shown themselves to be institutionally incapable of policing their own ethics because a legislative body is composed of independently elected officials, who must act as a body, thereby necessitating compromises and trade-offs, and lacks the hierarchical structure of the executive branch. Even parliamentary systems, as in Canada and England, face this same problem.[39] Only an independent body on which *no* present or former legislator or legislative staff member sits can effectively administer a legislative ethics system. Anything less invites (historically well-founded) cries of cronyism. And a system of split appointments, even when it does not engender paralysis, only exacerbates this problem.

Indeed, given Albany's history, the members of the body overseeing legislative ethics must not even be appointed by the legislature. Each member of the Hawaii State Ethics Commission, for example, is appointed by the governor from among two nominations made by the Judicial Council, an advisory body to the Hawaii Supreme Court.[40]

In New York State, the legislature's ethics body has acted only once against a sitting law maker (Assemblymember William F. Boyland, Jr.)—and then only after he was indicted—although at least nine legislators have recently been indicted or convicted of office-related crimes.[41] By contrast, in five years alone, New York City's ethics Board has found five New York City Council

[38] *Id.* § 80(9)(b), (10). Even if the LEC nullifies the determination of JCOPE, the LEC must still publish JCOPE's report, along with the LEC's own determination, within ten days after the LEC determination, unless otherwise requested by a law enforcement authority; if the LEC fails to release the report, then JCOPE must. *Id.* § 80(10).

[39] *See* Oonagh Gay, *The UK Perspective: Ad Hocery at the Centre*, *in* PARLIAMENT'S WATCHDOGS: AT THE CROSSROADS 17, 20–21 (Oonagh Gay & Barry K. Winetrobe eds., 2008); Donald M. Hamilton, *The Role of Legislative Officers in Alberta*, 30 CANADIAN PARLIAMENTARY REV. 19, 19–21 (2007); *Role of the Ethics Commissioner*, CBC NEWS ONLINE (June 10, 2005), http://www.cbc.ca/news/background/cdngovernment/ethics.html.

[40] HAW. REV. STAT. §§ 84-21(a), 601-4 (1993 & Supp. 2010).

[41] Nicholas Confessore & Thomas Kaplan, *Cuomo and Legislative Leaders Strike Deal on New Ethics Rules*, N.Y. TIMES, June 3, 2011, at A1.

members in violation of that City's ethics law,[42] even though the Council generally enjoys a far greater reputation for integrity and, with fifty-one members, is less than a quarter of the size of the state legislature.

B. Deficiencies in JCOPE

While one may thus level substantial criticism at the structure and powers of the LEC, those of JCOPE fare little better. First, the appointment (and removal) process by which three members are appointed (and removable) by the Speaker of the Assembly, three by the Temporary President of the Senate, one by the minority leader of the Assembly, one by the minority leader of the Senate, and six by the governor[43] severely undermines the independence and accountability of JCOPE, as discussed above for the LEC. Thus, although, also as discussed above, JCOPE has little actual authority over the legislature and although the legislative branch constitutes less than two percent of the state work force,[44] the legislature appoints the majority of the members of JCOPE, an unacceptable distribution of power.

Moreover, when these facts are combined with the mandate that at least two of the members of JCOPE voting in favor of a full investigation of a legislative member or staff member must be appointees of a legislative leader or leaders of the same major political party as the subject of the investigation,[45] this appointment process virtually guarantees the factionalizing and politicizing of JCOPE. If both the Senate and Assembly are controlled by the same political party and the subject of the investigation is from the other major political party, then both appointees of the minority leaders of the Senate and Assembly must vote in favor of the investigation, a completely untenable situation.[46] The requirement that half (three) of the governor's

[42] *See Chapter 68 Enforcement Case Summaries*, N.Y.C. CONFLICTS OF INTEREST BD. (updated Jan. 31, 2012), http://www.nyc.gov/html/conflicts/downloads/pdf2/enf%20docs/Enforcement_Case_Summaries.pdf [hereinafter *Chapter 68 Enforcement*].

[43] N.Y. EXEC. LAW § 94(2) (McKinney 2010 & Supp. 2012).

[44] U.S. CENSUS BUREAU, 2010 ANNUAL SURVEY OF PUBLIC EMPLOYMENT AND PAYROLL (2010), *available at* http://www2.census.gov/govs/apes/10stny.txt; EMPIRE CTR. FOR N.Y. STATE POLICY, PAYROLL OF THE STATE LEGISLATURE, http://seethroughny.net/payrolls/legislative (last visited Feb. 2, 2012).

[45] N.Y. EXEC. LAW § 94(13)(a).

[46] The analogous requirement that, where the subject of the investigation is a state officer or state employee, at least two of the eight or more JCOPE

six appointments to JCOPE must be of the major political party opposite to the governor underscores that JCOPE has been established as an inherently political body; even the appointment of the executive director has been politicized, requiring the support of at least one gubernatorial appointee from each of the major political parties and at least one legislative appointee from each of those parties.[47] The inadvisability of these dubious mandates is further compounded by the political party considerations in the voting requirements for a finding of a substantial basis to conclude that a member or staff member of the legislature has violated the ethics law or even for referral of the matter to a prosecutor.[48]

The unwieldy size of JCOPE (fourteen members)[49] far exceeds the optimal size for an effective and efficient ethics body, discouraging consensus, fomenting factions, and encouraging leaks, despite a misdemeanor non-disclosure provision.[50] Indeed, if JCOPE and LEC pay only one per diem per month per member, per diems alone for members of these ethics commissions would cost the people of the State of New York over $68,000 per year, hardly reflective of a lean and mean ethics machine.[51] Indeed, as no cap exists on the annual per diems, the cost could far exceed that amount. Furthermore, the legislature could curry favor (and thus votes) of the non-legislative members of the LEC by payment of substantial annual per diems.

Finally, this author's twenty years' experience as the executive

members voting in favor of a full investigation must have been appointed by the governor and lieutenant governor is marginally less offensive because the legislature appoints the majority (eight of the fourteen members) of JCOPE. But requiring that, where the subject of the investigation is a statewide elected official or his or her direct appointee, at least two of the eight or more JCOPE members voting in favor of an investigation must also be enrolled in the same political party as the subject of the investigation (and appointed by the governor and lieutenant governor) again politicizes and factionalizes the investigative process. *See* N.Y. EXEC. LAW § 94(13)(a).

[47] *See id.* § 94(2), (9)(a).

[48] *Id.* § 94(14-a). In regard to analogous voting requirements for a substantial basis finding where the subject of the investigation is a state officer or employee or a statewide elected official, see discussion *supra* note 46 and accompanying text. For such officers and employees no special voting requirements exist for referrals to a prosecutor. *Compare* N.Y. EXEC. LAW § 94(14-a), *with* N.Y. EXEC. LAW § 94(14-b).

[49] N.Y. EXEC. LAW § 94(2).

[50] *Id.* § 94(9-a).

[51] *Id.* § 94(2), (8); N.Y. LEGIS. LAW § 80(1), (6) (McKinney 2010 & Supp. 2012). The legislative members of the LEC do not receive a per diem. N.Y. LEGIS. LAW § 80(6).

director of ethics agencies would suggest that several of the administrative provisions for JCOPE will prove unworkable. In particular, the Reform Act involves JCOPE members in micromanaging the staffing of JCOPE.[52] Of even greater concern, the Act requires that investigations be commenced not by staff but only by the Commission itself, employing the cumbersome and politicized process discussed above.[53] In 2010, the New York City Conflicts of Interest Board opened 523 enforcement cases and referred 70 for investigation.[54] Requiring that all of those cases go before the Board for a determination on investigation would have slowed enforcement actions to a glacial pace. The Reform Act also micromanages ethics training and even public service announcements.[55]

At the same time, the prohibition on removal of the Executive Director except for neglect of duty, misconduct in office, violation of the confidentiality restrictions on JCOPE members and staff, or inability or failure to discharge the powers and duties of office, including the failure to follow the lawful instructions of the commission,[56] may concentrate too much power in the hands of the Executive Director and create the untenable situation where an Executive Director who, though completely at odds with JCOPE members, cannot be removed as long as he or she keeps a clean nose and avoids insubordination. Thus, the Reform Act contemplates a micromanaging commission and an untouchable Executive Director, hardly a recipe for success.

III. PROPOSALS FOR REFORM

Mean-spirited comments by critics of the Reform Act that no one's life, liberty, or property is safe while the legislature is in session[57] prove singularly unhelpful, for only the legislature and

[52] *See* N.Y. EXEC. LAW § 94(9)(b-1).

[53] *See id.* § 94(13)(a).

[54] *See* N.Y.C. CONFLICTS OF INTEREST BD., 2010 ANNUAL REPORT 44 (2010), *available at* http://www.nyc.gov/html/conflicts/downloads/pdf2/annual_reports/final_report_2010.pdf. The Board's statutory investigator is the New York City Department of Investigation. N.Y.C. CHARTER §§ 2603(e)(2)(b), 2603(f). In 2010, the Board imposed 76 fines and issued 36 public warning letters, for a total of 112 findings of violation, including, incidentally, one councilmember (fined $1,250) and two council staff members (each fined $2,500). *See Chapter 68 Enforcement*, *supra* note 42.

[55] *See* N.Y. EXEC. LAW § 94(9)(d-1), (10).

[56] *Id.* § 94(9)(a).

[57] Final Accounting in Estate of A.B., 1 Tucker (N.Y. Sur.) 247, 249 (1866).

the governor can fix the problems with New York State's ethics laws, including the problems created by the Reform Act. Fortunately those fixes prove not particularly difficult. Indeed, there are only four of them. One will note that all four changes address the administrative structure of ethics regulation, which remains far more important than tinkering with the financial disclosure form, as poor as it is, or even with the ethics code itself.[58] Without an effective administrative and enforcement mechanism, which has never existed for the legislature in Albany, no hope exists of improving Albany's ethics.

First, the LEC must be abolished and its powers (except imposition of penalties) transferred to the JCOPE, which would have full power over the legislature —to provide advice and ethics training, to administer and enforce annual disclosure, and to enforce the ethics laws, with one exception. In order to preserve

[58] These proposals are largely consistent with the three recent major reports on state ethics reform. *See* ASS'N OF THE BAR THE CITY OF N.Y., REFORMING NEW YORK STATE'S ETHICS LAWS THE RIGHT WAY 34–46 (2010), *available at* http://www.abcny.org/pdf/report/uploads/20071860-ReformingNYSEthicsLaws theRightWay.pdf; N.Y. STATE BAR ASS'N, TASK FORCE ON GOVERNMENT ETHICS 36–37 (2011), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=46069; MEANINGFUL ETHICS REFORMS, *supra* note 25, at 2–4. Note that, as a candidate for governor, Andrew Cuomo pledged to create a unified, independent ethics commission:

> Self-policing is rarely effective. Currently, our State government's ethics laws are policed by several separate entities, each without the independence necessary to ensure that violations are fully and fairly investigated and prosecuted. In particular, the Legislature essentially polices itself rather than making its members subject to investigation by an independent body. To restore public confidence and address this potential and actual conflict of interest, Andrew Cuomo will fight to eliminate the existing oversight bodies and establish an independent state ethics commission with robust enforcement powers to investigate and punish violations of law by members of both the executive and legislative branches.
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> . . . .
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> Thirty-nine states provide external oversight of their State government officials though an independent ethics commission that has statutory authority and staffing that are independent of the rest of State government. Ethics commissions in only six states, including New York, do not have jurisdiction over state legislators. Such unified authority residing in a truly independent body not only ensures that the laws are interpreted in the same manner regardless of which type of public official is being considered, but also that the regulating officials do not look the other way to protect their colleagues at the expense of the public's interests.

CUOMO 2010, THE NEW NY AGENDA: A PLAN FOR ACTION 7, 7 n.2 (2010), http://www.andrewcuomo.com/system/storage/6/34/9/378/acbookfinal.pdf.

separation of powers and the well-established doctrine that a legislative body should be the sole judge of the qualifications of its members,[59] the legislature must maintain the sole power to impose civil sanctions, including civil fines, upon its members and staff. JCOPE, however, would possess full authority to investigate members and staff of the legislature, hold due process hearings on possible violations, and issue a public report with findings of fact, conclusions of law, and an order finding the legislator or legislative staff member in violation of the ethics laws and recommending a penalty. That public report would be referred for action to the legislature, which could, albeit at its political peril, downgrade the recommended penalty or simply refuse to take action at all. Over the past twenty years this exact approach has worked well in New York City, whose ethics Board, as noted above, has found more legislators and legislative staff in violation of the ethics law in a single year than the legislature's ethics body has in the past twenty years.[60] The legislature then would have no more authority with respect to ethics enforcement than any other state agency, except the legislature would retain sole jurisdiction to impose civil penalties, including civil fines, for violations of the ethics laws by its members and staff.

Second, JCOPE must be reduced in size from fourteen members to five, all of whom must be appointed by the governor with the advice and consent of the legislature, without regard to political party affiliation. Again, that appointment system has worked well in New York City, where the quality and independence of the appointees has been uniformly high and where, under a prior mayor, sometimes the council has not consented, requiring the withdrawal of an nomination and the making of a new one. If, however, the legislature expresses significant and well-founded concern over such gubernatorial appointment power, the solution lies in a process similar to that adopted in Hawaii. The governor can be required to choose from among candidates nominated by a nominating panel (again, without regard to political party affiliation) whose independent,

[59] *See, e.g.*, U.S. CONST. art. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); N.Y.C. CHARTER § 2603(h)(3) (providing that the New York City Conflicts of Interest Board may determine, in a public order, that a councilmember has violated the City's ethics law but further providing that only the council may impose penalties upon its members and staff).

[60] *See supra* note 54.

non-partisan (*not* bi-partisan), non-political members are specified in the law—for example, the Chief Judge of the State of New York, the President of the New York State Bar Association, the chair of one or more designated civic groups, and the like. But any group, such as unions, active in partisan political matters must be excluded from the nominating panel.[61]

Third, the provisions of the Reform Act that micromanage staff, training, and investigations must be repealed, to promote efficiency, flexibility, and innovation. Instead, the law should include only general provisions on staffing, training, and the relative power of JCOPE members and staff as to investigations. At the same time, the Executive Director must serve at the pleasure of the commission. Finally, the law *must* protect the budget of JCOPE, perhaps as a percentage of the net total expense budget of the state or as a fixed amount with an inflation adjustment,[62] for virtually alone among state agencies, JCOPE

[61] Governor Paterson's ethics bill included a designating commission to appoint the members of a unified state government ethics commission. S. 6615-A, 2010 Leg., 233d Reg. Sess. (N.Y. 2010). Section 8 of the bill would have enacted a new section 73-e of the Public Officers Law establishing the designating commission. *Id.* Although that commission's members would have been appointed by the statewide elected officials and majority and minority legislative leaders, it would have abolished split appointments and removed the appointment of ethics commission members from the direct political process. *Id.* Section 1 of the bill would have given the ethics commission jurisdiction over legislators and legislative staff (proposed N.Y. PUB. OFF. LAW § 73-c(1)). *Id. See* Nicholas Confessore, *Paterson Seeks Sweeping Overhaul to Combat Political Corruption*, N.Y. TIMES, Jan. 5, 2010, at A15; Jimmy Vielkind, *The "Reform Albany Act," Explained*, N.Y. OBSERVER, Jan. 5, 2010; Editorial, *Some Honesty in Albany*, N.Y. TIMES, Jan. 7, 2010, at A30.

[62] *See, e.g.*, N.Y.C. CHARTER § 259(b) ("The appropriations available to pay for the expenses of the independent budget office during each fiscal year shall not be less than ten per centum of the appropriations available to pay for the expenses of the office of management and budget during such fiscal year."); MICH. CONST. art. xi, § 5 (requiring that the legislature appropriate to the Michigan Civil Service Commission "a sum not less than one percent of the aggregate payroll of the classified service for the preceding fiscal year"); NEW ORLEANS HOME RULE CHARTER § 9-401(3) (requiring that the Office of Inspector General, in conjunction with the Ethics Review Board, receive an annual appropriation from the Council, not subject to mayoral veto, in an amount not less than .75% of the General Fund operating budget, enacted in October 2008 by a citywide vote with a margin of nearly eighty percent); CAL. GOV'T CODE § 83122 (West 2005) (guaranteeing a budget of $1,000,000 for fiscal year 1975–1976, adjusted for cost-of-living changes during each fiscal year thereafter, for the California Fair Political Practices Commission); PHIL. HOME RULE CHARTER § 2-300(4)(e) (providing for minimum guaranteed budget of $1,000,000 for first two fiscal years of Philadelphia Board of Ethics and authorizing Board of Ethics to sue the Council if it thereafter fails to provide an amount adequate for the

exercises advice and enforcement power over the very persons who set its budget, often at the very time they are setting its budget, an unseemly conflict of interest that undermines the independence of the commission both in perception and in fact.

With these four changes, the Reform Act would at last deserve its name. Without them, it will remain what it is today: another sad example of legislative smoke and mirrors.

Board of Ethics to meet its Charter mandates); proposed amendment to N.Y.C. CHARTER § 2602(i) ("The appropriations available to pay for the expenses of the [conflicts of interest] board during each fiscal year shall not be less than seven thousandths of one percent of the net total expense budget of the city.").