

# Hope For JCOPE

**Report of the  
New York City Bar Association  
and  
Common Cause/New York**



MARCH 14, 2014

## **TABLE OF CONTENTS**

I.	Introduction.....	1
II.	Historical Background .....	6
	A.    Prior Efforts At Creating An Ethical Watchdog For New York.....	6
	B.    The New York Bar’s NYSBA and NYCBA Critiques of the CPI and LEC .....	8
	C.    The Creation of JCOPE .....	10
	D.    Public Reaction to JCOPE .....	12
III.	The Review Group’s Assessment .....	16
	A.    JCOPE’s Enforcement Activities.....	16
	1.    JCOPE’s Investigation of Assemblyman Lopez.....	17
	a.    Factual Background .....	17
	b.    Analysis.....	19
	c.    Recommendations.....	23
	B.    JCOPE’s Regulation of Lobbyists .....	29
	1.    Public Disclosure of Lobbyists’ Activities .....	30
	a.    Analysis.....	30
	b.    Recommendations.....	31
	2.    Lobbyist Conduct Creating an Appearance of a Significant Risk of Conflict of Interest .....	33
	a.    Analysis.....	33
	b.    Recommendations.....	36
	C.    The JCOPE Website .....	37
	1.    Analysis.....	39
	a.    User Friendliness .....	39
	b.    Transparency.....	42
	c.    Availability of Relevant Data .....	44
	2.    Recommendations.....	46
	D.    Self-Dealing .....	47
	1.    Analysis.....	47
	2.    Recommendations.....	49
	E.    Training.....	51
	1.    Analysis.....	52
	2.    Recommendations.....	53
	F.    Composition of the Commission .....	57
	1.    Analysis.....	57
	2.    Recommendations.....	61
IV.	Conclusion .....	62

## I. INTRODUCTION

The Joint Commission on Public Ethics (“JCOPE” or “Commission”), created by Chapter 399 of the Laws of 2011, is the body that administers and interprets the laws governing the ethics of New York public officials in both the Legislative and Executive Branches. It has the responsibility for initiating and conducting ethics investigations and decides whether a substantial basis exists to conclude that the ethics laws have been violated. It may impose sanctions, except in the case of a member or employee of the Legislature, where sanctions are imposed by the Legislative Ethics Commission (“LEC”).<sup>1</sup> An appointing authority may also impose disciplinary sanctions for violations found by the Commission. The Commission also enforces the State’s lobbying laws and is charged with administering public disclosure of both ethics and lobbying filings, including those designed to disclose conflict of interest risks and the nature and extent of special interest advocacy directed at public officials. It carries out ethics and lobbyist training and annually reports on, among other things, changes it believes are needed in the laws related to the conduct of persons within its jurisdiction, such as public officials and lobbyists.

It is in the interest of the State of New York that JCOPE be strong and effective. First, ethics laws are the first line of defense against actual corruption, such as paying a benefit in exchange for the action or inaction of a public official, whether that action is the vote of a member of the Legislature or an action by a state agency controlled or influenced by a member of the Executive Branch. It is the first line of defense because the rigorous enforcement of rules related to conflict of interest and breach of the public trust deters conduct that constitutes even the appearance of unethical or criminal behavior. Appearance is the common ethical standard and is, for example, the standard of ethical rules that govern the conduct of attorneys. Second,

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<sup>1</sup> The LEC may also consider whether it agrees with JCOPE’s determinations on questions of law.

ethics rules regulate activities which create conflicts of interests that may bias the judgment of the public officer against the interests of the State and its people, and his or her constituents in the case of elected officials, in favor of special interests and others whose private objectives may be in conflict with the public good. Third, and most importantly, because ethics rules are based on both the fact and appearance of impropriety, they serve to require a mode of official behavior that reduces cynicism and encourages the people's trust in government and their willing participation in the political process.

This assessment of the Commission after two years of its operation is being conducted jointly by the New York City Bar Association through its Committee on Government Ethics and Common Cause/New York (the "Review Group"). In the coming months there will be other reviews. The law establishing JCOPE requires, in § 21, that by no later than June 1, 2014 the Legislative Leaders and the Governor appoint eight people to review JCOPE's work and report by March 1, 2015.<sup>2</sup> That report must include "any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics laws in New York State." In addition, JCOPE and the LEC must, by February 1, 2015, conduct and report on their own internal review of "the effectiveness of existing laws, regulations, guidance and ethics enforcement structure to address the ethics of covered public officials and related parties." That report must include any advisory opinions or guidance necessitated by that review and propose any necessary statutory changes.<sup>3</sup>

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<sup>2</sup> "No later than June 1, 2014, the governor and the legislative leaders shall jointly appoint a review commission to review and evaluate the activities and performance of the joint commission on public ethics and the legislative ethics commission in implementing the provisions of this act. On or before March 1, 2015, the review commission shall report to the governor and the legislature on its review and evaluation which report shall include any administrative and legislative recommendations on strengthening the administration and enforcement of the ethics law in New York state. The review commission shall be comprised of eight members and the governor and the legislative leaders shall jointly designate a chair from among the members." N.Y. Laws 399 § 21 (2011)

<sup>3</sup> N.Y. Laws 399 § 94(1) (2011)

This Review Group believes that it is not too early to assess the effectiveness of JCOPE and its scope of authority, and to make recommendations for improvements that can be implemented now, often at little or no cost. In the past two years New York State's reputation has continued to be severely damaged by a series of criminal convictions and proven acts of breach of trust by elected officials. As this report was being finished, the latest in a string of State Legislators charged with criminal misconduct has just been convicted. We believe that JCOPE has the statutory authority to take the initiative and act now on recommendations that will go far to meet JCOPE's burden to demonstrate to the public its energy and commitment and thereby advance JCOPE's mission to secure public trust in government. The public need not wait until late 2015, or more likely 2016, for JCOPE to make these needed changes. Other steps to shore up the independence of JCOPE in fact and appearance will require legislation. Again there is no reason to wait.

This Report focuses on six areas: Enforcement, Regulation of Lobbying Activities, JCOPE's Website, Standards Relating to Self-Dealing, Ethics Training, and the Composition of the Commission. The "Hope for JCOPE" referred to in the title of this Report is that it act with the real vigor needed in the circumstances the State faces to help restore public confidence in government and arrest the decline in the public's participation in the political process. As explained more fully below, we believe that in overall terms JCOPE's first two years have been unsuccessful in meeting this mission because the agency has not acted with that full vigor. As noted above, JCOPE has the burden of proof to persuade the public of its independence, vigor and commitment, and in its first two years it has not in our judgment carried that burden. In many respects, JCOPE appears reactive rather than proactive. Much of its activity entails processing assigned work flow. We find that in areas such as the promulgation of regulations

and responding to requests for formal or informal advice it appears to have performed well. However, our view is that JCOPE is an agency that must be proactive and aggressive in the cause of ethical government by following investigations wherever they may lead and by making full use of its statutory powers. Our recommendations set forth what can and should be done in this regard.

Below in bullet point form are our recommendations. Those that can be implemented without the need for legislation are in bold.

- Enforcement
  - Eliminate the Political Party Component of the Special Vote Requirement for Enforcement Decisions
  - **Require Disclosure of Special Votes That Veto Enforcement Against the Vote of a Commission Majority**
  - **Delegate to the Executive Director the Ability to Issue Person of Interest or Target Letters in Ongoing Investigations**
  - **To Assure Appearance of Independence, Erect a Firewall between JCOPE Commissioners and the Public Officials Who Appointed Them**
  - **Issue Guidance Regarding Sanctions for Violating Public Officers Law § 74(3)(f) (appearance of undue influence) and § 74(3)(h) (breach of trust) of the Code of Ethics**
  - **Issue Guidance Regarding the Ethical Duty to Report Criminal or Fraudulent Behavior of Public Officers**
- JCOPE's Regulation of Lobbying Activities
  - **Require More Particularized and Uniform Disclosure**
  - **Promulgate a Lobbyist Code of Ethics**
- JCOPE's Website
  - Work to Expand Project Sunlight Beyond Procurement and Regulatory Issues in the Executive Branch to Include Law Making and the Legislative Branch

- **Together with the Attorney General and the Project Sunlight Office, Convene a Roundtable for Database Users And Work to Meet their Needs**
- Self-Dealing
  - **Issue Guidance that Bans Legislators, their Staffs and their Immediate Families from Holding Office, Recommending Employment, or Engaging in Certain Business Dealings with State-Funded Not-for-Profit Organizations**
- Ethics Training
  - **Prepare a Comprehensive and User Friendly Ethics Handbook**
  - **Provide Guidance on the Ethical Rules Applicable to Dealings With Large Campaign Contributors**
  - **Specify in that Guidance a Standard that Prohibits the Appearance of Unethical Conduct in Selling Special Access to Large Contributors or Their Lobbyists**
  - **Work to Use Guidance and Advocacy to Build a Better and More Ethical Culture for the State Of New York**
  - **Use Video Messages from Top State Leadership to Promote an Ethical Culture**
- Composition of the Commission
  - Eliminate the Express Political Test for Gubernatorial Appointments
  - Reduce Gubernatorial Appointments to Four
  - Reduce Legislative Leader Appointments to a Total of Six
  - Add Appointments by the Chief Judge, the Attorney General and the Comptroller
  - Make the Size of the Commission an Odd Number, Namely Thirteen

We wish to extend our gratitude to JCOPE for their full and most helpful cooperation with our work. We do not doubt that the Commissioners and their staff are all people of ability and goodwill desirous of doing their job well. We have met twice with the Commission Chair and Executive Director and on both occasions had helpful dialogue about what might be done.

We believe they are eager to do more. It is the Review Group’s hope that our recommendations will be seen as constructive, and that our offer to help facilitate the implementation of these or comparable steps, including advocating the budgetary funding needed to carry out the recommendations below that require additional funding. The creation of JCOPE was appropriately heralded at the time as a breakthrough, and a new beginning of ethical government for our State. JCOPE remains a young agency. Its bumpy past need not be prologue. It is time to capitalize on the lessons of JCOPE’s first two years, and help the agency realize its original promise. That is our Hope for JCOPE.

## **II. HISTORICAL BACKGROUND**

### **A. Prior Efforts At Creating An Ethical Watchdog For New York**

The Public Integrity Reform Act of 2011 (“PIRA”),<sup>4</sup> which created JCOPE, was the product of Governor Andrew Cuomo’s campaign promise to address unethical conduct in state government. During his first six months in office, Governor Cuomo made passage of the legislation a top priority, using the influence and weight of his office across the State to convince the legislature to enact his proposed reforms. PIRA was intended to be an improvement upon past ethics reforms, which had not prevented a string of scandals involving officials and legislators.

The modification to lobbying and ethics laws in New York State began with the Public Employee Ethics Reform Act of 2007 (“PEERA”),<sup>5</sup> which was the first comprehensive ethics legislation passed by the Legislature in more than 20 years.<sup>6</sup> PEERA merged the State Ethics Commission and the Temporary Commission on Lobbying to create a combined commission

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<sup>4</sup> 2011 N.Y. Laws 399. PIRA was signed into law by Governor Cuomo on August 15, 2011.

<sup>5</sup> 2007 N.Y. Laws 159. PEERA was signed into law by Governor Spitzer on March 27, 2007.

<sup>6</sup> See Ethics in Government Act of 1987, 1987 N.Y. Laws 3022.



called the Commission on Public Integrity (“CPI”).<sup>7</sup> The thirteen-member CPI had jurisdiction over statewide elected officials and candidates for statewide elected office; State officers and employees; political party chairs; lobbyists and clients of lobbyists—but not legislators or employees of the Legislature. The latter non-covered groups came under the jurisdiction of the separate LEC. The membership of the LEC, which formerly consisted solely of active legislators, was adjusted to include nine appointments from the legislative leadership, with four seats reserved for sitting legislators.

The CPI and LEC had similar roles within their respective jurisdictions. The CPI was empowered to provide advisory opinions, conduct investigations, and impose penalties for violations of the state’s ethics laws.<sup>8</sup> The LEC, on the other hand, had the statutory power to promulgate regulations on limited matters, assist the Legislature in creating rules and regulations, including those concerning the conduct of covered individuals, and was responsible for educating employees of the legislative branch about the state’s ethics laws.<sup>9</sup>

During its existence, allegations were made that the CPI was being used for political purposes by Governor Eliot Spitzer.<sup>10</sup> The “Troopergate” matter, in which the Executive Director of CPI inappropriately shared confidential CPI information with members of the Spitzer administration, undermined confidence in CPI, which was controlled by governor-appointed commissioners and affected by overlapping bureaucracies.<sup>11</sup> In addition, the LEC, which was

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<sup>7</sup> 2007 N.Y. Laws 159. PEERA was signed into law by Governor Spitzer on March 27, 2007.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *See, e.g., Fed Up With Albany*, N.Y. TIMES, Oct. 19, 2009, at A26, available at <http://www.nytimes.com/2009/10/19/opinion/19mon1.html>.

<sup>11</sup> State of New York Office of the Inspector General, *An Investigation of an Allegation That Herbert Teitelbaum, Executive Director of the Commission on Public Integrity, Inappropriately Disclosed Confidential Commission Information Related to Its Troopergate Investigation and An Investigation of the Appropriateness of the Commission on Public Integrity’s Response Upon Receiving the Allegations Against Its Executive Director* 168-174 (May 13, 2009);

never fully staffed, did not initiate a single significant investigation of legislator misconduct until 2010.<sup>12</sup> During this same time, no fewer than nine legislators were indicted or convicted of bribery, fraud or other crimes committed while they were in office.<sup>13</sup>

### **B. The New York Bar’s NYSBA and NYCBA Critiques of the CPI and LEC**

In light of PEERA’s history, numerous government watchdog groups,<sup>14</sup> the New York City Bar Association (“NYCBA”) and the New York State Bar Association (“NYSBA”) recommended the creation of a new ethics agency. The NYCBA argued that even after PEERA, New York State government remained “under intense scrutiny for its ethical shortcomings.”<sup>15</sup> The NYSBA suggested that additional changes were needed to bolster “the ethics climate in New York State.”<sup>16</sup> The NYCBA and NYSBA made recommendations for a new ethics agency. The recommendations included: (1) combining the CPI and the LEC into a single agency, (2) reducing the number of commissioners serving on the new agency, (3) protecting the ethics agency’s independence and funding, and (4) resolving the conflict between the CPI and LEC’s dual roles as ethical enforcer and advisor.

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*See also* Fred Lebrun, *Many Questions Linger About State Ethics Panel*, ALBANY TIMES UNION, Oct. 17, 2011, available at <http://www.timesunion.com/local/article/Many-questions-linger-about-state-ethics-panel-2220733.php>.

<sup>12</sup> Lawrence Norden, et al., *Meaningful Ethics Reforms for the ‘New’ Albany*, Brennan Center for Justice at New York University Law School (Feb. 11, 2011) at 2, available at [http://www.brennancenter.org/sites/default/files/legacy/Democracy/Meaningful\\_Ethics\\_Reform\\_New\\_Albany\\_Final.pdf](http://www.brennancenter.org/sites/default/files/legacy/Democracy/Meaningful_Ethics_Reform_New_Albany_Final.pdf).

<sup>13</sup> *Id.*

<sup>14</sup> *See, e.g., id.* PEERA ignored “calls for an independent, bipartisan commission with jurisdiction over all public officials, including the executive and legislative branches and lobbyists” and “New York was left with the bifurcated and confusing system of ethics oversight that has largely stood by, mute, through a series of scandals on the legislative side.”

<sup>15</sup> “Reforming New York State’s Ethics Laws The Right Way,” Report of the New York City Bar Association Committee on State Affairs and Committee on Government Ethics, Feb. 2010, at 1, available at <http://www.nycbar.org/pdf/report/uploads/20071860-ReformingNYSEthicsLawstheRightWay.pdf>. [hereinafter “NYCBA Report”]

<sup>16</sup> New York State Bar Association Task Force On Government Ethics, Jan. 28, 2011, at 5, available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26662>. [hereinafter “NYSBA Report”]

Both bar associations recommended that the CPI and the LEC be combined into a single independent agency with responsibility for overseeing and enforcing ethics laws for the executive branch, the Legislature and lobbyists alike. The NYCBA noted that the “Legislative branch is not hermitically sealed from its coordinate branches” and argued that some overlap between the branches would not violate the separation of powers.<sup>17</sup> Further, the NYCBA commented that the Legislature could, through standing committees on ethics, continue to police its own membership,<sup>18</sup> and that the creation of a single ethics agency would follow the practice of a majority of states which have some type of unified ethics commission with jurisdiction over both legislative and executive branches.<sup>19</sup>

The NYSBA recommended that the number of commissioners on the new agency be reduced from thirteen to between seven and nine. The NYSBA cited as support for this recommendation the CPI’s own admission that its large membership was “unwieldy.”<sup>20</sup> Both bar associations recommended that each commissioner serve a five-year term,<sup>21</sup> “so that their terms will outlast those of the elected official who appointed them.”<sup>22</sup>

To further preserve the independence of the ethics agency, the NYCBA called for the creation of a designating commission, similar to the system used to recommend potential nominees to the Court of Appeals, to appoint members to the ethics agency.<sup>23</sup> It recommended that the pool from which appointments can be made also be limited to persons who are not current state officials or lobbyists.<sup>24</sup> The NYSBA recommended that appointments to the agency come from a number of sources: the Chair being appointed by the Governor and confirmed by

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<sup>17</sup> NYCBA Report at 35.

<sup>18</sup> *Id.* at 44-45.

<sup>19</sup> NYSBA Report at 36.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5

<sup>22</sup> NYCBA Report at 42.

<sup>23</sup> NYCBA Report at 37-40.

<sup>24</sup> *Id.* at 29.

the Senate; two additional members, who could not be of the same political party, appointed by the Governor; one member each appointed by the Attorney General and Comptroller, and one member each appointed by the legislative leaders.<sup>25</sup> In addition, the NYSBA recommended that the independence of the ethics agency be safeguarded by secured annual funding.<sup>26</sup>

Finally, the NYSBA stressed that the CPI and the LEC should have roles that go beyond their enforcement authorities. Both agencies provide ethical advice and issue advisory opinions, collect and manage financial disclosure statements, and ensure transparency through periodic reporting by lobbyists and their clients. As such, the NYSBA recommended the creation of two distinct bureaus that would report to the same executive director. One would receive requests for, and proffer advisory opinions, as well as receive and review financial disclosure statements and lobbyist reports, while the other would be concerned only with the investigation of ethics violations.<sup>27</sup> The NYCBA concurred in that any new ethics agency should have the power to conduct meaningful investigations, with the authority to issue subpoenas.<sup>28</sup>

### **C. The Creation of JCOPE**

PIRA amended New York's Executive Law to create JCOPE out of the old CPI. PIRA acknowledges the continued existence of the LEC, but with more limited authority. JCOPE has the authority to oversee and investigate the conduct of employees and elected officials in both branches of government, as well as lobbyists, while the LEC has the authority to impose penalties on legislators and legislative branch employees who violate their ethical obligations or fail to file the required disclosure forms.<sup>29</sup>

JCOPE is composed of fourteen members serving staggered five-year terms:

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<sup>25</sup> NYSBA Report at 36.

<sup>26</sup> NYCBA Report at 43.

<sup>27</sup> NYSBA at 36-37

<sup>28</sup> NYCBA at 40-42.

<sup>29</sup> 2011 N.Y. Laws 399

- six members appointed by the Governor, with three from the major party of which the Governor is not a member;
- three appointed by the Senate President;
- three appointed by the Speaker of Assembly;
- one appointed by the Senate Minority Leader; and
- one appointed by the Assembly Minority Leader.

The pool of potential appointees is limited to those who have not served as a registered lobbyist in the last three years or served as a statewide office holder, legislator, state commissioner, or political party chairman in the last year. As was the case with the CPI, the governor has the authority to appoint the chair of JCOPE. The executive director is appointed by the Commission itself under a special voting procedure. The procedure requires the concurrence of at least one member appointed by the Governor from each of the two major political parties, and at least one member appointed by the legislative leaders from each of the two major political parties.<sup>30</sup>

JCOPE has the power and responsibility to investigate violations by persons in either the legislative or executive branches, or by a lobbyist or lobbying client, of the ethics, disclosure and lobbying laws it administers. However, in order to initiate an investigation, eight members of JCOPE must consent and, unless the investigation involves a lobbyist, at least two of the eight members must be from the other party and branch. JCOPE's jurisdiction to impose penalties, including a referral for a criminal prosecution and the forfeiture of a public servant's pension, is limited to executive employees and lobbyists. With respect to legislators, JCOPE can only

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<sup>30</sup> *Id.*

provide a report to the LEC, which will determine what, if any, sanction or penalty will be imposed. The LEC's disposition of the matter must be made public.<sup>31</sup>

JCOPE, like the CPI, also has the power to issue guidance and advisory opinions. Among the duties JCOPE acquired from the former CPI is the development of an online ethics training programs for government officials and employees. The enacting statute contained a new provision for the ethics training of lobbyists.<sup>32</sup>

#### **D. Public Reaction to JCOPE**

Among the improvements cited by PIRA's supporters is that JCOPE has some authority over ethical lapses by legislators as well as executive branch members.<sup>33</sup> Detractors raised concerns stemming from JCOPE's structure. Critics noted that even though JCOPE was the largest such ethics agency in the nation at fourteen members,<sup>34</sup> the dissent of only two members can thwart the initiation of an investigation. This has been called the potential "Achilles heel" of the agency.<sup>35</sup> Twelve commissioners can vote to proceed with an investigation of the executive branch and yet the opposition of two members can prevent it.<sup>36</sup> Thus, JCOPE may be "far more prone to partisan vetoing of investigations than the" CPI.<sup>37</sup> In fact, it has been suggested that JCOPE may be "so deeply flawed in its structure as to be wholly ineffective."<sup>38</sup> Governor

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Joel Stashenko, *Appointment of D.A. to Chair Ethics Commission Signals More Aggressive Approach*, *Experts Say*, N.Y.L.J., Dec. 19, 2011.

<sup>34</sup> *Ethics: State Ethics Committee*, NATIONAL CONFERENCE OF STATE LEGISLATURES, [www.ncsl.org/research/ethics/state-ethics-commissions.aspx](http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx)

<sup>35</sup> Stashenko, *supra* n.33.

<sup>36</sup> Danny Hakim, "Ethics Commission Quietly Names New Director," N.Y. TIMES, Feb. 2, 2012.

<sup>37</sup> LeBrun, *supra* n.11.

<sup>38</sup> *Ethics Reform, Albany Style*, N.Y. TIMES, June 7, 2011 at A30, *available at* <http://www.nytimes.com/2011/06/07/opinion/07tue1.html>.

Cuomo has acknowledged that “[t]o the extent that we need to make some tweaks to the law...then that’s something that needs to be entertained.”<sup>39</sup>

Comment was also made of the time it took between Governor Cuomo’s signing of PIRA on August 15, 2011 and the appointment of members to JCOPE on December 12, 2011.<sup>40</sup> During this time the old CPI ran on a skeleton staff and continued to receive filings and provide records to the public, but its ongoing enforcement actions were held in abeyance until JCOPE was up and running.<sup>41</sup>

There also have been questions concerning some of JCOPE’s early operating procedures. While Governor Cuomo’s designation of Janet DiFiore, a sitting district attorney, as the original chair of JCOPE signaled to some a more aggressive approach to enforcing ethics laws in state government, others said that the real question was whether JCOPE would hire experienced investigators to develop its cases.<sup>42</sup> The practice of conducting most of JCOPE’s business in private session, and asking observers of the commission’s public meetings to identify themselves, has drawn criticism.<sup>43</sup>

Later, when JCOPE announced that Ellen Biben would serve as the Commission’s first executive director, some questioned whether her service as Governor Cuomo’s deputy at the attorney general’s office and as his inspector general would affect her independence.<sup>44</sup> Some felt this concern was reinforced when she announced at her first meeting that JCOPE was part of the executive branch and operated under the jurisdiction of the governor’s appointed state inspector

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<sup>39</sup> Nick Reisman, *Cuomo: Changes May Be Needed for JCOPE*, NY STATE OF POLITICS, May 21, 2012, available at <http://www.nystateofpolitics.com/2012/05/cuomo-changes-may-be-needed-for-jcope/>

<sup>40</sup> *Governor Cuomo and Legislative Leaders Appoint Member to the Joint Commission on Public Ethics*, NY GOVERNOR, Dec. 12, 2011, available at <http://www.governor.ny.gov/print/2138>.

<sup>41</sup> David Howard King, *Is the Long Wait for New Watchdog Nearing its End?* GOTHAM GAZETTE, Oct. 27, 2011, available at <http://www.gothamgazette.com/index.php/government/854-is-the-long-wait-for-a-new-watchdog-nearing-its-end->

<sup>42</sup> Stashenko, *supra* n.33.

<sup>43</sup> Hakim, *supra* n.36.

<sup>44</sup> *Id.*

general.<sup>45</sup> Legislators disagreed, claiming that boards where most of their members were appointed by legislative leaders have traditionally been considered under the jurisdiction of the Legislature.<sup>46</sup>

JCOPE's beginnings signaled a "rocky start". After short tenures with the Commission, both Ms. DiFiore and Ms. Biben resigned from JCOPE in 2013. Ms. DiFiore, who continued to hold her position as Westchester District Attorney and raise campaign funds while serving as JCOPE's chair, resigned in April 2013 to focus on her re-election.<sup>47</sup> The issue of her fundraising had been a source of controversy during her sixteen months as chair.<sup>48</sup> Governor Cuomo replaced Ms. DiFiore a month later by elevating one of his appointees to JCOPE, Daniel Horwitz, a partner at the New York City law firm of McLaughlin & Stern, LLP and a former New York County Assistant District Attorney.<sup>49</sup>

In May 2013, after Ms. Biben announced that she would be leaving,<sup>50</sup> and JCOPE began running newspaper advertisements seeking to fill the executive director vacancy.<sup>51</sup> Commissioner Ellen Yaroshefsky, an appointee of Assembly Speaker Sheldon Silver, publicly advocated that the Commission take the time and expend the resources to conduct a national search for a new executive director.<sup>52</sup> In October 2013, JCOPE named Letizia Tagliafierro, who

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<sup>45</sup> *Legislative Appointees Question NY Ethics Board*, THE WALL STREET JOURNAL, Feb. 28, 2012.

<sup>46</sup> *Id.*

<sup>47</sup> Jimmy Vielkind, *JCOPE Director Biben is Resigning*, ALBANY TIMES UNION, May 2, 2013, available at <http://www.timesunion.com/local/article/JCOPE-director-Biben-is-resigning-4484668.php>.

<sup>48</sup> David Howard King, *Cuomo Appoints New JCOPE Chair As DiFiore Resigns*, GOTHAM GAZETTE, Apr. 22, 2013, available at <http://www.gothamgazette.com/index.php/the-eye-opener/entry/state/2013/04/22/cuomo-appoints-new-jcope-chair-as-difiore-resigns->

<sup>49</sup> *Id.*

<sup>50</sup> Viekland, *supra* n.47.

<sup>51</sup> James M. Odat, *Agency Seeks Qualified Cop*, ALBANY TIMES UNION, Aug. 4, 2013, available at <http://www.timesunion.com/local/article/Agency-seeks-qualified-cop-4706640.php>.

<sup>52</sup> Glenn Blain, *Former Gov. Cuomo Aide Letizia Tagliafierro Named Executive Director of Joint Commission on Public Ethics*, NY DAILY NEWS, Oct. 30, 2013, available at <http://www.nydailynews.com/news/politics/tagliafierro-named-executive-director-joint-commission-public-ethics-article-1.1501065>



had served as JCOPE's first director of investigation, to fill the position.<sup>53</sup> According to one media article, Ms. Yaroshefsky quit in apparent protest over the failure to launch a national search.<sup>54</sup>

In addition to Ms. Yaroshefsky, three of the other original JCOPE commissioners have resigned.<sup>55</sup> Ravi Batra, an outspoken appointee of Senate Democratic Leader John Sampson, resigned expressing protest over how the Commission has been run.<sup>56</sup> Commissioner Pat Bulgaro resigned without stating a reason for his resignation, but he had complained publicly about leaks from the Commission to the media during the Commission's investigation of Assembly Member Vito Lopez.<sup>57</sup> Commissioner Vincent Delorio resigned, citing "personal and professional commitments."<sup>58</sup>

The highly credentialed individuals who have served JCOPE in its start-up period deserve great appreciation and thanks. The Review Group emphatically underscores that no criticism of character, integrity or competence is intended or implied here. At the same time, it is simply to be recognizing reality to note that the departure of so many individuals during JCOPE's short existence has left the Commission in a near constant state of change that has no doubt made it more difficult for the Commission to do its job. Those appointing JCOPE Commissioners naturally want to appoint persons well suited by reason of character, aptitude and experience and in that regard their choices should take account of the need for the appearance of independence

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<sup>53</sup> Jessica Alaimo, *JCOPE, Again, Confronts a Leadership Issue*, CAPITAL NEW YORK, Oct. 29, 2013, available at <http://www.capitalnewyork.com/article/politics/2013/10/8535214/jcope-again-confronts-leadership-issue>.

<sup>54</sup> Blain, *supra* n.52.

<sup>55</sup> Cf. Cuomo, *legislative leaders name JCOPE members*, ALBANY TIMES UNION, Dec. 12, 2011, available at <http://blog.timesunion.com/capitol/archives/95460/cuomo-legislative-leaders-name-jcope-members/> with JCOPE, *About Us, The Commission*, <http://www.jcope.ny.gov/about/commission.html>.

<sup>56</sup> Liz Benjamin, *Batra Quits JCOPE*, STATE OF POLITICS, Sept. 7, 2012, available at <http://www.nystateofpolitics.com/2012/09/batra-quits-jcope/>.

<sup>57</sup> Karen DeWitt, *Appointees Resign Amidst Lack of Faith in Ethics Panel*, NORTH COUNTRY PUBLIC RADIO, July 31, 2013, available at <http://www.northcountrypublicradio.org/news/story/22456/20130731/appointees-resign-amidst-lack-of-faith-in-ethics-panel>.

<sup>58</sup> *Another JCOPE Resignation*, CAPITAL NEW YORK, Dec. 24, 2013, available at <http://www.capitalnewyork.com/article/albany/2013/12/8537918/albany-pro-another-jcope-resignation>.

from the appointing authority, a standard that seems currently met. Now it is time for a fresh start with the strong showing that the Review Group believes would be achieved were JCOPE to act on our, or similar, recommendations.

### **III. THE REVIEW GROUP'S ASSESSMENT**

#### **A. JCOPE's Enforcement Activities**

At the heart of JCOPE's effectiveness and its ability to discharge its statutory mission of improving public trust in government is the vigor with which it enforces the laws that it administers. When JCOPE was established many were skeptical of its enforcement capacity due to the special voting requirements applicable to enforcement actions. These requirements effectively give an enforcement veto to the appointees of the legislative leaders in the case of targets of investigation who are members of the Legislature, or employed in the Legislative Branch, and to appointees of the Governor as to targets of investigation employed in the Executive Branch. The requirements also give an enforcement veto to those appointed by legislative leaders of one party in the case of targets of enforcement who are members of that party. These provisions, while said to be justified on the basis of separation of powers concerns and the need to avoid politically motivated enforcement actions, also serve to undermine the full independence of JCOPE.<sup>59</sup>

To date, JCOPE has had few chances to demonstrate the breadth and efficacy of its enforcement powers, notwithstanding these provisions. However, the Commission's investigation into sexual harassment allegations against former New York Assemblyman Vito Lopez has come to serve not only as JCOPE's most high-profile effort, but also as the primary

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<sup>59</sup> JCOPE's scope and authority are set forth in Executive Law § 94. The special voting requirements, discussed in more detail below, are set forth in Executive Law § 94(13)(a).

example of the limitations the Commission’s structure creates for the Commission’s ability, both in fact and appearance, to investigate ethical misconduct in state government with full independence in both appearance and fact. It must be emphasized that since the primary purpose of JCOPE is to promote a restoration of public trust in government, something now lacking, the independence of JCOPE must be judged at least in part by the standard of the appearance of JCOPE’s independence. In doing so the Review Group wishes to emphasize that it is not making any conclusion that JCOPE should have found misconduct beyond what it found. We accept JCOPE’s findings of fact. Thus we are not passing on the merits of these matters, but only on the question whether JCOPE’s enforcement work met the basic test of pursuing a matter wherever it might lead without fear or favor.

1. JCOPE’s Investigation of Assemblyman Lopez

a. *Factual Background*<sup>60</sup>

From at least 2010 until 2012, Assemblyman Vito Lopez “engaged in an escalating course of conduct with respect to multiple female staff members.”<sup>61</sup> The conduct included “demeaning comments about appearance and dress as well as demands for fawning text and email messages.”<sup>62</sup> This escalated to “requirements for companionship outside the office, and culminated in attempted or forced intimate contact.”<sup>63</sup> Mr. Lopez rewarded female employees who tolerated his behavior or acceded to his demands with cash gifts, promotions, salary increases, and plum assignments.”<sup>64</sup> If female staff members resisted or were “not sufficiently demonstrative in their praise,” he “punished them with removal from important assignments,

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<sup>60</sup> Unless otherwise noted, all details from this section are taken from State of New York Joint Commission on Public Ethics, *In the Matter of an Investigation of Assemblymember Vito Lopez*, Substantial Basis Investigation Report (February 12, 2013) (hereinafter “Substantial Basis Report”) as articulated in pages 1-3 and further supported in the balance of the report.

<sup>61</sup> Substantial Basis Report, p. 2

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

public berating, and threats of demotion or job termination.”<sup>65</sup> He also “used his position and resources as an elected official to threaten or punish certain individuals, including those who left his office, and thereby created an environment that discouraged staff from making complaints or availing themselves of any form of redress against him.”<sup>66</sup> The first formal complaint of harassment was not filed until December 2011, though additional complaints were filed in January and July 2012. The complaints detailed Mr. Lopez’s habitual inappropriate behavior towards female staffers both within and without the workplace, as well as numerous instances of abuse of government funds and misuse of Mr. Lopez’s position and influence as a member of the Assembly.

The complaints from December and January were not referred to the Assembly Ethics Committee for investigation, despite written policies that mandated such referral. Instead, they were handled by the complainants’ legal counsel, members of the Assembly staff and on occasion by Speaker Silver himself. A private and confidential settlement was negotiated among Mr. Lopez, the complainants, Speaker Silver, and their respective counsel. The complainants’ allegations were not investigated and no measures were taken to protect other staff members in the Lopez office.<sup>67</sup> Subsequent investigations revealed that Assembly staff, not the complainants, were responsible for the decisions to make the settlement confidential.<sup>68</sup> Assembly staff were also responsible for the decision not to refer the complaints to the Ethics Committee, and the Speaker endorsed that decision.<sup>69</sup> Counsel for the Majority, despite conferring with the Office of the Attorney General (OAG) in drafting the settlement agreement and despite awareness that it was OAG policy to not include confidentiality provisions of any

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 41.

<sup>69</sup> *Id.* at 2.

kind in such a settlement agreement,<sup>70</sup> nevertheless pressed for confidentiality in this case, an action that, according to JCOPE, raised a “number of public policy concerns.”<sup>71</sup> Additionally, the Assembly funds that formed part of the settlement payment were paid from an obscure account whose title, “Miscellaneous Contractual Services Account”, misrepresented the nature of the payment and therefore served to conceal even the fact of a confidential settlement, let alone the identity of the parties.<sup>72</sup> It was not until the July 2012 complaints by two additional staff members of Lopez that the Assembly Ethics Committee investigated Mr. Lopez’s conduct.

In its report, JCOPE found a substantial basis to conclude that Mr. Lopez, through his abusive conduct, “used his office to pursue a course of conduct that was in violation of his public trust, to secure unwarranted benefits, and to give a reasonable basis for the impression that one could unduly enjoy his favor in the performance of one’s official duties.”<sup>73</sup> It made no finding as to whether there was a substantial basis to conclude that the Speaker or any member of his staff or any other parties had violated ethics laws administered by JCOPE. JCOPE noted that the scope of the investigation was confined to Assemblyman Lopez. The Report contains no indication of whether JCOPE considered extending its investigation to other participants in the settlement, including the Speaker and/or his staff. JCOPE has declined to answer that question on the ground of confidentiality.

*b. Analysis*

It is important to distinguish between the violation of ethical standards and the violation of civil and criminal laws. In the Lopez case, the central issue of misconduct was Mr. Lopez’s alleged sexual harassment of his staff members. This conduct (if proven) was unethical because

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<sup>70</sup> *Id.* at 43.

<sup>71</sup> *Id.* at 66.

<sup>72</sup> *Id.* at 45.

<sup>73</sup> *Id.* at 67.

it involved an abuse of official position, but it was also a civil wrong that carried potential legal liability for Mr. Lopez, and possibly his employer. Also, as lawyers well know, the manner in which a civil matter is handled can have ethical consequences. That is equally true of the manner in which a public officer handles a civil matter and particularly its settlement. As an ethical matter, a settlement with state funds must serve the interests of the State of New York and not just the interests of the person approving the settlement or the person whose conduct is the subject of the settlement. In this connection ethics laws reach conduct that, while not criminal, may give rise to the appearance of wrongdoing. There are elements of the Lopez case that reveal potential ethical failings that do *not* rise to the level of a violation of civil or criminal laws. It is this conduct that is the particular job of JCOPE to identify and sanction.

A threshold question is whether the facts set forth in JCOPE's Lopez Report implicate questionable conduct that might give rise to a possible ethics violation by the Speaker and his staff warranting further investigation and possible action by JCOPE. The New York State Code of Ethics, found in section 74 of the Public Officers Law, has several relevant provisions. Under the Code, it is a violation for a member of the legislature or a legislative employee to "use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself, herself or to others" (Public Officers Law § 74(3)(d)). It is also a violation for any such person to "by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person" (Public Officers Law § 74(3)(f)). Finally, such members and employees of the legislature are under an affirmative duty to "endeavor to pursue a course of conduct which will not raise suspicion

among the public that [they are] likely to be engaged in acts that are in violation of [their] trust” (Public Officers Law § 74(3)(h)).

If we consider the facts of the Lopez case in the public record in light of these ethical standards, then under § 74(3)(d) the actions which led to the private settlement of the Lopez complaints with public funds merited an investigation by JCOPE, at least on the basis that not disclosing Mr. Lopez’s wrongdoing publicly, or even to the Assembly Ethics Committee, may have secured unwarranted privileges or exemptions for Mr. Lopez. § 74(3)(f) may have been violated if the facts demonstrated that Mr. Lopez received this favor on account of his position in the Assembly or as an influential member of the majority party in the Assembly. And § 74(3)(h) may have been violated if the conduct of those involved in the settlement gave rise to reasonable suspicion that they were acting in violation of their public trust when they brought about a confidential and hidden settlement without referring the matter for investigation in accordance with established legislative policy.<sup>74</sup> We draw no conclusions as to whether such violations occurred, only that a JCOPE investigation into these matters was warranted.

We do not know why JCOPE’s Lopez Report did not address these potential violations. The law calls for a special vote in order for JCOPE to investigate a subject matter. Such a vote takes place either upon sworn complaint of a violation or on the Commission’s own initiative.<sup>75</sup> In order to commence a full investigation of matters under consideration, at least eight of the fourteen members of the Commission must vote in favor.<sup>76</sup> However, additional requirements are added when the subject of an investigation is a member of the legislature.

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<sup>74</sup> Danny Hakim, et al, *Assembly Leader Admits Fault as Critics Assail Secret Payoff*, N.Y. TIMES, Aug.28, 2012 at A1, available at <http://www.nytimes.com/2012/08/29/nyregion/lopez-to-yield-party-leadership-role.html>.

<sup>75</sup> N.Y. Executive Law Sec. 94(13)(a)

<sup>76</sup> *Id.*

“Where the subject of such investigation is a member of the legislature or a legislative employee or a candidate for member of the legislature, at least two of the eight or more members who so vote to authorize such an investigation must have been appointed by a legislative leader or leaders from the major political party in which the subject of the proposed investigation is enrolled if such a person is enrolled in a major political party.”<sup>77</sup>

Under this voting standard, the vote of the majority does not necessarily control. Of the fourteen JCOPE commissioners, three are appointed by the Senate President and three are appointed by the Speaker of the Assembly. Only one is appointed by the Senate minority leader and only one is appointed by the minority leader of the Assembly. The remaining six are executive appointments by the Governor and the Lieutenant Governor.<sup>78</sup>

When both houses of the legislature are controlled by the same party, only two commissioners are appointed by members of the minority. Thus under the rule set forth above, for JCOPE to investigate any legislator or legislative employee who is a member of the minority party, both appointees of the minority must join in the vote. A single dissent by either commissioner results in a defeat of the vote regardless of the actual margin.

In situations where Senate and Assembly majorities differ, three appointees of the investigative subject’s party can vote together to prevent an investigation, even if the Commission as a whole votes 11-3 in favor of investigating. Under such a scenario, even an overwhelming majority is not sufficient to invoke JCOPE’s investigative and enforcement powers to police legislative ethics.

Without knowing what actually transpired during JCOPE’s deliberations and its investigation of the Lopez case, such an anti-majoritarian vote, had it taken place, could have blocked the extension of the investigation to other persons whose conduct merited further inquiry.

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<sup>77</sup> *Id.*

<sup>78</sup> N.Y. Executive Law Sec. 94(2)



Because JCOPE’s practice is to keep the results of such votes secret (a practice we advocate changing), we do not know whether or not such a counter-majoritarian overrule took place. But the facts disclosed in the Commission’s Substantial Basis Report on the Vito Lopez matter clearly provided grounds for extending the investigation. At the same time, the Lopez Report makes clear that only Assemblymember Lopez was made a subject of investigation.<sup>79</sup> At a minimum, the “micro-minority veto” in JCOPE’s voting structure is antithetical to its purpose as a commission to restore public confidence in government and creates an appearance of lack of independence that is inconsistent with the mandate of an independent investigative body. JCOPE was created to a great extent to separate in fact and appearance ethics and lobbying enforcement from political influence. The Lopez Substantial Basis Report strongly suggests that that objective has not been achieved.

*c. Recommendations*

*Modifying the Special Vote Requirement*

The special vote requirement has two aspects of protection: protection against one branch of government seeking to dominate the other and protection against the members of one major political party seeking to unfairly disadvantage the other. The way the special vote requirement is structured, the political party protection component applies only if the person being investigated is a member of the Legislature or employed in the Legislative Branch. There is no political party protection for statewide elected officials or political appointees in the Executive

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<sup>79</sup> In presenting its findings about the confidentiality portion of the settlement, JCOPE concludes that “Confidentiality clauses that shield a public officer or institution from disclosure of allegedly improper or illegal conduct, however, raise a number of public policy concerns and should be subject to a high degree of circumspection.” Substantial Basis Report p. 66. But immediately afterwards, JCOPE clarifies that “The Commission authorized the investigation of alleged violations of the Public Officers Law *by Lopez*. Under the record here, the evidence does not establish such a violation *by Lopez* with respect to the inclusion of the confidentiality clause in the Settlement Agreement.” *Id.* (emphasis added). In presenting its conclusions, JCOPE was careful to ensure that its findings extended only to Lopez because only Lopez was an authorized target of the investigation.

Branch. While there is a constitutional right to form political parties, there is no constitutional requirement that party members be given the special protection that JCOPE's special voting requirement affords them.

The Review Group recommends that the political party protection aspect of the special voting requirement that is now applicable only to the Legislative Branch be eliminated. This would place the Legislative Branch and the Executive Branch on an equal footing. If the person to be investigated was a member of the Legislative Branch, two appointees of the legislative leaders would have to concur. If the person is a member of the Executive Branch, and assuming that the Governor continues to have six appointments, two appointees of the Governor would have to concur.

Political party protection measures impede effective enforcement. The Commission to Investigate Public Corruption Preliminary Report ("Moreland Commission Report") has recently singled out the political party protection mechanism found in the membership structure of the New York State Board of Elections as a cause of the poor enforcement record of that body. Moreover, it is the rare elected official who does not claim that even legitimate scrutiny of his or her conduct is politically motivated. Finally, the political protection provision is simply unsustainable in the circumstance where two houses of the Legislature are controlled by the same political party, since a single vote could block an investigation supported by thirteen Commissioners.

#### *Greater Transparency in the Enforcement Process*

Whether or not the recommendation set forth above is adopted by the Legislature and approved by the Governor, we believe that JCOPE has the power without new legislation to ensure public accountability whenever a special vote is used to block the action desired by the

majority. JCOPE has the power by a simple majority vote to disclose the use of an anti-majority veto for the reasons explained below. The public could then be the judge of whether the exercise of an anti-majority veto was appropriate. This disclosure to the public is particularly appropriate where an investigation into subject matter has been authorized and a veto is used to block the addition of new subjects of inquiry recommended by the JCOPE staff. Such action blocks pursuing an investigation wherever it objectively may lead.

We understand that the Commission is bound by certain confidentiality requirements, the violation of which is a class A misdemeanor.<sup>80</sup> But under Section 94(9-a) of the Executive Law, confidentiality covers only testimony and information received by a commissioner or staff member, and does not extend to the fact that a veto has been exercised to block a particular investigation or to add a particular person as a subject of that investigation.<sup>81</sup> Moreover, the confidentiality requirement applies only “during the pendency of any matter” and therefore does not bar disclosure of the use of a veto to block an investigation, or to include in any final report information about the use of a veto to limit the scope of an investigation. Indeed, in our opinion JCOPE could by majority vote now decide to disclose whether a veto was used to prevent the expansion of the Lopez investigation. We urge them to do so.

#### *Greater Staff Autonomy*

Because of the political nature of JCOPE’s appointment process, the commissioners’ impartiality may reasonably be questioned by the public. The JCOPE professional staff, in contrast, is further removed from the political process of appointment and indeed must have support in both branches and by legislative leaders in both parties. We are concerned that the JCOPE staff is in peril of being unduly inhibited in its ability autonomously to pursue suspicions

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<sup>80</sup> N.Y. Executive Law Sec. 94(9-a)(c)

<sup>81</sup> N.Y. Executive Law Sec. 94(9-a)(b)

and allegations of ethical violations, particularly as the objective basis for an expanded investigation may arise during ongoing investigations.

We believe the staff's lack of autonomy once a general investigation into a matter has been initiated is one of the Commission's own self-imposed practices and not one required by law. In particular, the JCOPE enforcement process includes the use of so-called 15 day letters which alert a person that he or she may become the subject of an investigation, and provides that person with an opportunity to present information in his or her defense. No special vote is required to issue a 15 day letter, and under the JCOPE statute the authority to do so may therefore be delegated to JCOPE's Executive Director. We urge JCOPE promptly to issue a rule of procedure that delegates that authority.

*Erecting a Firewall Between JCOPE Commissioners and the Public Officials Who Appointed Them*

It should be obvious that as an adjudicative authority JCOPE Commissioners may not have any ex parte contact whatsoever with regard to any pending enforcement proceeding.

Beyond this, however, we think it would be desirable for JCOPE or the legislature to formally create a "firewall" between the Commissioners and the elected official who appointed them.<sup>82</sup> Such a step would go far to improving the public perception of JCOPE's independence. It would also be a clear confirmation of the fact that the Commissioners are accountable not to those who appointed them, but to the public and the best interests of the State of New York. A Commissioner should never take instructions from anyone including, most particularly, the elected official who appointed them or a member of that person's staff. The creation of a firewall would not adversely affect the work of JCOPE since the views of the appointing

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<sup>82</sup> Governments use firewalls to deal with conflict situations where a particular governmental decision-maker must be recused from a matter and it is appropriate to bar discussion between those handling the matter and that recused person. There seems to be no reason not to use this same procedure with the Commission to assure independence in fact.

officials could be aired publicly, in open meetings, or in written communications with the entire Commission or with staff.

*Guidance regarding § 74(3)(f) and § 74(3)(h)*

At various places in the New York State Ethics Laws, various breaches of the Code of Ethics are sanctioned by specific punitive consequences in the form of a restitutionary civil penalty for the benefit received, plus \$10,000.<sup>83</sup> However, paragraph f (dealing with improper influence) and paragraph h (dealing with breach of trust) of Public Officers Law § 74(3) are not included in these specific restitution provisions. In the course of our review it has been suggested that this fact means that there is no penalty for a violation of these provisions.

JCOPE should take steps to correct this misimpression. The first sentence of § 74(4) of the Public Officers Law provides that “[i]n addition to any penalty contained in any other provision of law any such officer, member or employee who shall knowingly and intentionally violate *any* of the provisions of this section may be fined, suspended or removed from office or employment in the manner provided by law” (emphasis added). Clearly, paragraphs f and h fall under this provision. Thus while sections f and h are not subject to a civil penalty for restitution, they are subject to significant sanctions.

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<sup>83</sup> Executive Law § 94(14) provides that “An individual who knowingly and intentionally violates the provisions of paragraph a, b, c, d, e, g, or i of subdivision three of section seventy-four of the public officers law shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation.” Public Officers Law § 74(4) provides that “Any such individual who knowingly and intentionally violates the provisions of paragraph b, c, d or i of subdivision three of this section shall be subject to a civil penalty in an amount not to exceed ten thousand dollars and the value of any gift, compensation or benefit received as a result of such violation. Any such individual who knowingly and intentionally violates the provisions of paragraph a, e or g of subdivision three of this section shall be subject to a civil penalty in an amount not exceed the value of any gift, compensation or benefit received as a result of such violation.”

We urge the Commission and the LEC to issue guidance concerning the sanction options available to it and the LEC for any violation of the State Code of Ethics. Due notice of potential sanctions is desirable to avoid any risk of a due process challenge. The available sanctions include private reprimand, public reprimand, suspension from office, removal from office and fine. JCOPE and the LEC should publish sanction guidelines comparable to those adopted by the American Bar Association for violations of the rules of ethics for lawyers,<sup>84</sup> but it first should make clear that no provision of the State Code of Ethics may be violated with impunity.

*Ethical Duty to Report the Criminal or Fraudulent Behavior of Public Officers*

The legal profession is subject to an ethics code which carries possible sanctions for its violation. In New York, the Rules of Professional Conduct place an affirmative duty upon lawyers to report when another lawyer has violated the Rules in such a way that “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness.”<sup>85</sup> The Rules also permit an exception to the otherwise strongly protected lawyer’s duty of confidentiality when a lawyer knows of a client’s intent to commit a crime or a client’s continuing crime or fraud, allowing a lawyer to report the intent or the ongoing crime or fraud because of society’s “important interests” in preventing contemplated or ongoing crimes.<sup>86</sup>

The Review Group believes that any failure of a public officer to report an ongoing crime or fraud being committed by another public officer would constitute a breach of public trust and therefore violate the State Code of Ethics. The essence of a public trust relationship is that it can impose affirmative ethical duties to act. That is exactly why lawyers have an ethical duty to make disclosure even though it may be contrary to the interests of their clients. If a public

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<sup>84</sup> ABA, *Standards for Imposing Lawyer Sanctions* (1992), available at [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/corrected\\_standards\\_sanctions\\_may2012\\_wfootnotes.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.pdf)

<sup>85</sup> New York Rules of Professional Conduct R. 8.3(a) (2009)

<sup>86</sup> New York Rules of Professional Conduct R. 1.6(b) and cmt. 6C (2009)

officer has the power through disclosure to limit the damage to the State and the public being caused by such a crime or fraud, the same standard should apply.

We urge the Commission to issue guidance to this effect using its power to construe the State Code of Ethics. We also urge the Commission to adopt a standard practice to consider the initiation of an investigation whenever the commission of a crime or fraud related to official activities by a public officer is uncovered, where that crime or fraud also implicates breaches of ethical duties by a person or persons who had reasonable foreknowledge of the crime or fraud, who failed to act report it and whose office and actions were covered by the Code.

At the same time JCOPE should adopt anti-retaliation rules akin to the provisions found in the Sarbanes-Oxley legislation (18 USCA § 1514A) and other statutes to protect those who report ethical violations. JCOPE can do this without new legislation because it would be an ethical breach for a person within the Commission's jurisdiction to retaliate against a person for reporting misconduct. By way of analogy, New York courts have given strong protection against reprisal to lawyers who report substantial ethics violations of other lawyers, including those holding senior positions in the law firms in which they are employed. The New York Court of Appeals ruled in *Wieder v. Skala* that even an at-will associate with no contractual rights to continued employment was nevertheless protected from retaliatory dismissal stemming from his effort to report a colleague's ethical violations.<sup>87</sup> JCOPE should take the opportunity of issuing guidance on reporting misconduct to emphasize its commitment to these protections.

#### **B. JCOPE's Regulation of Lobbyists**

The work of lobbyists is protected under the First Amendment, which includes protection of the right of the people to petition government for the redress of grievances.<sup>88</sup> Despite this

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<sup>87</sup> *Wieder v. Skala*, 609 N.E.2d 105 (1992)

<sup>88</sup> U.S. Const. amend. I

protection, however, it is permissible to require lobbyists to make public disclosure about their activities<sup>89</sup> and, of particular relevance here, to restrain the manner in which they conduct their business so as to avoid an appearance of a substantial risk of corruption of the public officials with whom they interact. *See Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

The Review Group believes that, consistent with the First Amendment, JCOPE can and should do much more to increase the quality of public disclosure by lobbyists, to make that information available to the public media and the general public in a uniform and user-friendly way and to hold lobbyists accountable to ethical standards reasonably calculated to curtail activities that create an appearance of a risk of corruption. The Review Group is also of the view that these much needed improvements would not require the enactment of legislation and that all that is required is the will and initiative on JCOPE's part to pursue the purpose of the ethics and lobbying laws it administers.

1. Public Disclosure of a Lobbyist's Activities

- a. *Analysis*

Under Article 1-A of the Legislative Law, the central body of law regulating lobbyists, lobbyists are required to file annual registration statements and, if the lobbying expenditures exceed \$5,000, bimonthly reports.<sup>90</sup> A separate filing must be made for each client.<sup>91</sup> These reports must contain certain information including "the name of the person, organization, or legislative body before which the lobbyist is lobbying or expects to lobby..."<sup>92</sup> However, an examination of filed reports on the JCOPE website makes it clear that the quality of the

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<sup>89</sup> *See U.S. v. Harriss*, 347 U.S. 612 (1954) (finding the Federal Regulation of Lobbying Act constitutional despite a claim of unconstitutionality by lobbyists because restrictions such as a registration and disclosure requirement do not effectively prevent the exercise of the right of petition).

<sup>90</sup> N.Y. Legislative Law Art. 1-A, Sec. 1-e, 1-h.

<sup>91</sup> N.Y. Legislative Law Art. 1-A, Sec. 1-e.

<sup>92</sup> *Id.*



disclosure under this latter provision varies widely. Most often disclosure is made of only the broadest category, for example, the disclosure that the Assembly is being lobbied generally with no identification of any particular members or staff.

Information of such generality is nearly useless to the public. Lobbyists should disclose the specific names of the persons with whom they have had a significant<sup>93</sup> lobbying contact or whom they anticipate they will so lobby following the filing. Mere reference to an agency or legislative body is inadequate. The word “or” in the statute cannot, consistent with the purpose of the statute, be read to confer on the lobbyist the ability to make disclosure by the broadest category, if more specific information is available. The function of the word “or” in light of the purpose of the statute should allow a more general answer only when specific information is not known or may need to be supplemented with a general catch-all response. Thus an appropriate answer might be to identify the specific persons who are the subject of a significant lobbying contact (e.g., the person with whom the lobbyist is specifically seeking a meeting and to add a more general catchall for others who might be lobbied).

Article 1-A also requires disclosure of the general subjects of lobbying and the bill numbers assigned to legislation, executive orders and contracts with respect to which the lobbyist has been retained.<sup>94</sup> Bill numbers, while informative to the press and to those who closely follow the Legislature, are of limited utility if the objective is to give the public an easy way to understand a lobbyist’s activities.

*b. Recommendations*

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<sup>93</sup> By significant lobbying contact we mean one that is material to the risk that the public official is selling access to the lobbyist and his or her client in return for campaign contributions or other favors. An example we find troubling would be a sustained merits discussion between a decision maker or senior advisors and the contributor or his lobbyist where no similar opportunity is provided to those who have a substantial disagreement with the position taken by the large contributor.

<sup>94</sup> N.Y. Legislative Law Art. 1-A, Sec. 1-e.

We recommend in our consideration of JCOPE’s website below that the JCOPE website aggregate all lobbying disclosures related to a particular bill with identification of that bill’s subject matter and a hyperlink to the bill itself. We also recommend aggregation of all data related to the lobbying of a particular person and his or her staff.

Beyond this we think there is a compelling argument that JCOPE has the authority to require a lobbyist to disclose the subject matter of significant lobbying contacts with a particular person so that the public and the public media will know exactly which public official was lobbied about which issue.

First, access to this information is required to fulfill the purpose stated in the Legislative Declaration at the outset of Article 1-A. That declaration calls for the disclosure of the activities of lobbyists with respect to “**any**” legislation or rule or regulation having the force of law.<sup>95</sup> The word “any” makes clear that particularized disclosure is intended because it states that the public should be able to know the activities of lobbyists with respect to “any” bill.

Second, Item 5 in section 1-e(c) calls for information about the topics of lobbying, and Item 6 calls for the name of the persons lobbied. The name of the persons lobbied is of little practical use without knowing the general subject matters on which they were lobbied. Under New York statutory construction law the manifest purpose of the law must be given effect. We can safely presume that the Legislature did not intend the required disclosure to be of little practical utility.<sup>96</sup> To give the disclosure requirements real meaning, JCOPE must be faithful to the purpose of the law and require filers to file an answer to Item 6 for each bill or topic identified in Item 5.

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<sup>95</sup> N.Y. Legislative Law Art. 1-A, Sec. 1-a.

<sup>96</sup> Metropolitan Life Ins. Co. v. Durkin, 276 A.D. 394 (1<sup>st</sup> Dep’t 1950), *aff’d* 301 N.Y. 376 (1950) (finding that the paramount consideration in construing statutes is to ascertain and give effect to the spirit and the purpose of the law and the object to be accomplished by it).

Third, this approach ensures the same level of disclosure for lobbyists who lobby for a client about multiple bills or topics and those who lobby for a client on a single bill or topic.

Finally, this reporting requirement would be a reasonable application of the express power conferred on JCOPE to issue uniform forms for the statements and reports required by Article 1-A.

2. Lobbyist Conduct Creating an Appearance of a Significant Risk of Conflict of Interest

*a. Analysis*

Codes of Ethics are designed to avoid conduct which creates an appearance in the mind of a reasonable person of improper conduct. Thus Codes of Ethics prohibit conflicts of interest absent consent by all concerned, not because a person's judgment may be impaired by such conduct but because of the appearance of a substantial risk that such judgment might be impaired. In the landmark case of *Buckley v. Valeo* the United States Supreme Court applied this concept to campaign contributions, holding that large contributions could be prohibited because of the risk that the recipient might be beholden to the contributor even if the recipient was totally confident that his or her judgment would not in fact be impaired.<sup>97</sup>

This ethical concept of avoiding an appearance of corruption applies with full force to the work of lobbyists. While the function of a lobbyist is to advocate the position of their clients to the government decision makers, the Moreland Commission Report shows that some lobbyists consider it part of their job to ensure that the decision makers will be beholden to their clients through the making of campaign contributions.

Specifically, the Moreland Commission Report provides this example:

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<sup>97</sup> *Buckley v. Valeo*, 424 U.S. 1 (1976).

Contributions may also be expected in exchange for political support. In a separate investigation, a lobbyist emailed a prospective client about a bill before the state legislature. In negotiating the terms of his contract, the lobbyist provided the client with what the lobbyist referred to as “a fair projection of expenses.” In addition to informing the client of the lobbyist’s fees, the “expenses” the lobbyist lined out included costly “political contributions” that the client would have to make to certain elected officials, including the chairs of committees that would have jurisdiction over the bill. In this same investigation, the client complained to the lobbyist in an email that an elected official critical of the bill had received over \$50,000 in campaign contributions from an individual who opposed the bill. The client hypothesized that “the money [the individual] spent on [the elected official] is directly related to us” and that such a contribution was an attempt to “pay NOT to let them play.”<sup>98</sup>

Currently, New York State does not have a clear rule or regulation in place which speaks to the ethical standards for lobbyists seeking to influence the enactment of legislation, the adoption of rules and regulations or the procurement of government grants and contracts. No line is drawn between conduct which permissibly seeks to influence and that which creates an appearance of an effort to corrupt.

It seems simple and obvious that an ethical standard should be applied to all those who lobby the government. In 2012, JCOPE suggested in its Annual Report that the New York State Legislature enact a Code of Ethics for lobbyists, but the Legislature has failed to act on the recommendation. This inaction cannot be justified by any argument that current law is adequate. Article 1-A says nothing prescriptive about ethics. JCOPE’s Guidelines to the New York State Lobbying Act provide no instructions about ethical standards for lobbyists. It falls to JCOPE to take affirmative steps towards remedying this clear gap in the regulation of public ethics provided that JCOPE has the power to do so.

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<sup>98</sup> Moreland Commission, Prelim. Report, p. 34 (Dec. 2, 2013).

The Review Group believes that JCOPE has that power. The provision for lobbyists' ethics and campaign contribution law training added to Article 1-A by Chapter 399 of the laws of 2011 gives JCOPE, in our opinion, the power as part of that training to specify ethical standards, including ethical standards that relate to campaign contributions. There is little point instructing lobbyists regarding the ethical standards applicable to others without there being an ethical obligation on the part of the lobbyists both to respect those standards in their own conduct, and to not create an appearance that a public officer is being influenced in a way that contravenes that officer's ethical duty. JCOPE's power to specify ethical guidance for lobbyists is also implicit in the Legislature's decision to delegate the regulation of lobbying to an ethics commission.

We recognize that as a matter of past practice the State's ethics agencies have considered the conflict of interests that arise from campaign contributions to be beyond their purview. The New York State Board of Elections also does not address conflicts of interest arising from large campaign contributions beyond administering a regime of campaign contribution disclosure. The Judiciary, on the other hand, has addressed conflicts of interest arising from campaign contributions by requiring judicial recusal in certain instances.<sup>99</sup> The State Code of Ethics contains no carve out for conflicts arising from campaign contributions and that this is therefore an area in which JCOPE has authority to issue guidance binding on lobbyists and Executive Branch decision makers. Because the LEC had the statutory right to disagree with JCOPE's conclusions of law, it would be highly desirable if JCOPE and the LEC were in agreement on this guidance. In all events, the issuance of such guidance binding on lobbyists should be a

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<sup>99</sup> Rules of the Chief Administrative Judge (22 NYCRR) § 151.1 (judicial rule requiring recusal when a judicial assignment "would give rise to a campaign contribution conflict"). *See also* Caperton v. AT Massey Coal Co., Inc., 129 S. Ct. 2252 (2009) (establishing that while "not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal," exceptional cases "when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent" require recusal under the Due Process Clause).

matter of high priority since conflicts of interest arising from large campaign contributions, and the providing of special access to large contributors and their lobbyists, is a prime source of dysfunction in Albany and the lack of public confidence in government.

*b. Recommendations*

We recommend that JCOPE not continue to wait for legislative action but rather adopt a Code of Ethics specifically applicable to lobbyists and the work they undertake. JCOPE's training of lobbyists should include the ethical standards that cover the obligation of candor to the government, fidelity to the legitimate interests of the client, avoidance of conflicts of interest, as, for example, by representing clients with conflicting interests as to the subject matter of the representation and, most particularly, avoiding any conduct that creates an appearance of a significant risk of corruption on the part of public officers, or of encouraging them to breach their public trust or appear beholden to large campaign contributors.

Targeted campaign contributions such as those detailed in the Moreland Commission Report should be among those practices which fall outside the permissible ethical behavior for lobbyists. It should also be unethical for lobbyists to bundle contributions so as to effectively be perceived as making a contribution in excess of contribution limits, as this practice creates the appearance of a significant risk of corruption in the form of vote buying. As an ethical matter, it should be made clear that a lobbyist may not use bundling or the arranging of large contributions to buy special access for the lobbyist or his or her client must avoid even the appearance of doing so by refraining from participating in such special access when it might reasonably be tied to a large campaign contribution.

Other states have already recognized the need for such rules and that certain activities fall outside of what would be reasonable ethical conduct for lobbyists. For example, Connecticut's Client Lobbyist Guide to the Code of Ethics, while recognizing that political contributions are permissible, prohibits any such contribution from being offered with the understanding that a vote, official action or judgment of the recipient would be influenced by the contribution.<sup>100</sup> Similarly, California's Government Code includes prohibitions on lobbyists influencing a bill or creating an appearance of public favor of any proposed legislative action, in addition to engaging in any deceitful or fraudulent activities.<sup>101</sup> The American League of Lobbyists has implemented its own Code of Ethics which has specific articles addressing honesty and integrity, professionalism, conflicts of interest, and best efforts.<sup>102</sup> The Review Group is of the opinion that New York State should be a leader and not a laggard in this area.

While we urge JCOPE to take a view of its jurisdiction broad enough to achieve the purposes for which it was created, should JCOPE be of the view that it lacks the power to promulgate a Code of Ethics for Lobbyists, then JCOPE should do more than call on the Legislature to adopt one. Rather, JCOPE should draft and propose a specific Code of Ethics for Lobbyists as part of its legislative program. In the interim, its training of lobbyists should encompass, at a minimum, training as to what conduct might subject a lobbyist to complicity in a violation of laws related to campaign contributions, bribery, and breach of trust by public officers.

### **C. The JCOPE Website**

JCOPE regulates the ethics of public officers and the lobbyists who seek to influence their decisions. At the heart of these tasks is public disclosure of information about the conflicts

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<sup>100</sup> CT Code of Ethics § 1-97 (Jan. 1, 2013).

<sup>101</sup> Cal. Gov't Code § 86205

<sup>102</sup> ALL Code of Ethics, Arts. I, III, IV, & V (Nov. 2010).

of interest and special interest pressures to which these public officers are subject. While it is important to provide an electronic means of reporting misconduct, learning about JCOPE's activities and watching webcasts of its meetings, the core test of the website is the easy accessibility of information about who is seeking to influence whom about what, by what means and at what cost.

The deficiencies of the JCOPE website are not attributable to any lack of authority. Executive Law § 94 provides for the creation of a publicly accessible website that makes available public officials' financial disclosure forms, various documents related to enforcement actions against public officials, and “any other records or information which the commission determines to be appropriate.”<sup>103</sup> (emphasis added). In other words, subject only to cost and the availability of good data, JCOPE is free to make its website a comprehensive repository for all information bearing on conflict of interest and special interest advocacy in the decision making processes of New York State Government.

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<sup>103</sup> Executive Law § 94(18) provides: “[T]he commission shall create and thereafter maintain a publicly accessible website which shall set forth the procedure for filing a complaint with the commission, and which shall contain the documents identified in subdivision nineteen of this section, other than financial disclosure statements filed by state officers or employees or legislative employees, and any other records or information which the commission determines to be appropriate.”

Executive Law § 94(19)(a) provides: “Notwithstanding the provisions of article six of the public officers law, the only records of the commission which shall be available for public inspection and copying are:

- (1) the information set forth in an annual statement of financial disclosure filed pursuant to section seventy-three-a of the public officers law except. . . information deleted pursuant to paragraph (h) of subdivision nine of this section;
- (2) notices of delinquency sent under subdivision twelve of this section;
- (3) notices of civil assessments imposed under this section which shall include a description of the nature of the alleged wrongdoing, the procedural history of the complaint, the findings and determinations made by the commission, and any sanction imposed;
- (4) the terms of any settlement or compromise of a complaint or referral which includes a fine, penalty or other remedy;
- (5) those required to be held or publicly available pursuant to article one-A of the legislative law; and
- (6) substantial basis investigation reports issued by the commission pursuant to subdivision fourteen-a or fourteen-b of this section. With respect to reports concerning members of the legislature or legislative employees or candidates for member of the legislature, the joint commission shall not publicly disclose or otherwise disseminate such reports except in conformance with the requirements of paragraph (b) of subdivision nine of section eighty of the legislative law.”



## 1. Analysis

The JCOPE website is the public's primary point of access to JCOPE and JCOPE's project of transparency. It is therefore necessary to evaluate it from the perspective of a member of the public trying to find information about the efforts to influence public officials. In its current form, JCOPE's website contains a large amount of data, but does not organize the data in an easily searchable way that gives the public meaningful access to information about the money and interest groups behind New York State's decision-making. There is a need for improvement in three key areas: (a) user-friendliness, (b) transparency, and (c) availability of relevant data.

### *a. User Friendliness*

By user-friendliness we mean the ability of a user with a basic level of computer and Internet knowledge to find information contained in a website with ease, and without having to do further research on additional websites.

Large amounts of information filed by lobbyists and elected officials are theoretically accessible through the website, but the information is not available in a user-friendly way. The website itself is not searchable. A user cannot simply type in the name of a public officer, the subject matter of a bill, or the name of a company in which one or more public officers may have a financial interest, and find information relevant to a conflict of interest and lobbying activity. Rather, users must navigate through various links to get to the information they can reasonably be expected to seek.

And when users get to the documents they seek, further difficulties abound. Many of the filings themselves are scanned-in paper documents, a good number of which are handwritten and not easily legible, rather than electronically-searchable files. Moreover, in order to efficiently access material, a visitor to the website would have to know a lot of information in advance. For

example, bills are listed by bill number with no indication of the topic of the bill or link to the bill itself. Users also cannot easily cross-reference the name of the bill externally because the Lobbyist Filing Portal does not provide the year of the bill's proposal.

The website's lack of user-friendliness is apparent from simple efforts to search for disclosure filings of assembly members and lobbyists, and to review enforcement actions.

To search for an assembly member's financial disclosure form on the website, users must already know who represents the assembly district in which they are interested. Searchers should not have to look up this information on a separate website. In a user-friendly website, this information would be available by member name, by assembly district number and by zip code and address. It should not be harder to look up information about the financial interests and outside activities of a member of the Legislature or a policy maker in the Executive Branch than it is to get a weather forecast for a particular location.

Users searching for lobbying filings confront the inverted problem of too many search options. To start, the Database Query page provides fillable forms to execute queries by client, lobbyist, public corporation, lobbyist disbursement, or public corporation disbursement. But there is no guidance as to how this information can be relevant to an assessment of lobbying activity, why its disclosure is required or of the context in which it should be considered. The Run Reports page of the Lobbyist Filing Portal has multiple search fields and lists various report-types, which is confusing, as there are no interpretive tools for users who lack an understanding of the administrative jargon used to describe report types. It is doubtful that a member of the public would necessarily know the difference between procurement and non-procurement lobbying, or would understand how the information in Report A, Additional Lobbyist Terminations, might relate to information provided via Report D2, Client-Lobbyist Cross

Reference. In addition, these reports, which could theoretically be analyzed to compile a web of lobbyist-client relationships, are not in any way integrated into the Database Query page. Thus, the searchable database of lobbyist filings is of very limited utility to individuals who do not have a fairly sophisticated understanding of various lobbying activities, but who seek lobbying information. It is designed to channel queries narrowly, rather than yield a broad overview of lobbying activities. Outside of the Lobbyist Filing Portal, users have the option of piecing together the web of lobbying activity themselves via the “View a Filing” page, but this would be an inefficient and overwhelming task. The data is available to download as massive Excel spreadsheets, which organize the data by year, and within each year alphabetically by lobbyist name. The sort function has been disabled, so users must sift through thousands of pages of data to track a single lobbyist’s activity. Clearly, the lobbyist filing database is not set up in a way that provides meaningful access to information on lobbying activities.

The Enforcement Actions section of the website is also needlessly opaque, as it requires significant cross-referencing in order to meaningfully access the information on the website. The Enforcement Actions index page is the only point of access to these records.<sup>104</sup> The index consists of a table listing the name of the individual or organization that was subject to the action; the report and year; the date and status; and the statute allegedly violated. There is nothing identifying the role or position of the subject of the action in the index. As a result, short of clicking through each settlement document, there is no way to determine which, if any, of the individuals listed are legislators. In addition, rather than listing the type or nature of the violation, the index lists only the statute number, and does not provide a live link. Without a link to the statute, users must navigate back through three separate pages to find the link to the statute

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<sup>104</sup> New York State Joint Commission on Public Ethics, Enforcement Actions, *available at* <http://www.jcope.ny.gov/enforcement/index.html>

and search for the provision, which users would then have to parse and interpret on their own. It is worth re-emphasizing that the enforcement records themselves are not text-searchable, and will therefore not return any query results from the search bar on that page.

Based on these examples, which are not exhaustive, it is clear that the website's organizational structure and search mechanisms can be made much more user-friendly particularly from the perspective of the user who is not an insider with sophisticated computer research skills.

*b. Transparency*

By transparency we mean that the website readily discloses any lack of completeness and helps the user to connect the dots in a way that provides a useful picture of conflict of interest risks and lobbying activities.

A basic requirement of candor requires that the website disclose fully and candidly any limitations or lack of completeness in the information provided. The JCOPE website, contrarily, gives a false impression of completeness. This is because the pages that contain filings and other public records have no mention of exceptions and waivers that make them incomplete. Users have to look up—and then parse and interpret—the enabling legislation on the “About JCOPE” page to discover that certain records may be deleted, expunged or exempt.

Executive Law § 94(9)(h) provides in relevant part that “information ... may be deleted by the commission upon a finding by the commission that the information which would otherwise be required to be made available for public inspection and copying will have no material bearing on the discharge of the reporting person's official duties.” Such a finding is not even required to remove information temporarily from the website. Executive Law § 94(19)(c) provides: “Pending any application for deletion or exemption to the commission, all information

which is the subject or a part of the application shall remain confidential. Upon an adverse determination by the commission, the reporting individual may request, and upon such request the commission shall provide, that any information which is the subject or part of the application remain confidential for a period of thirty days following notice of such determination. In the event that the reporting individual resigns his office and holds no other office subject to the jurisdiction of the commission, the information shall not be made public and shall be expunged in its entirety.”

While there is nothing inherently problematic with these provisions, they are not mentioned in the sections that provide access to available documents. This creates the false impression that the records available on the website are comprehensive. Moreover the Review Group believes that the redaction of any information should be indicated when the redacted document, or the information taken for it, is accessed on the website. While it may reasonably appear to the Commission at a point in time that certain information is not material, circumstances can change. If redaction is noted, the user will have the opportunity to advise JCOPE what he or she is seeking and why and the redaction can be reviewed for potentially responsive information.

The website’s Reportable Business Relationship pages are an example of this problem of lack of completeness. There are only eight records of reportable business relationships for lobbyists, and only fourteen for clients. Of the fourteen for clients, six are half-year filings for three entities. These numbers appear unreasonably low. The website discloses that the paper forms are scanned and posted as they are processed but there is no information about how many have been filed and remain to be processed.

The JCOPE website also fails to help the user obtain a comprehensive understanding of the lobbyists and legislators associated with an individual piece of legislation. This is primarily because it is not searchable, and therefore one cannot find all the information on the website related to a particular person or piece of legislation. There is no reason why this information could not be aggregated by JCOPE so that all the lobbying activity related to particular bills and subjects could be easily accessed, as could all lobbying directed to a particular person. As already noted, the Review Committee believes that if properly construed the law requires lobbying disclosure to indicate the person lobbied or to be lobbied where that information is known, and the subject matter about which each such person is lobbied. From 2007 to 2013, the overwhelming majority of lobbyist disclosures listed only the name of the governmental branches they expected to lobby.<sup>105</sup> As we have shown, JCOPE can and should change that.

*c. Availability of Relevant Data*

In the end a website designed to provide information about conflict of interest and special interest advocacy is no better than the quality of the information provided and the provision of all the information material to those topics. JCOPE fails to include certain relevant and material information in some cases because it is not available to any state agency, and in other cases because JCOPE has not placed relevant and material information on its website.

For example, while users can retrieve forms through the Lobbyist Filing Portal reporting how much compensation a lobbyist has received in any two month period in the case of all lobbyists over a \$5,000 compensation level,<sup>106</sup> Article 1-A does not require the lobbyist to attribute that income either to particular persons lobbied or to particular topics of lobbying for a

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<sup>105</sup> See Registered Lobbyist Disclosures 2007-2013 (as of 9-26-2013), available at [http://www.jcope.ny.gov/datasets/JCOPE\\_LOBBYISTDISCLOSURE.xlsx](http://www.jcope.ny.gov/datasets/JCOPE_LOBBYISTDISCLOSURE.xlsx). Notably, this information is formatted in such a way that users cannot use the “sort” function in Excel.

<sup>106</sup> N.Y. Legislative Law Art. 1-a, Sec. 1-h(a).

particular client. Thus there is no way to determine with accuracy through the lobbying reports how much money went to lobbying activity for any specific piece of legislation. Users also have no way of distinguishing between types of lobbying activities. For example, faxing a fact-sheet to legislators is not distinguishable from a one-on-one conversation over dinner.

This lack of concrete information about significant lobbying contacts related to legislation can be contrasted with the more detailed information about contacts with lobbyists concerning contract procurement and regulatory matters that is provided by the Project Sunlight database. The Legislature required the Executive Branch to establish this database of meetings, and required that it be in searchable form, in the same bill, Chapter 399 of the Laws of 2011, that established JCOPE.<sup>107</sup> The Project Sunlight database ([www.projectsunlight.ny.gov](http://www.projectsunlight.ny.gov)) has useful features and will help JCOPE's enforcement because it contains disclosure of meetings with lobbyists generated within the State and can be used to identify lobbyists who have failed to register.

However, the Project Sunlight database lacks some important information because it does not require the reporting of meetings about legislation and does not require the reporting of meetings with persons in the Legislative Branch. Still, for purposes of creating a better picture

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<sup>107</sup> Every state agency, department, division, office, and board; every public benefit corporation, public authority and commission at least one of whose members is appointed by the governor; the state university of New York and the city university of New York, including all their constituent units except community colleges of the state university of New York; and the independent institutions operating statutory or contract colleges on behalf of the state, shall cooperate with the office of general services and supply to that office on a schedule and in a format determined by the office of general services in consultation with such governmental bodies, a list of all individuals, firms, or other entities (other than state or local governmental agencies) who have appeared before such governmental body in a representative capacity on behalf of a client or customer for purposes of: (a) procuring a state contract for real property, goods or services for such client; (b) representing such client or customer in a proceeding relating to rate making; (c) representing such client in a regulatory matter; (d) representing such client or customer in a judicial or quasi-judicial proceeding; or (e) representing such client or customer in the adoption or repeal of a rule or regulation. The office of general services shall create forms upon which such information shall be supplied and a database which shall collect and systemize the collection of such information. The office of general services shall make the database available and accessible to members of the public on a webpage subject to statutory confidentiality restrictions, and shall ensure that the information contained in the database is readily searchable and available for download. The database shall be known as "project sunlight." Laws of 2011, Chap. 399, § 4.

of lobbying for procurement and rules and regulations having the force of law, it can be viewed together with bi-monthly lobbying reports. These documents provide a clearer picture of lobbying advocacy. Accordingly, the JCOPE website should at a minimum provide integrated searching with the data in the Project Sunlight database.

A particularly glaring omission from the JCOPE website is campaign contribution information. A common question is how much those who are the target of lobbying are receiving in contributions from those interests that have launched the lobbying campaign. For a public officer to ask, “what is in it for me” is no less a breach of public trust if what he or she has in mind is a campaign contribution, as opposed to a quid pro quo cash kickback for his or her legislative vote. That is the premise of *Buckley v. Valeo*.

In this regard the JCOPE website should be contrasted with the NYOpenGovernment website ([www.NYOpenGovernment.com](http://www.NYOpenGovernment.com)), which was established by the New York Attorney General. That website is a leap forward because it provides ready access to both lobbying and campaign contribution information and allows searches across both databases. However it is not linked to the Project Sunlight database, as it should be. It also does not provide information about the outside activities and financial interests of members of the Legislature or Executive Branch policy makers. In addition, it is subject to the limits of the completeness of lobbying information described above.

## 2. Recommendations

JCOPE should be in the forefront of the effort to provide easily accessible and comprehensive information about conflict of interest risks and lobbying activities. Together with the custodians of the Project Sunlight and NYOpenGovernment websites, JCOPE should convene a users’ roundtable including representatives of the public media, government watchdog



groups and the public to discuss ways to consolidate and expand these public access efforts. Project Sunlight should be expanded to cover meetings concerning legislation and with members of the Legislature and their staff. The users' roundtable should discuss in what domain the expanded coverage should be located. Project Sunlight is housed in the Office of General Services in the Executive Branch. It may make sense for it to continue to be housed there but to be placed under the control of JCOPE, as the disclosure will cover meetings in the two branches of government that JCOPE uniquely regulates.

The expansion of Project Sunlight will require legislation. JCOPE should take the lead in proposing that legislation. This step will go far to show the public that JCOPE can act with true independence.

With regard to the coordinated disclosure of campaign contribution and lobbying information, JCOPE should work with the Attorney General to build on what that office has started. Unlike Project Sunlight where the information is captured and reported by state officials, this coordinated disclosure calls for more detailed reporting by lobbyists. This is therefore a topic that should be addressed in a roundtable of both users and filers, which JCOPE should convene. The roundtable should consider the need for amendments to Article 1-A of the Legislative Law to make the lobbying activity database adequate to the disclosure of lobbying activities affecting particular public officers, or the adoption or defeat of particular bills or legislative proposals. Again, JCOPE should take the lead in proposing needed changes to the Legislature and working for their adoption.

#### **D. Self-Dealing**

##### 1. Analysis

The Moreland Commission Report illuminates the abuse and criminality that can be enabled by non-profit organizations sponsored, controlled, or staffed in part at the legislator's direction – nominally to provide community services, but in fact as the means to create no-show, seldom-show or overcompensated jobs, while delivering little in the way of actual services.

The report specifically cites four cases in which legislators were convicted of charges relating to theft or misappropriation of funds of non-profit organizations they established or controlled.<sup>108</sup>

The report also addresses the subject of “Member Items and Legislatively–Directed Funding Grants”, noting “potential conflicts of interest and legislatively-directed discretionary funding grants.”<sup>109</sup> (The report notes that its investigation into one cited organization is continuing.)

The Moreland Commission states that “[S]o-called ‘member items’ – legislative grants of discretionary funding that are not lined out in the State budget – have been used in some of the most egregious corruption schemes by corrupt officials who funnel state money to those who line the official’s pockets”, and ” recommends “greater transparency so that the public will know which legislators are sponsoring what public projects.”<sup>110</sup> We adopt that recommendation and ask that JCOPE do so as well, by taking affirmative and low-to-no-cost actions within its existing authority. While the Moreland Commission notes several corrective and preventative actions taken by the governor and state agencies<sup>111</sup>, including the Governor’s commendable decision to disapprove member items, his action did not de-fund all organizations receiving legislative grants. We believe that JCOPE can play a useful role in helping to implement these reforms on a

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<sup>108</sup> Moreland Commission, Prelim. Report, pp. 4, 19 (Dec. 2, 2013).

<sup>109</sup> *Id.* at 9.

<sup>110</sup> *Id.* at 10.

<sup>111</sup> *Id.* at 21.

permanent and broader basis. Section 17 of the law governing JCOPE gives it explicit authority to “[p]romulgate rules concerning restrictions on the outside activities. . . of persons subject to its jurisdiction.” The Review Group is of the opinion that legislators are persons subject to the jurisdiction of the Commission within the meaning of this provision because it is the outside activities or legislators that are particularly intended to be regulated. JCOPE can therefore use that power to promulgate rules that bar outside activity that creates an appearance of impropriety through self-dealing.

The need for a prophylactic rule addressing appearances is clear because the actual facts may be hard to establish. We note especially the finding by the Moreland Commission that “. . . in some cases, the legislative sponsor of a particular member item or other legislatively-directed capital funding was not always identifiable through publicly available documents. . . in some cases, it has proven impossible for the Commission to identify the legislator or legislators at whose discretion member items or other legislatively-directed capital funding was disbursed. Not only do sponsors regularly fail to identify themselves on member initiative forms, but at times, a legislator will swap out his or her own name for the name of another legislator who actually has no connection to the funding.”<sup>112</sup>

## 2. Recommendations

We make the following recommendations:

### *Publicize Legislator Associations With State-Funded Not-For-Profit Organizations*

We call upon JCOPE to publish and maintain a list of the not-for-profit organizations funded by the legislature. The list should:

- set forth the amount of money paid to the organization by the legislature

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<sup>112</sup> Moreland Commission, Prelim. Report, p. 22 (Dec. 2, 2013).

- identify the name(s) of the legislators who sponsored the appropriation
- cross reference the names of the legislators and the organizations on the JCOPE website
- state whether any legislator is associated with the organization in an official capacity, such as a consultant, trustee, director or officer

*Prohibit Legislators, Their Staffs and Their Immediate Families From Holding Office in, being Employed by, or Recommending Persons to be Hired by State-Funded Not-For-Profit Organizations*

We believe that it is an inherent conflict of interest for a legislator to serve in a paid or unpaid position with an organization receiving state funding. There may be situations where that conflict could be safely waived, as for example to allow a legislator to teach a course at a university that receives state funding, but those waivers should be considered in a transparent way by JCOPE with the burden on the person seeking the waiver to demonstrate absolute propriety. We further believe that it creates an appearance of impropriety for a member of the Legislature to recommend the hiring of a particular person in a state-funded not-for-profit organization. As noted above, JCOPE has the power to promulgate a rule banning these outside activities. We recommend that they do so because of the appearance they create of a breach of public trust in violation of subdivision h of the State Code of Ethics.

*Prohibit Legislators, Their Staffs and Their Immediate Families From Engaging in Certain Business Dealings with State-Funded Not-For-Profit Organizations*

We believe it is also a conflict of interest for a legislator, staff member or immediate family member of either to engage in a business transaction with a state-funded not-for-profit organization other than as a member of the group to which the not-for-profit was created to provide services. We urge JCOPE to issue guidance about what kinds of business dealings should be prohibited outside activity. Such prohibited acts would include selling services to a

state-funded organization. A legislator could evade the prohibition against holding office by being a paid outside advisor or vendor to the organization.

#### **E. Training**

Reflecting the importance training plays in bringing about ethical behavior, Chapter 399 of the Laws of 2011 added statutory requirements regarding ethics and lobbyist training. All public officials who are required to file financial disclosure forms are required to take a two hour comprehensive ethics course designed and administered by JCOPE. The course is to cover all laws of relevance to the ethical behavior of those in public service. It must be taken within two years of appointment, however within three months of appointment such persons must complete an online ethics orientation course. In addition, once every three years following the completion of the comprehensive training course, covered public officials must complete a 90 minute ethics seminar developed and administered by JCOPE. Members and employees of the Legislature may meet this requirement by taking training courses designed by the LEC provided the legislative training program meets or exceeds the above described requirements. Whether that is in fact the case is a subject this Report does not address because the Review Group has not reviewed the activities of the LEC. It intends to do so in the future but believes that a clear focus on JCOPE was the best place to start.

On the lobbyist side, Chapter 399 added a new training requirement for lobbyists. Once every three years registered lobbyists are required to take an online ethics training course developed by JCOPE that must include explanations and discussions of New York statutes relating to ethics in the Public Officers Law, the Election Law and the Legislative Law. This new mandatory training is significant in part because it recognizes that the Election Law concerns ethics and requires JCOPE to provide instruction about the ethical components of the

Election Law. The law also requires instruction as to the “underlying purposes and principles of the relevant laws.” JCOPE has not yet made available the curriculum it will use to implement this training requirement.

1. Analysis

JCOPE’s current Comprehensive Ethics Training Course is a good start but could be significantly improved.

The 2013 Comprehensive Ethics Training Course is a 102-page presentation used to satisfy JCOPE’s training requirement. While a training seminar is time-limited by law to two hours, and the 102-page length is probably an adequate size for practical reasons, the materials do not adequately explain the purposes of ethical requirements, the reasons why conflict of interest must be judged under an appearance standard and the serious consequences that can befall a state employee who acts while burdened with a conflict of interest. The 102 page power-point presentation and hand-out slides thus do not capture all of the training materials that public officials and employees need in order to fully understand the ethics laws and the potential consequences that follow them. It is more of the start on an ethics laws handbook than a fully effective vehicle to promote compliance.

JCOPE’s training materials must contain more robust guidance not only about what the laws are, but also about why public officials and employees must abide by those laws. Only two pages are devoted to this topic and one consists entirely of a dense quote from the message that President John Kennedy sent to Congress in 1961 proposing conflict of interest legislation. Since the tone for ethics compliance is set from the top, far more useful would be strong statements from the Governor and the Legislative leaders. Committing themselves in this way to

ethical conduct in an ethics training course would also serve to help them recognize their obligation to lead from the top by example in matters of ethics.

Currently, the Training Course does not provide a comprehensive publication or source for supplemental materials. The Training Course directs trainees to the JCOPE website for fuller laws, advisory opinions, policies and guidance documents. While there is a quite basic guidance document for the lobbying law, the only guidance for ethics compliance is the interim guidance on gifts. There is a purported “handbook” that is not in fact a real handbook but rather a 104-page document setting out in unsearchable format the laws JCOPE administers. This statutory text is duplicated elsewhere on the website.

## 2. Recommendations

If JCOPE is going to rely on its website to supply supplemental training and informational material, which is reasonable, we urge it to construct a dedicated page in the style of a real handbook containing easily-searchable training-oriented materials so that public officials and employees with ethics questions can find answers quickly and easily. JCOPE has in development the online training course required by Chapter 399 but the true handbook we have in mind would be a comprehensive supplement to online training. The primary focus of online training should be the reasons behind JCOPE’s low tolerance for anything less than full compliance.

Certain portions of the ethics laws also receive too little attention in the training materials. For instance, as noted above in the enforcement section, we feel that paragraphs 3(f) and 3(h) of the Code of Ethics (Public Officers Law § 74) demand greater emphasis and more accurate guidance. In the Training Course, these two paragraphs combined receive only two sentences of treatment, suggesting a lack of importance as well as a lack of significant consequence if violated.

They also lack the examples and hypotheticals that other paragraphs of the Code of Ethics receive. Because we feel that the duties and responsibilities under paragraphs 3(f) and 3(h) are vital to the ethical culture in state government, we urge the Commission to devote greater attention to them in these materials.

In particular there need to be examples and ethical guidance on the conflict of interest issues that arise when public officials deal with persons or companies that have made large campaign contributions to their campaign, the elected official for whom they serve as staff or the elected official by whose authority they hold a policy making position. In specifying in Chapter 399 that the ethics training JCOPE provides to lobbyists must include training on the Election Law, the Legislature has recognized that campaign finance has important ethical dimensions. Indeed, large contributions are such an obvious source of conflict of interest that their connection to ethics rules cannot be seriously debated. In the opinion of the Review Group the guidance needs to state clearly that creating an appearance that special access has been granted in exchange for a campaign contribution is a violation of sections 3(d) and 3(f) of the Code of Ethics<sup>113</sup> and that the proper course is to avoid such an appearance by not granting special access to either the lobbyist for a large contributor or his client that might reasonably be tied to a large campaign contribution. The access will not be special, for example, if it is granted equally to all sides of the issue.

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<sup>113</sup> N.Y. Public Officers Law Sec. 74(3)(d): “No officer or employee of a state agency, member of the legislature or legislative employee should use or attempt to use his or her official position to secure unwarranted privileges or exemptions for himself or herself or others, including but not limited to, the misappropriation to himself, herself or to others of the property, services or other resources of the state for private business or other compensated non-governmental purposes.”

N.Y. Public Officers Law Sec. 74(3)(f): “An officer or employee of a state agency, member of the legislature or legislative employee should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.”



The Commission also should be more expansive generally in explaining the various ethics laws through guidance, FAQs, hypotheticals, and examples, including any relevant rulings or advisory opinions. Currently, the Training Course directs trainees to “JCOPE’s regulations, advisory opinions, and policies” (which are not linked in the “Training” section of the JCOPE website) for further guidance on the ethics laws. As noted above, the materials available on the website are either incomplete or scattered, so this direction is of little practical aid to anyone seeking further guidance. While the presentation itself is limited by time, the website is not, and JCOPE should make clear and abundant explanation of the various laws a primary and easily-searched component of the online Training library.

We also urge the Commission to move beyond the mere mechanics of the ethics laws in these trainings. While it is important to educate public officers and employees on what the laws are and how they can be followed or violated, equally as important is *why* the laws exist and *why* it is so vital that people at all levels of state government take their ethical responsibilities seriously. This element of purpose and importance should pervade throughout the training alongside the mechanical explanation of what the law is and how it is to be followed.

Finally, the Review Group also believes that the Commission has the authority to be in effect an advocate for ethical government. Just as police departments and governmental agencies proactively endeavor to educate the public about drunk driving to reduce violations preventatively, even while also enforcing drunk driving laws when violated, so too should JCOPE be proactive in trying to cultivate an ethical government even as it enforces ethics laws in response to violations. The training seminars are intended achieve this to a degree. But a champion for ethics in Albany is badly needed, and we believe that JCOPE can and should play that role. This goes beyond mere training seminars, and should develop into a multi-faceted

campaign to make ethics awareness a regular and visible part of State Government for elected officials and employees alike.

Visibility is critical for cultivating a culture of high ethical conduct. We urge the Commission to pursue a regular and visible campaign to make ethics a part of the State Government culture. As noted above, the State's leadership should be enlisted in creating strong ethical messages from the top. Sending regular ethics-oriented emails to government officials and employees that include elements of training (perhaps a "rule of the week" with examples and answers to frequently asked questions) as well as news (recent JCOPE actions, ethical behavior worthy of recognition, or similar items of note) would do much to maintain a conscious awareness on the part of public officials and employees of their ethical duties.

Workplace signage would also be a boon to the ethics effort. Large, highly-visible reminders with easily read and remembered slogans or messages hung in government offices and agencies would provide daily reminders that officials and employees carry a public trust and an ethical duty not to betray that trust. They could also be used to warn of the serious consequences that ethical lapses can and do carry. Greater awareness of the consequences of violating ethics laws can be a powerful tool in deterring unethical behavior.

We also urge the Commission to be assertive in expecting top government leaders and agency heads to contribute to ethics training materials and ethics-oriented media. An ethical culture must be endorsed from the top down, and participation by leaders not only creates an element of ethical accountability, but also conveys an internal motivation for ethical behavior as distinct from an outside imposition of ethical mandates.

Finally, one of the Commission's most important roles in this aspect is to enable the perception that Albany has made ethics a priority. JCOPE must take the lead in establishing

guidelines regarding the ethical behavior of public officers who have received, or whose appointing authorities have received, large campaign contributions from persons or entities seeking to influence them through subsequent lobbying.

Ethical training in state government cannot simply be a mechanical exercise in teaching what the ethics laws are and how their violation can be punished. In order to cultivate a culture of ethics in government, JCOPE must take a proactive lead in wielding its authority and trying to shape the agencies and government branches subject to it. We urge the Commission to embrace this role with gusto.

#### **F. Composition of Commission**

JCOPE's first two years of existence show the persistence of a basic flaw in its structure that prevents it from operating at full capacity with an independence not open to reasonable question. From the outset, government watchdogs and the media expressed skepticism about JCOPE's independence in light of the fact that its appointment structure reflects partisan considerations and a problematic power dynamic between the legislature and governor's office. As the New York Times opined in June 2011, "the new 14-member Joint Commission on Public Ethics created to monitor elected officials, legislators and lobbyists is so deeply flawed in its structure as to be wholly ineffective."<sup>114</sup> The initial skepticism about JCOPE's ability to be independent does not appear to have abated and there is no objective reason to think it should have. Therefore, on the current trajectory there is no reason to suppose that JCOPE will be able to restore public confidence in government.

##### 1. Analysis

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<sup>114</sup> *Ethics Reform, Albany Style*, N.Y. TIMES, June 6, 2011.

JCOPE must be more of an activist. Its major enforcement action was truncated in its reach. It must show the energy and boldness required to address the weaknesses of the culture for ethical behavior in State Government.

It is also the Review Group's judgment that public skepticism is not likely to abate in the future without a sharp increase in the robustness of JCOPE's performance. We also believe that an increase in robustness, while highly desirable, will not be sufficient under the circumstances. In order for JCOPE to fulfill its mission of restoring and maintaining public confidence in New York State Government and the integrity of the law making and procurement processes in Albany, it is necessary to correct the flaws in JCOPE's structure.

Under Executive Law § 94, the majority leaders of the Assembly and the Senate each appoint three commissioners; the minority leaders of the Assembly and the Senate each appoint one commissioner; and the governor and lieutenant governor appoint six commissioners, three of which must be long to a major party that is not the governor's party.<sup>115</sup> The law also requires vacancies to be filled along party lines.<sup>116</sup> As already discussed, certain enforcement actions can be vetoed on a party basis. The Executive Director is appointed by a majority vote which must include at least one member appointed by the Governor from each of the two major political parties and one member appointed by a legislative leader from each of the two major political parties.

The assumption of this appointment structure appears to be that seven members of the Commission will be Democrats and seven members will be Republicans. However it is

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<sup>115</sup> See N.Y. Executive Law Sec. 94(2).

<sup>116</sup> "In the event that a vacancy arises with respect to a member of the commission first appointed ... by a legislative leader, the legislative leaders of the same political party in the same house shall appoint a member to fill such vacancy... In the event of a vacancy in a position previously appointed by the governor and lieutenant governor, the governor and lieutenant governor shall appoint a member of the same political party as the member that vacated that position." *Id.*

theoretically possible for minor party or independent members to be appointed except in one instance. That instance is the mandate that the Governor appoint not merely three members who do not belong to his party but three who belong to the other major political party. This provision on its face discriminates against persons who are not members of any political party or are members of a minor political party.

There is a reasonable question whether this discrimination is narrowly tailored to serve a compelling state interest and therefore constitutional under the First and Fourteenth Amendments.<sup>117</sup> The de facto split of the Commission into seven Democrats and seven Republicans is also constitutionally problematic because the constitutional analysis here must take account of realities and not just the theoretical possibilities.<sup>118</sup> The practical reality is that under the current structure independents and minor party members are precluded from participation in the vital activity of administering and enforcing ethics and lobbying laws.

Moreover, the 50 – 50 party structure is something to be avoided as a matter of policy in an ethics enforcement agency. It bespeaks a partisan focus that has no place in government ethics oversight.

This is so for several reasons. First, independence, not party membership or loyalty, should guide government oversight. JCOPE’s organizational structure should facilitate fair scrutiny of elected officials; it should not reflect a political truce to avoid embarrassment to

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<sup>117</sup> By “giv[ing] the two old, established parties a decided advantage over any new parties struggling for existence,” the state “place[s] substantially unequal burdens on ... the right to associate,” which can only be justified by a compelling state interest. *Williams v. Rhodes*, 393 U.S. 23, 31(1968) (striking down ballot-access provision that effectively excluded new parties from qualifying for the ballot). Although a state may have a valid interest in promoting a two-party system to encourage compromise and political stability, this interest is not so compelling as to justify a system that “does not merely favor a ‘two-party system’; it favors to particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly.” *Id.* at 32. While *Williams* addressed the issue in the context of election law, the principle of equal political opportunity under the First and Fourteenth amendment extends broadly to participation in the political process.

<sup>118</sup> *Id.* at 31.

either party. When such a political truce reigns, it improperly prioritizes the interests of entrenched political parties over the public's interest in securing ethical government.

Second, the 50-50 structure creates the appearance of weak enforcement and the primacy of the principle that no party will be embarrassed. Since in order to maintain public confidence in government ethics laws are based on the standard of appearances, the structure of JCOPE needs to be judged by the same standard.

Third, others have remarked on the weakness of a 50 – 50 structure in a context where it is far more defensible than it is for JCOPE. The Moreland Commission, in its Preliminary Report, identifies the partisan structure of the Board of Elections as among the primary causes of the Board's deficiencies. The "party divide" was found to limit the flow of information within the agency, breed hostility and undermine cooperation among Board of Elections employees, and "often ensur[e] that the [enforcement] Unit engages in little or no enforcement."<sup>119</sup> The partisan concerns underlying the Board's structure pervade the Board's decision-making, as is clear from the Board's troubling determination that "the value of protecting against possible political vendettas outweigh[s] the cost of not addressing potentially meritorious anonymous complaints ... regardless of the severity of the allegations involved or the quality of the information provided by the anonymous complainant."<sup>120</sup> Thus, the Moreland Commission concluded that "the Board's chronic, willful inaction, and anti-enforcement policies and practices, are rooted in the Board's party-driven structure," and that "[f]or the Board, bipartisanship means a tacit agreement among the parties to do nothing to enforce our laws."<sup>121</sup>

Therefore, if there is another way to prevent partisan abuse of the Commission's authority that does not have the practical effect of excluding independents and minor party

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<sup>119</sup> Moreland Commission, Prelim. Report, pp. 61–62 (Dec. 2, 2013).

<sup>120</sup> Moreland Commission, Prelim. Report, p. 72 (Dec. 2, 2013).

<sup>121</sup> *Id.* at p. 85.

members, or perpetuating a 50 – 50 major party control of JCOPE, following that alternative would serve both constitutional and ethics policy values.

## 2. Recommendations

Unless the Legislature and the Governor are willing to reconsider earlier proposals for an appointment commission like that used to select judges of New York’s highest court, which is the ideal approach, we propose urgently needed improvement by eliminating the political test for appointments to JCOPE, and revising the Commission’s structure and appointments as follows. The majority leaders of the Senate and Assembly should each appoint two, rather than three, commissioners. The minority leaders of the Senate and Assembly should each appoint one commissioner. The Governor and Lieutenant Governor should appoint four, rather than six, qualified commissioners irrespective of political allegiance. The Attorney General and the Comptroller, who currently make nonbinding recommendations for appointees to the governor, should each appoint one commissioner. An additional commission seat should be added for an appointment by the Chief Judge of the State of New York.<sup>122</sup>

This appointment scheme would meet concerns about abuse of JCOPE as a tool for partisan infighting, while increasing the Commission’s independence in appearance and fact. It would reduce the representation disparity between majority and minority legislative leaders, eliminate the party-based requirements for the Governor’s appointees, and provide for

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<sup>122</sup> This requirement is in accordance with the separation of powers under New York’s Constitution. *See* Rosenthal v. McGoldrick, 280 N.Y. 11 (Ct. App. N.Y. 1939) (“The exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers.’ The rule that the judiciary may not be charged with administrative functions does not apply when such functions are ‘reasonably incidental to the performance of judicial duties.’”) (quoting Matter of Richardson, 247 N.Y. 401 (Ct. App. N.Y. 1928), opinion by Cardozo, Ch. J.). It is a judicial duty to interpret and enforce the laws of the state of New York, including the laws governing the procedures to be followed in judicial proceedings, and it is reasonably incidental to that duty for the Chief Judge to make an appointment to a body that oversees the ethics of those who write these laws so that the laws generally, and the procedural laws in particular, may more clearly be said to do justice and not be tainted by conflict of interest.

appointments by the Attorney General, Comptroller, and Chief Judge of the State of New York—the State’s chief legal officer, its chief audit officer and its chief judicial officer. As a result, the Commission’s structure would no longer reflect a partisan truce that facilitates giving priority to protecting the image of both major parties. Instead, it would strike a balance of perspectives from the legislative, executive, and judicial branches of government, and provide for non-partisan appointments by diverse elected officials and the Chief Judge. This structure is one reasonably designed to avoid political abuse and facilitate effective, professional and independent government ethics oversight.

#### **IV. CONCLUSION**

The Review Group believes that the two most important conclusions to draw from this Report are first, that JCOPE has not yet made the contribution it can to its vital mission of restoring public confidence in government largely due to lack of a vigor sufficient to overcome public skepticism, and second, that any reasonable attack on the conflict of interest in State Government cannot ignore the conflicts of interest created by large campaign contributions and that it within the mandate of JCOPE to address this key source of conflict of interest.

As to the first point, JCOPE did not show leadership, assertiveness and initiative when not fully pursuing the Lopez investigation. Thus, JCOPE did not meet the challenge of showing that its appointment and decision making structure will not impair its independence in fact and appearance.

As to the second point, even if restructured and reinvigorated in the ways we have suggested above, JCOPE must provide an inoculation against the perception that Albany is under the influence of large campaign contributions by establishing guidelines for the ethical behavior of a public official who has received, or whose appointing authority has received, a large



campaign contribution from a person or entity now seeking to influence his or her decision through lobbying activity. As noted above we believe that in the case of a large contribution, the public officer should decline to grant any special access to the lobbyist or his or her client.

We recognize that the remedies we are recommending constitute strong medicine. However the breach of public trust that now besets State Government requires strong medicine. It is always important to recognize the many persons of the highest integrity and commitment to public service who work in State Government. It is for their sakes as well as the public's that the seemingly unending trail of indicted and convicted legislators must end. As noted above, the Review Group, and the organizations with which it is affiliated, stand ready to help JCOPE in this task. We want to make our Hope for JCOPE a reality.

# New York City Bar Association Committee on Government Ethics

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