

Written Testimony of Judge Sanford Berland
Executive Director, Joint Commission on Public Ethics

Chair Biaggi, Chair Krueger, Ranking Member Palumbo, members of the Committee, I want to thank you for the opportunity to appear before you this morning. On behalf of our commissioners, I am proud to be part of the Joint Commission on Public Ethics, New York State's ethics and lobbying regulator. To be clear, however, I am only speaking today for myself and the staff.

I am Sanford Berland, the Commission's Executive Director, a position I assumed only three months ago. Prior to joining JCOPE, I spent several years on the bench as a Court of Claims Judge sitting as an Acting Supreme Court justice, and also had a long career in private practice and in-house with Pfizer Inc.

While I am still getting up to speed at the Commission, I am immediately struck by the expertise and dedication of our professional staff. There are former prosecutors and FBI agents, lawyers, auditors, accountants, reporters, and educators, all of whom, for the last decade, have provided steady and capable guidance and direction, ensuring that no state official, employee or lobbyist can claim ignorance of the laws we administer or of their obligation to comply with them – and of the penalties they face should they fail to do so. Our staff have shown themselves to be wholly committed to executing the role assigned to the

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Commission as part of the Public Integrity Reform Act that the Legislature enacted in 2011.

Under PIRA, we are charged with administering the State's ethics and lobbying laws. In that capacity, we educate, train, issue advice and guidance, and, yes, compel compliance with, and enforce violations of, the law. With over 200,000 state officers and employees under our jurisdiction, as well as Members of the Legislature and Legislative staff, and more than 13,000 individual lobbyists and their clients, we are extremely proud of our record in carrying out our mission.

I understand, of course, that this hearing has been called not so much to catalogue our successes in administering the State's ethics and lobbying laws as to explore whether there are ways in which enforcement of those laws can be both strengthened and made more public. But to do the latter effectively, we have to understand the former.

Our dedicated staff of 50 has navigated this past year remotely, and I am grateful for the work they have accomplished under extremely trying circumstances. This year, we will process some 34,000 financial disclosure statements; issue guidance to thousands of New York State officials, employees, lobbyists and clients; administer more than 50,000 reports by lobbyists and their clients; and investigate hundreds of complaints against state officers, lobbyists and clients.

In addition to these day-to-day tasks, the Commission this year alone completed two major initiatives that provide immediate benefits to the state and the public: our online lobbying filing system and updates to the comprehensive lobbying regulations, which together not only have improved compliance with the Lobbying Act's filing requirements, they have increased public access to real-time data by light-years. Lobbying filings are available the moment they are submitted, and the new regulations improve the quality of the data itself – requiring more specific detail about who is being lobbied, as well as the subject matter and the bills being promoted.

While projects like these don't generate headlines, they do represent enormous advancements in transparency in government.

As I said, I am proud of the work JCOPE has accomplished, and I am excited to now be at the helm of the ship.

I am here neither to speak for or against the ideas that have been proposed for changing the structure and composition of the Commission and for altering the ways in which its mission is carried out. But I do want to speak about the laws that currently govern our work, because without an understanding of that, proposals for change are at least as likely to miss the mark as to hit it.

As you know, our confidentiality rules are strict and the penalties for violations are severe – criminal misdemeanors, in fact. Those rules were deliberately imposed by the Legislature when it enacted PIRA, and as staff, we must operate

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within them. But that does not mean that, given the choice, we would necessarily choose to operate in this fashion. Nonetheless, although much of what we do is in the service of transparency and sunlight, there are aspects of our work that cannot be made public.

Our critics misconstrue that forced silence as evidence of inaction and assume, without basis, that important cases are being ignored. Neither assumption is correct. To attempt to rectify this misperception, the Commission just adopted a policy to confirm publicly the general status of certain high-profile matters to the extent permitted by law.

We process over 200 investigative matters every year. However, we are not a law enforcement agency – like the FBI – or a prosecutor's office – like a District Attorney or a United States Attorney, and when those prosecutors are pursuing an investigation parallel to ours, typically they will ask that we “stand down.” We accede to such requests – that is, hold our matter in abeyance until the corresponding criminal matter has been pursued – because doing so best serves the public interest. Our proceedings, and the penalties we impose, are civil, not criminal. We are not empowered to run covert investigations, seek wiretaps, or grant immunity to witnesses. We can't execute search warrants and we don't have the resources to hire forensic accountants. In fact, we are required to *notify* the subject at the start of the investigation.

Simply put, even in our investigative and enforcement functions, we are not a substitute for the traditional law enforcement agencies to which we will ordinarily defer while the criminal investigation runs its course. Yes, this means that often –

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and whether we like it or not – we are compelled to wait until the end of the criminal process to complete our proceedings, sometimes enforcing violations years after the misconduct occurred. But our quiet patience in ensuring that misconduct is ultimately dealt with completely and to the full extent permitted by law should not be confused with inaction or a sign that important matters are being ignored. They are not. Remember, our main functions are to educate, monitor and guide – that is, to bring about compliance with the ethics and lobbying laws that fall within our purview – and, when we discover or become aware of violations (whether through our own investigative means or by information brought to us), to investigate and enforce those laws. In our view, we do all of these things very, very well, despite the constraints within which much of our work must be conducted.

And even within these boundaries, we have moved major cases. Among the notable public examples, we prosecuted the first ethics action ever against a sitting Assembly member, as well as a series of actions against legislators for sexual misconduct against their staff. We have also imposed hundreds of thousands of dollars in sanctions against lobbyists for seeking improperly to influence public officials and for failing to follow the Lobbying Act's filing requirements. These are just a few examples of the major cases we have prosecuted, despite the constraints within which we operate. So however the laws are written, I can assure you that we will continue to administer and enforce them to the best of our abilities.

New York State Senate Committee on Ethics and Internal Governance

Public Hearing: New York State's system of ethics oversight and enforcement

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Again, Madam Chairs, Mr. Ranking Member and members of the Committee, I appreciate the opportunity to be here today, and I look forward both to your questions and to your suggestions. Thank you.



**SEXUAL
HARASSMENT
WORKING GROUP**

Testimony of Sexual Harassment Working Group to Senate Standing Committee on Ethics and Internal Governance

Good morning/afternoon. My name is Erica Vladimer and I am a co-founder of the Sexual Harassment Working Group- a worker collective of former state and city legislative staffers turning their lived experiences of sexual harassment, assault, and retaliation at the hands of elected and appointed officials into advocacy for a harassment-free Albany and New York.

Thank you Chairperson Senator Biaggi and members of the Ethics Committee for holding this public hearing. It is the Working Group's belief that, in order for policy reform to be truly effective, it must start with public input. We know how impactful public hearings can be: the 2019 joint legislative public hearings on sexual harassment in the workplace were instrumental in passing the harassment-free NY legislative bill package. This hearing, and any future hearings examining our state's ethics oversight system, is the first step in creating a truly effective and independent accountability system.

At the outset, I want to emphasize the need to dismantle, reevaluate, and recreate the *entire* existing ethics system. So much of the recent public conversation has, rightfully so, focused on the Joint Commission on Public Ethics (JCOPE). Yet JCOPE is just one entity empowered to investigate and hold elected and appointed officials accountable. The Governor's Office of Employee Relations (GOER), Inspector General's office (IG), Legislative Ethics Commission (LEC), Senate and Assembly Ethics committees, personnel offices, even state statutes – all of these play a role in maintaining the integrity of our state government.

For example, after joining numerous women in speaking out about Bob Freeman, former Executive Director of the New York Committee on Open Government, the Inspector General's office called me and asked if I'd come in to be interviewed. I told them how exhausting it is to be interviewed about such experiences; I already shared the multiple instances of grooming with JCOPE more than once while being interviewed for a different experience with former Senator Jeff Klein and the interviews left me emotionally, mentally, and physically exhausted. I asked the IG staffer to request my testimony from JCOPE. She told me it would be impossible: while entities such as the IG's office can share information with JCOPE, JCOPE cannot share information with other investigative entities. I begged her, even offered to sign a waiver to

release my testimony. She said she'd try and call me back later that week, but I never heard from her again.

I also want to emphasize that we cannot continue defining power abuse the same way we have for decades. Power abuse is not just a commissioner leaking confidential information, an elected official using state resources for personal benefit, or a senior advisor rigging RFP processes for major donors. Power abuse is also an elected official shoving their tongue in a staffer's mouth, a chamber leader failing to hold a member accountable for sexual assault, and an elected pitting young staffers against one another, asking deeply personal and inappropriate questions, sticking his hand up a staffer's blouse.

Discrimination, harassment, assault, and retaliation are all manifestations of power abuse. Yet they are not explicitly mentioned in the Public Officers Law, leaving too much room for interpretation. I know this first hand, and you can also read about it in *Klein v. JCOPE*. After JCOPE found my allegations to be substantially credible, a hearing officer determined that it doesn't matter, because in his view, Public Officers law section 74 does not cover what is alleged and therefore he concluded that JCOPE does not have jurisdiction.

Although JCOPE overturned the hearing officer's decision, Klein sued in NYS court to have a judge enforce the hearing officer's dismissal. We are still waiting for the judge's decision- one that could, in my opinion, set a dangerous precedent for any future harassment case that JCOPE investigates. Without explicit and clear language giving an ethics body jurisdiction over these types of power abuse, staff will continue to be subjected to abuse without any true recourse or justice.

Yet even with a clear, statutory mandate, an ethics system cannot protect staff if the entities do not hire and appoint people with the necessary expertise. And many of us in the Working Group also know from personal experience that the state's existing ethics entities are completely devoid of the necessary expertise to adequately handle these types of power abuse. To be quite blunt—my first meeting with JCOPE was traumatizing. I'm incredibly lucky that my friend and fellow co-founder Rita worked close by and could meet up after to help me process and vent, but it took over a week to stop rehashing the interview in my head, what I might've forgotten or should've said differently and wondering why they asked me certain questions - several of the questions focused on my past relationships or past trauma which had no connection to my allegations about Klein forcibly kissing me. It was, like psychological warfare. My follow-up interviews were somewhat better, though I believe that stemmed—at least in part— from the Working Group's testimony at the February 2019 hearing, where some members who had been interviewed by JCOPE described their experiences. What's clear is that there is a significant lack of

trauma-informed and victim-centered processes, training, and understanding in our ethics entities.

This must change in any new ethics system; it starts with ensuring the system is staffed with experienced personnel and decision-makers who understand the intricacies and nuances of employee harassment, discrimination, and abuse.

Ensuring a new ethics system has the requisite expertise is also one way to rectify perhaps the most pressing issue: independence. We need a truly independent investigative and accountability system, one where decision-makers are not beholden to the very people they are supposed to hold accountable. Much like a company's HR department is designed to protect the company, not employees, our current ethics system is meant to protect the institution and the power-holders within it – not staffers or the public. New Yorkers can never have trust in such a biased system; it's a stacked deck, the unfairness of which also tends to add a second layer of trauma to victims.

I'd like to end by providing a few additional recommendations:

- ***The judiciary should not play a role in the appointment process:*** Many of the proposals for a new ethics commission provide too much appointment power to the Chief Justice, even with the involvement of the State Bar. Judges are extremely politically connected and appointed to the bench or supported in elections by political connections, raising questions about the potential bias they'd have in selecting neutral appointees to oversee people subject to Public Officers Law (or at least the appearance of impropriety). It is even more concerning given that the Chief Justice is appointed by the Governor, and those apparent conflicts of interest. Additionally, all Court of Appeals judges play a role in ny impeachment process of state officials, which adds another conflict of interest into placing these judges on any ethics investigative body, and further complicates consolidating this power here.
- ***The new ethics system budget should not rely on backroom political negotiations:*** Without adequate financial resources, any new ethics system will be rendered ineffective.

The Working Group hopes this hearing is the first of many public conversations, and that the Assembly will step up and join the Senate in future hearings; any change will require action in both chambers. Thank you again for the opportunity to testify, I'd be happy to answer any questions you have.



Testimony of Reinvent Albany to Senate Standing Committee on Ethics and Internal Governance

Good afternoon Senator Biaggi and members of the Senate Ethics and Internal Governance Committee. My name is Rachael Fauss, and I am the Senior Research Analyst for Reinvent Albany. We advocate for open and accountable New York government. Thank you for holding this important, timely hearing and inviting us to testify.

We are here today to make five points:

- 1. New York State government has a serious and ongoing corruption problem that goes well beyond the misdeeds of former Governor Andrew Cuomo.**
- 2. The Joint Commission on Public Ethics (JCOPE) is worse than useless and must be replaced.**
- 3. The legislature must pass a constitutional amendment replacing JCOPE with an independent agency.** This should be discussed further in an additional public hearing on ethics this fall.
- 4. The legislature must pass legislation to fix JCOPE before constitutional changes take effect, and to better protect state employees from harassment—another form of abuse of power.**
- 5. At a second ethics hearing this fall, the legislature must also examine policy change to prevent abuses of power like those seen with all of Andrew Cuomo’s scandals,** including the use of state resources for personal gain, and influence over state spending without public transparency or legislative and/or comptroller approval. The Comptroller’s and Attorney General’s roles in preventing corruption should also be reviewed.

New York State government has a serious and ongoing corruption problem.

The scandals involving Andrew Cuomo are only the latest in a sad saga of public officials abusing their power, further fueling cynicism and damaging the public’s trust in state government. New York has had more public officials prosecuted for corruption than any other state.¹ At one point, New York state senators were more likely to lose their seats

¹<https://gothamist.com/news/new-york-is-the-1-most-corrupt-state-in-america>

due to a corruption investigation than to losing an election.² Since 2000, nearly 50 public officials have been accused of misdeeds, including three governors, three legislative leaders and the state attorney general.³ Many more state officials have been investigated by federal authorities.

Barely a year goes by without a massive scandal in Albany. Before the sexual harassment and COVID-19 deception investigations erupted around the Governor, there was the Buffalo Billion bid-rigging scandal in which hundreds of millions of taxpayer dollars were awarded to the Governor's donors because of bribery and pay-to-play.⁴ As a result, four of the Governor's donors and two of his allies – including his top aide, Joseph Percoco – were found guilty on corruption-related charges.⁵

Corruption and abuse of power are not victimless crimes. Corruption hurts vulnerable New Yorkers the most. When state funds are awarded and laws passed because of pay-to-play and conflicts of interest, the richest and most powerful are rewarded, not the neediest or most deserving.

The Joint Commission on Public Ethics (JCOPE) is worse than useless and must be replaced.

Federal prosecutors and the State Attorney General, not JCOPE, have conducted the fight against corruption in state government. The highly politicized JCOPE often appears to serve to protect those in power. JCOPE has handed out permission slips to the Governor of New York allowing him to receive millions in outside income for his book deals, without approval from JCOPE commissioners.⁶ JCOPE has done nothing about the Governor's alleged use of state staff and resources to write and edit a book that netted him millions of dollars.⁷

JCOPE is built on a quicksand of conflict of interest. Consider the alleged leak of former commissioner Julie Garcia's vote in January 2019. Because of laws prohibiting disclosure of votes on JCOPE investigations, these votes are supposed to be confidential.⁸ However, shortly after the vote took place, Garcia alleges that she received a phone call from Speaker Carl Heastie's Counsel Howard Vargas saying that the Governor had complained about the votes of the Speaker's appointees (Garcia was

²<https://www.chicagotribune.com/news/ct-xpm-2013-04-04-sns-rt-us-usa-politics-newyork-corruptionbre933019-20130404-story.html>

³https://www.syracuse.com/news/2015/01/troubled_ny_politicians_a_list_of_arrests_scandals_misdeeds_and_controversies.html

⁴ <https://www.nytimes.com/2018/06/18/nyregion/buffalo-billion-corruption-kaloveros-cuomo.html>

⁵ <https://spectrumlocalnews.com/nys/binghamton/news/2018/07/13/buffalo-billion-reaction->

⁶https://buffalonews.com/news/state-and-regional/seven-months-later-cuomo-administration-divulges-details-about-his-covid-19-book-deal/article_e2ba30ba-9275-11eb-9642-83fedbd461fc.html

⁷ <https://www.nytimes.com/2021/04/19/nyregion/andrew-cuomo-book-investigation.html>

⁸<https://www.timesunion.com/news/article/Inspector-general-probed-alleged-ethics-panel-s-14832610.php>

appointed by the Speaker). On June 29, 2021, JCOPE voted not to seek an investigation into the leak — largely because Governor Cuomo’s commissioners all voted against doing so.⁹ If Garcia’s account is true, then JCOPE, which is supposed to enforce ethics laws, instead reinforced corruption.

Ethics enforcement agencies are supposed to be independent of the public officials that they police, but JCOPE commissioners are nominated on the basis of their political connections, not their independence. As a result, commissioners vote to protect their own appointers. This has been common in the case of Governor Cuomo and his allies.

Governor Cuomo’s appointees wield so much power because JCOPE’s dysfunctional voting rules enable a minority of commissioners to protect their appointer. Under the rules, an investigation into a statewide official can be blocked without support from two of the Governor’s appointees. Similarly, investigations of legislators cannot take place without two votes from appointees of the legislator’s party. This is supposedly intended to prevent partisan investigations, but instead it prevents *any* investigations.

JCOPE is so dysfunctional that in 2015, the State Integrity Investigation gave NY’s Ethics Enforcement Agencies an “F” grade, placing the state 38th in the nation.¹⁰ One factor in the failing grade was a 25/100 score on the perceptions that “in practice, the ethics entity/ies operates with independence and is protected from political interference” and “independently initiates investigations and imposes penalties on offenders.”

The legislature must pass a constitutional amendment replacing JCOPE with an independent agency.

JCOPE can only be replaced with a constitutional amendment, which must be passed by the legislature in two consecutive legislative sessions then approved by voters.

Throughout the state’s history, the problem with New York ethics enforcement has been that elected officials choose their own police. The question is, how do we establish an ethics enforcement commission that is truly independent from elected officials?

Reinvent Albany is working with other advocates and legal experts like Evan Davis, former counsel to Mario Cuomo, and Ed Murray at the NYC Bar Association, as well as other government watchdogs and organizations, to develop an appointment process for a new, independent ethics enforcement agency. This work builds on the important constitutional proposal to replace JCOPE introduced by Senator Liz Krueger and

⁹<https://www.timesunion.com/news/article/JCOPE-votes-down-criminal-probe-into-Cuomo-leak-16285265.php>

¹⁰<https://publicintegrity.org/politics/state-politics/state-integrity-investigation/new-york-gets-d-grade-in-2015-state-integrity-investigation/>

Assemblymember Robert Carroll. Consensus is building on a number of principles. Reinvent Albany supports the following:

- **JCOPE must be eliminated and replaced by a new, independent ethics commission** to be established by constitutional amendment.
- **The commission should be smaller in size than JCOPE**, even as small as five members, to increase accountability of those making decisions.
- **The method of appointment is important for facilitating independent action.** Joint appointments, in which the responsibility is shared by two or more parties, could be an improvement on the current direct system. For example, the Governor could appoint two members jointly with the Comptroller and Attorney General, while the majority leaders and minorities leaders of the legislature could each make a joint appointment. The goal is to encourage moderation and reduce the likelihood that a commissioner is beholden to any one appointing authority.
- **There should also be an additional, independent joint appointment as a tiebreaker** between the legislative and executive joint appointees. One option is to have the four commissioners appointed by the legislative and executive branches appoint a fifth member. Another option is to have the chief judge (perhaps in consultation with the 4 presiding justices) recommend a pool of candidates from which the four commissioners appointed by the legislative and executive branches select the fifth member.
- **To avoid situations where an appointment stalls because of political stalemate, the law can spell out consequences for inaction**, including that the appointing authority devolves to another authority.
- **Certain individuals should continue to be barred from serving on the commission**, such as those who hold elective or party office, lobby, or have business before the state.

Outside of the appointment process, we support ensuring that the commission is properly funded to do its job, and that it be required to issue annual reports on its performance which include recommendations for legislative changes to allow for continuous improvement. JCOPE is currently required to issue annual reports but has failed to make significant recommendations for improvements. This model has been successfully used by the New York City Campaign Finance Board to continually update and improve the city's campaign finance laws. Additional consideration should be given to how to structure an independent commission via a constitutional amendment in another hearing this fall.

The legislature must pass legislation to fix JCOPE and better protect state employees from harassment.

Amending the constitution to replace JCOPE will take until 2023 at the earliest, so in the meantime the legislature can improve JCOPE and better protect state employees from harassment—another form of abuse of power—by passing the following bills:

1. [S6964A \(Biaggi\)](#) – omnibus JCOPE reform legislation. This bill passed the Senate this year, but currently has no Assembly sponsor (the individual components are also present in separate legislation sponsored by Assemblymembers Hyndman and Simon). The omnibus bill:
 - a. Removes the requirement that in order to initiate investigations, two commissioners voting in favor must be from the suspected individual’s political party and/or branch of government.
 - b. Removes partisan voting requirements for appointing or removing JCOPE’s executive director, instead requiring a simple majority.
 - c. Changes the appointment process so that each legislative leader nominates two commissioners to JCOPE.
2. [S6364 \(Gounardes\)/A7512 \(Hyndman\)](#) - allows JCOPE to keep complainants informed of investigations, and disclose the status of investigations to the public. JCOPE [announced in July](#) that some of the components of this bill are being enacted administratively. This bill has not passed either house.
3. [A5825 \(Cruz\)/S1096 \(Liu\)](#) – includes legislative and judicial employees under state civil service law whistleblower and anti-retaliation protections. This is a proposal from the Sexual Harassment Working Group’s 2021 Legislative Agenda.¹¹ This bill has not passed either house.
4. [A2483B \(Niou\)/S3395A \(Gounardes\)](#) – ensures that employees of elected and appointed officials are better able to hold state government accountable and are protected under NYS Human Rights Law’s anti-discrimination and harassment provisions. This bill passed the Senate, and is also a proposal from the Sexual Harassment Working Group.
5. [S990 \(Hoylman\)](#) - removes exemptions for JCOPE and the Legislative Ethics Commission from the Freedom of Information Law (FOIL) and Open Meetings Law (OML). This legislation does not currently have an Assembly sponsor, though has been introduced in both houses in prior sessions.

We also conceptually support policy changes to protect state employees from retaliation, including unlawful release of personnel files. There are a number of bills to address these issues which apply broadly to all employers in New York State, including Senator Biaggi’s new bill about the standard for retaliation, [S7292](#), and Senator Gounardes’s bill prohibiting the release of personnel files, [S5870/A7101 \(Gonzalez-Rojas\)](#), which passed the Senate in June.

¹¹ <https://www.harassmentfreealbany.com/home>

New legislation should also be introduced to do the following:

1. **Require, at a minimum, the financial disclosure statements of senior agency officials to be posted online.** Currently the [District of Columbia posts all financial disclosure statements online](#) for its agency staff members. Ideally, disclosure statements should be filed in electronic form that allows for the information disclosed to be released in open data format. JCOPE discussed this issue at its July 2021 meeting after Reinvent Albany and other watchdogs [sent letters asking for the disclosures to be posted online](#), but stated that it required legislation. Given that JCOPE recently voted to allow proactive disclosure of the status of investigations after previously recommending this be accomplished by legislation, we see no reason why proactive posting online of disclosure statements cannot also be done administratively. However, the legislature can and should pass a law to require this given JCOPE's inaction.

The legislature must also examine policy change to prevent abuses of power like those seen with Andrew Cuomo's scandals.

We encourage the Senate to continue its review of abuses of power and need for ethics reforms in another hearing this fall. There is a lot to unpack from the Governor's scandals, including how to better regulate the use of state resources for personal gain, and the executive's influence over state spending without public transparency, or legislative or comptroller approval, as seen with the Governor's [unilateral steering of state funds for the Harbor Lights project](#).

Reforming enforcement bodies is one step toward reforming Albany, but alone may not be enough to prevent abuses. The State Ethics Code as part of the Public Officers Law should also be examined with regard to prohibitions on use of state resources, as well as outside income. Reinvent Albany believes that bans on outside income are far more effective than the the current "disclose and recuse" regime, for example.

Additionally, the State Comptroller and Attorney General are important parts of the state's anti-corruption safety net. The Comptroller's role in overseeing state spending has been whittled away by Governor Cuomo [through the budget](#) and [Executive Orders](#), and must be restored to prevent waste, fraud and abuse. Legislation sponsored by Senator Reichlin-Melnick and Assemblymember Zebrowski, [A7925/S6809](#), would restore some of this oversight. Additionally, the Attorney General has a Public Integrity Bureau and regional offices, as well as a standing partnership with the Comptroller to investigate the improper use of taxpayer funds.

Thank you again for the opportunity to testify. Please contact Rachael Fauss at rachael [at] reinventalbany.org should you have any questions.

TESTIMONY OF EVAN A. DAVIS¹ BEFORE THE SENATE COMMITTEE ON ETHICS AND INTERNAL
GOVERNANCE

AUGUST 25, 2021

Thank you for inviting me to testify at today's hearing.

When the statute creating JCOPE and the LEC was enacted in 2011, it was hoped that ethics enforcement in state government would become more consistent and rigorous as a result of unifying the investigative function in a single entity. Unfortunately, that benefit has been more than negated by the failure in 2011 to structure the new entity in a way that would assure its independence from those who appoint the members of the commission.

The result is that as things stand JCOPE is doing more harm than good. Rather than promoting confidence in state government, JCOPE is reducing it. JCOPE MUST GO and be replaced by a single independent enforcement agency for the Executive and Legislative branches of state government.

There are at least eight ways in which JCOPE lacks the independence needed to do its job.

1. Public officials who are regulated by JCOPE get to appoint "their person" to JCOPE and no appointments are made by an unregulated person such as the Chief Judge. This is in contrast to the Commission on Judicial Conduct a majority of whose members are appointed by non-regulated persons.
2. The JCOPE Chair is appointed by the Governor and serves at the Governor's pleasure.
3. As few as two of the Governor's appointees to the 14 member Commission can veto an investigation or adverse finding about the Governor or his direct appoints. As few as three legislative appointees have this veto power. No other state has a comparable provision.
4. There is no two-way ban on communications between appointing authorities and their appointees. Commissioners and JCOPE staff in theory may not disclose confidential proceedings but appointing authorities are free ex parte to urge directly or through agents the outcome they want to see.
5. Appointing authorities can act unilaterally to remove their appointees for what they deem to be good cause.
6. The Executive Director may be, and frequently has been, a person closely associated with the Governor.
7. The JCOPE budget is totally in the discretion of the Governor and the Legislature without the kind of protection afforded by the Constitution to the legislative and judiciary budgets.

¹ I am the Manager of the Committee to Reform the State Constitution which supports the Constitutional Amendment to replace JCOPE and the LEC with an independent entity modeled on the Commission on Judicial Conduct. See S855/A1929. My work in the ethics field includes service on the New York City Conflict in interest Board, as Counsel to Governor Mario Cuomo where I led negotiation of legislation to require financial disclosure, bar legislators from appearing before state agencies, and subject party leaders to ethical regulation and as a member of the Second Circuit Disciplinary Committee and the New York State Bar Committee that drafted the NY lawyers' Code of Professional Responsibility. Relatedly I led the Watergate and Cover-up Task Force of the Nixon Impeachment Inquiry House Judiciary Committee Staff and served as President of the New York City Bar Association.b.

8. There is no duty to report ethical misconduct to JCOPE. There is a duty to report to the Inspector General but the IG reports to the Secretary to the Governor who is unlikely to take action that reflects badly on the Governor.

These are JCOPE's structural flaws. These flaws have led to repeated instances in which JCOPE commissioners have appeared more concerned about serving the interests of the person who appointed them than in serving the interests of the people.

A prime example is JCOPE's handling of allegations that a senior aide to the Governor, Joseph Percoco, misused state resources and that other state officials likely knew that fact. During his trial for receiving over \$300,000 in bribes in return for official favors, it became clear that while on leave to manage the Governor's reelection campaign, Percoco continued to work out of the Governor's Office in Manhattan. Investigative reporting by the *Times Union* showed that from his desk at that office he made calls to his partner in crime, Todd Howe, as well as to campaign fundraisers and state officials. All told 837 calls were made from his phone.

JCOPE should have investigated these allegations, but it now appears that by a close vote JCOPE decided not to. That vote occurred only because a Court ordered it. JCOPE had refused to even consider the complaint on the specious ground that it was based on trial testimony and not personal knowledge.

We now know that at least two of the Speaker's three appointees voted in favor of investigating. Even though it is a crime for commissioners or commission staff to disclose this information, almost immediately the Governor was informed of their vote and immediately called the Speaker to complain. Obviously the Governor felt the Speaker should have done a better job of controlling his appointees.

JCOPE recently voted not to refer this matter for potential prosecution and the identity of the person who informed the Governor remains unknown.

Another example of excessive accommodation of the political needs of the Governor is JCOPE'S handling of its approval of the governor's \$5.1 million agreement to write a book about the State's handling of the Covid-19 Pandemic. The approval was handled at the staff level when this massive monetization of public service deserved to be escalated to the full commission. There is a substantial question under the State Ethics Code whether such monetization can be taken by a currently serving state officer without violating the duty not to use official authority for personal gain. Awareness of this problem is indicated by the fact that contrary to JCOPE'S own regulations, the letter of approval did not state the amount of the compensation.

The letter did warn that the Governor could not use state resources to help write the book. Nonetheless there are credible allegations that this is exactly what happened. The Comptroller has asked the Attorney General to investigate. However misuse of state resources is squarely within JCOPE's jurisdiction and had it the requisite independence it would have initiated its own investigation.

What is to be done? Clearly JCOPE must go. Given the importance of independent ethics oversight as check and balance mechanism, it should be enshrined in the State Constitution just as is the Commission on Judicial Conduct. All of the indicators of lack of independence outlined above should be eliminated. Two way negotiations with the Assembly need to begin immediately.

And one other thing. This Committee could do a great service by using its subpoena power to get a clear picture of how JCOPE actually works including asking the Governor who told him about the vote on a Percoco investigation question. It's an embarrassment that we still don't know.



**TESTIMONY OF THE
GOVERNMENT ETHICS AND STATE AFFAIRS COMMITTEE**

SENATE STANDING COMMITTEE ON ETHICS AND INTERNAL GOVERNANCE

**PUBLIC HEARING ON NEW YORK STATE'S SYSTEM
OF ETHICS OVERSIGHT AND ENFORCEMENT**

August 25, 2021

Good morning. My name is Edward Murray. I am an attorney testifying today on behalf of the New York City Bar Association's Government Ethics and State Affairs Committee.

Since the Joint Commission on Public Ethics ("JCOPE") was created in 2011, the Committee has issued a series of reports on the commission's structure and the manner in which it hinders effective administration of the state's ethics laws. Most recently, the Committee issued a ten-year report on JCOPE, a copy of which is submitted with this testimony.¹ The report found that JCOPE's overall mission continues to be hampered by these structural flaws.

These flaws include JCOPE's appointment method that discourages independent action by the commission members and voting rules that allow enforcement actions supported by a super-majority of commission members to be blocked, in some cases, by no more than two members.

JCOPE is also subject to strict confidentiality provisions, which can legitimately serve to protect the integrity of investigations and the reputations of innocent public servants. However, these provisions have, at times, appeared to serve as a means to hide political interference rather than the purposes for which they are intended.

Finally, JCOPE shares oversight responsibilities with the Legislative Ethics Commission ("LEC"). Notably, JCOPE has the authority to issue advisory opinions interpreting the state's ethics laws for the executive branch and LEC has the authority to do the same for the legislative

¹ "Ten Years In, Is There Still Hope for JCOPE?", Report of the Government Ethics and State Affairs Committee of the New York City Bar Association, Feb. 16, 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/ten-years-in-is-there-still-hope-for-jcope>. A copy is also appended to this testimony.

About the Association

The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.

branch. A joint commission that has appointees from both the legislative and executive branches should be empowered to regulate both branches equally to avoid an inconsistent interpretation of the state's ethics laws and to make clear to the appointing authorities, the regulated parties, and the public where the responsibility for ethics oversight lies.

In recent months, the State Senate has taken significant steps to address some of these structural issues by passing S.6964-A, prime sponsored by Senator Biaggi.² The bill, among other things, brings JCOPE's voting rules into line with agencies such as the Commission on Judicial Conduct and the New York City Conflicts of Interest Board, by requiring that JCOPE act, in all matters, by simple majority vote. The bill provides a needed short-term solution until broader, more permanent reforms can be adopted.

In this regard, the Committee supports the constitutional amendment proposed by Senator Krueger and Assemblyman Carroll to establish a Government Integrity Commission (S.855 / A.1929).³ The proposal includes many important improvements on the existing regime, including empowering the commission to sanction both elected and non-elected officials and separating out the power to remove commissioners from the power to appoint commissioners. But the appointment method for this new commission is critical for facilitating independent action. As we learned in the recent report on Governor Cuomo by the state Attorney General, even the Governor's office recognizes that an appointed official cannot effectively investigate their appointing authority.⁴ For this reason, the Committee has supported an appointment method that mirrors the one used by state's Commission on Judicial Conduct, whereby the majority of commission members are appointed by someone other than the regulated parties. The Committee has also been discussing with other organizations testifying today alternative methods that we hope would achieve similar ends, including a method of joint appointments, in which the appointment power is shared by two or more parties. From these discussions, the organizations have also come to a consensus that the new ethics commission should be much smaller in size than JCOPE, even as small as five commission members, to bring about more accountability for those making the decisions at the ethics commission.

The City Bar thanks the Senate for holding this oversight hearing and taking the lead on the difficult but important work of ethics reform. We encourage the Senate to continue this work with the Assembly so that concrete results can be achieved.

Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org

² Report in Support of Legislation Reforming JCOPE's Voting Rules and Appointment Method, New York City Bar Association, June 30, 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/jcope-reform-voting-rules-and-appointment-method>.

³ Support for the Creation of a NYS Government Integrity Commission, New York City Bar Association, March 8, 2021, <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-the-creation-of-a-nys-government-integrity-commission>.

⁴ Report of Investigation into Allegations of Sexual Harassment by Governor Andrew M. Cuomo, State of New York Office of the Attorney General Letitia James, August 3, 2021, at 128-129, https://ag.ny.gov/sites/default/files/2021.08.03_nyag_-_investigative_report.pdf.



NEW YORK
CITY BAR

REPORT BY THE
GOVERNMENT ETHICS AND STATE AFFAIRS COMMITTEE

TEN YEARS IN, IS THERE STILL HOPE FOR JCOPE?

I. INTRODUCTION

Since 2011, the New York State Joint Commission on Public Ethics (“JCOPE”) has administered and enforced the state’s ethics and lobbying laws. At its creation, the political leaders over whom JCOPE has oversight hailed the Commission as an independent monitor that would help restore integrity in state government. But while JCOPE has undertaken serious and substantial work over the past ten years, its mission has been impaired by structural flaws and, like its predecessors, by leaks and political scandal.

Initially, this Committee believed that JCOPE’s structural flaws could be effectively remedied. Indeed, in 2014, the Committee and Common Cause/New York issued a detailed report, entitled *Hope for JCOPE*, with recommendations to strengthen the Commission.¹ Today, however, the Committee, along with a number of good government groups,² believes that the promise of an independent monitor with the necessary safeguards to protect against political interference can only be realized by abolishing JCOPE and replacing it with an entity to be established by constitutional amendment.³

As we continue to advocate for constitutional change, the Committee offers this survey of JCOPE’s activities over the past ten years to glimpse the potential of a strong, independent ethics body and press the need for more immediate reforms. The report discusses key aspects of JCOPE’s structure, including its appointment method, voting procedures, and confidentiality provisions, alongside specific events in the public sphere, to illustrate the challenges to effective

¹ Hope for JCOPE, Report of the New York City Bar Association and Common Cause/New York (hereinafter “Hope for JCOPE”) (March 14, 2014), <https://www2.nycbar.org/pdf/report/uploads/Hope-for-JCOPE-Report.pdf> (all websites last visited Feb. 15, 2021).

² News Release (Feb. 26, 2020), https://www.nypirg.org/pubs/202002/release_jcopemustgo.pdf.

³ Report on A.1282/S.594 by the New York City Bar Association Committee on Government Ethics and State Affairs (Apr. 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2017378-CommissionPublicIntegrity.pdf>.

About the Association

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administration and enforcement of the state’s ethics laws. The report then describes potential reforms to JCOPE’s structure, as well as a proposal to amend the constitution.

The status quo at JCOPE is unacceptable. A lack of strong ethics oversight and ineffective regulation of conflicts of interest, as we have seen in recent years, can pose significant, if not fatal, risks to democratic norms and values. And so, with this report on the ten-year anniversary of JCOPE, the Committee urges not only assessment, but action.

II. THE COMMISSION

JCOPE comprises 14 members. The appointment method is unique. Six commissioners are appointed by the Governor and eight are appointed by the four legislative leaders. At least three of the gubernatorial appointees cannot be members of the same political party as the Governor.⁴ With respect to the legislative appointments, the Republican Senate leader has three appointments and the Democratic Senate leader has one appointment, regardless of which party controls the chamber.⁵ The Democratic Assembly leader has three appointments and the Republican Assembly leader has one appointment, regardless of which party controls the chamber.⁶ Commissioners are appointed for five-year terms and may be removed by their appointing authority “solely for substantial neglect of duty, gross misconduct in office, violation of the confidentiality restrictions,” and an “inability to discharge the powers or duties of office.”⁷

The executive director must be a “qualified, independent professional” who is appointed “solely on the basis of fitness to perform” the duties of office. The executive director is appointed (and may be removed) by a majority vote of the Commission, provided that at least one Republican appointee and one Democratic appointee of both the Governor and the Legislature approve.⁸ The Commission can remove the executive director for, among other things, a violation of the confidentiality provisions and a failure to discharge the duties of office, including the failure to follow the lawful instructions of the Commission.

The 2014 *Hope for JCOPE* report noted a number of short tenures at the Commission that “signaled a ‘rocky start.’” As discussed in that report, the first chair and executive director resigned in 2013 after little more than one year into their tenures. A second commissioner resigned in 2013 in apparent protest over the failure to launch a national search for JCOPE’s second executive director, and a third commissioner had publicly complained about leaks to the media prior to his 2013 resignation.⁹

The rocky start has settled into a rocky existence, where short tenures persist alongside extended vacancies. In 2016, a commissioner who had called for a national search for JCOPE’s

⁴ Exec. Law § 94(2).

⁵ Exec. Law § 94(2), (5).

⁶ Exec. Law § 94(2), (5).

⁷ Exec. Law § 94(3), (7).

⁸ Exec. Law § 94(9)(a).

⁹ *Hope for JCOPE*, at 14-15.

third executive director had resigned following the appointment of Governor Cuomo's former counsel as executive director.¹⁰ And in 2019, as discussed further below, a commissioner resigned in apparent protest over a leak and subsequent investigation of that leak.¹¹

Although vacancies on the Commission are to be filled within 30 days,¹² the requirement has not always been followed. In 2019, the Republican Assembly leader appointed a commissioner after a two-year vacancy.¹³ Currently, two of the four appointments allotted to the Democratic legislative leaders have been unfilled for more than a year.¹⁴ According to a spokesperson, the Democratic Senate leader has not filled the vacancy due to the "well-documented problems [at JCOPE] which make it hard to find people that would want to serve." The spokesperson also made reference to the appointment method under which the Democratic Senate leader, despite now having control of the Senate, has only one of the 14 appointments.¹⁵

The executive director position has been occupied by three people during JCOPE's ten-year existence. It has been vacant since June 2019, likely due to the longstanding dispute between gubernatorial and legislative appointees over the degree to which the executive director should be independent.¹⁶ The three executive directors – all of whom served in roles in the Cuomo administration prior to their appointment – have been criticized by JCOPE commissioners, among others, for their ties to Governor Cuomo.¹⁷ In March 2020, six JCOPE commissioners wrote to JCOPE's chairman requesting that the Commission conduct a search for an "independent" executive director, stating that "the appearance of any possibility of any continuing political allegiances runs contrary to JCOPE's mission and hampers its capacity to inspire public trust."¹⁸

¹⁰ Chris Bragg, *Two JCOPE Commissioners Quietly Depart*, Albany Times-Union (April 12, 2016), <https://www.timesunion.com/tuplus-local/article/Two-JCOPE-commissioners-quietly-depart-7243678.php>

¹¹ Chris Bragg, *New York Ethics Agency Votes Down 'Self-Assessment' Of Its Operations*, Albany Times-Union (Dec. 17, 2019) <https://www.timesunion.com/news/article/JCOPE-votes-down-inquiry-of-itself-Inspector-14913369.php>.

¹² Exec. Law § 94(5).

¹³ Chris Bragg, *Despite State Law, Democrats' Seats on Ethics Panel Remain Vacant*, Albany Times-Union (Nov. 16, 2020), <https://www.timesunion.com/news/article/Despite-law-Democrats-seats-on-JCOPE-remain-15731298.php>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *See, e.g.*, Jon Campbell, *State Ethics Panel Member Quits After Former Cuomo Aide Named Director*, lohud.com (Oct. 29, 2013), <https://www.lohud.com/story/news/2013/10/29/state-ethics-panel-member-quits-after-former-cuomo-aide-named-director/3310277/>; Mike Vilensky, *Discord Flares on New York State Ethics Panel*, Wall Street Journal (July 28, 2015) <https://www.wsj.com/articles/discord-flares-on-new-york-state-ethics-panel-1438133772>.

¹⁷ *See, e.g.*, Governor's Reach Shouldn't Extend to the "Independent" Ethics Panel, <https://www.usatoday.com/story/opinion/2016/04/03/governors-reach-extend-independent-ethics-panel/82584562/>

¹⁸ Chris Bragg, *New York Ethics' Panel Renews Search For A Leader*, Albany Times-Union (Sept. 18, 2020), <https://www.timesunion.com/news/article/No-end-in-sight-for-JCOPE-job-search-15578360.php>.

III. ENFORCEMENT ACTIONS

a. Procedures

JCOPE's enforcement procedures and actions have generated the greatest interest and scrutiny. JCOPE can undertake an investigation on its own initiative or in response to referrals from government entities or public information. Before doing so, JCOPE must provide notice of the alleged violations to the subject of the complaint and allow him or her 15 days to respond (the "fifteen-day" letter). Thereafter, but within 60 days of receipt of a complaint, JCOPE commissioners must vote on whether to initiate an investigation. Following any investigation and related hearing, a hearing officer sets forth proposed findings of fact and a penalty recommendation, if any, in a Substantial Basis Investigation Report ("SBIR").¹⁹ JCOPE commissioners must then vote to accept or reject the report in part or in full. In cases that involve executive branch officers and employees, lobbyists, and clients, JCOPE can impose the penalty. In cases that involve legislators and legislative employees, if JCOPE finds that there is a violation, JCOPE must refer the report to the Legislative Ethics Commission ("LEC"), which has full discretion to accept, reject, or otherwise modify JCOPE's findings and impose a penalty, if any. JCOPE is required to make public an SBIR within 45 days of its issuance.²⁰ For an SBIR referred to LEC, however, JCOPE must publish the SBIR only if LEC fails to do so within a time certain.²¹

Generally, JCOPE can act by a majority vote "without vacancy," that is, with the approval of eight commissioners. A notable exception to the voting requirement is for enforcement actions against officials elected to state office, state legislative candidates, and state and legislative employees. These actions are subject to a "minority veto."

As noted above, for enforcement actions, JCOPE commissioners must vote, first, to commence an investigation, and second, to find that a person violated the law. For both votes, in cases relating to the Legislature, at least two of the eight votes in favor of the enforcement action must be from appointees of the legislative leaders of the same party as the subject of the enforcement action, if the subject is a member of that political party.²² In cases relating to statewide elected officials or their direct appointees, at least two of the eight votes in favor of enforcement action must be from appointees of the Governor and enrolled in the same party as the subject of the enforcement action, if the subject is a member of that political party.²³ Finally, in cases relating to state officers or employees, at least two of the eight votes in favor of enforcement action must be from appointees of the Governor.²⁴

¹⁹ JCOPE appears to interpret the 60-day timeframe as being triggered only where there is a "sworn" complaint. *See Cox, et al. v. N.Y.S. Joint Commn. on Pub. Ethics*, Index No. 04812-18, Decision and Order, dated December 18, 2019 (arguing that a contrary interpretation would require the Commission to convene and vote on every hearsay complaint, thus encouraging the filing of multiple complaints for political reasons).

²⁰ Exec. Law § 94(14-b).

²¹ Legislative Law § 80(9-b).

²² Exec. Law § 94(13)(a).

²³ Exec. Law § 94(13)(a).

²⁴ Exec. Law § 94(13)(a).

To illustrate, a Republican Governor can appoint up to three Republican commissioners to JCOPE. In cases where the Governor's aide, for example, is the subject of possible enforcement action, JCOPE can only act if two of those three Republican commissioners vote in favor of the enforcement action. That means, two commissioners can prevent JCOPE from taking any action, even if the remaining twelve commissioners (including the other five members from the party of the person being investigated) are in favor of such action.

Similarly, the Democratic legislative leaders appoint four commissioners. Two of these four commissioners must approve enforcement action against a Democratic legislator. That means, three commissioners can prevent JCOPE from taking any action, even if the remaining eleven members (including the other four members from the party of the person being investigated) are in favor of such action.

Notably, because the voting rules do not take into account vacancies, given the current composition of the Commission, where only two of the four Democratic positions allotted to the Democratic legislative leaders are filled, one commissioner can veto an enforcement action involving Democratic legislators and their staff. Should the Democratic legislative leaders decline to fill a third vacancy, if it arises, JCOPE would effectively be prohibited from taking enforcement action against Democratic legislators and their staff.

Although JCOPE does not report voting tallies of enforcement actions, in 2015, the New York Ethics Review Commission, an advisory body established in 2011 to evaluate the activities of JCOPE and LEC, stated that the minority veto had not been routinely used.²⁵

b. Overview of Enforcement Activity

JCOPE is required to prepare an annual report that includes a “listing by assigned number of each complaint and referral received which alleged a possible violation within its jurisdiction, including the current status of each complaint,” and for any matter that has been resolved, “the date and nature of the disposition and any sanction imposed,” subject to JCOPE’s strict confidentiality requirements. The report cannot contain information for which disclosure is not permitted, such as the details of a pending investigation.

JCOPE does not make public a list by assigned number of each complaint and referral received, but does provide a summary report of “matters,”²⁶ a sample of which includes:

²⁵ Review of The Joint Commission on Public Ethics and The Legislative Ethics Commission (“2015 Ethics Review Commission Report”) (November 1, 2015), at 11.

²⁶ See JCOPE’s Annual Reports, <https://jcope.ny.gov/reports-and-publications>.

	Matters	15-Day Letters	Investigations	Settlements	Penalties / Settlement Payments
2019	209	17	12	21	\$172,550
2018	257	35	27	10	\$73,037
2017	170	22	14	8	\$123,000

Specific actions by JCOPE have been discussed in detail elsewhere,²⁷ but in the following sections, we focus on enforcement activity relating to gifts and sexual harassment.

c. Gift Cases

Since 2011, there have been numerous successful federal prosecutions of high-profile state officials in the executive and legislative branches.²⁸ In fact, three of the four legislative leaders at JCOPE’s creation were subsequently imprisoned, including Assembly Speaker Sheldon Silver and Senate Majority Leader Dean Skelos, who were both found guilty of bribery and extortion.²⁹ Additionally, Joseph Percoco, a former top aide to Governor Cuomo, was convicted of bribery,³⁰ and Alain Kaloyeros, who oversaw state economic development projects, was convicted of fraud for rigging bids on state contracts.³¹

These criminal prosecutions have generated criticism of JCOPE’s own efforts to aggressively combat corruption.³² JCOPE staff has responded, in part, by saying that it is not a “prosecutorial agency” and has a “limited amount of ability to look into matters.”³³ This position is consistent with the New York Ethics Review Commission’s conclusion that JCOPE is most like a “*conflicts of interest board*, rather than a public integrity law enforcement agency which would focus exclusively on combatting public corruption.”³⁴ While likely correct, the position glosses over the tools at JCOPE’s disposal and its ability to penalize misconduct, including, and perhaps

²⁷ Fred Lebrun, *Probing JCOPE’s Motives*, Albany Times-Union (Aug. 10, 2019), <https://www.timesunion.com/local/article/Probing-JCOPE-s-motives-14295472.php>.

²⁸ Kay Dervishi, *What Has JCOPE Actually Done?*, City & State (Aug. 5, 2018), <https://www.cityandstateny.com/articles/policy/ethics/what-has-jcope-done.html>

²⁹ Benjamin Weiser, *Sheldon Silver, Former N.Y. Assembly Speaker, Will Finally Go to Prison*, N.Y. Times (July 20, 2020), <https://www.nytimes.com/2018/07/27/nyregion/sheldon-silver-sentencing-prison-corruption.html>; Vivian Wang, *Guilty, Again: Dean Skelos, Former Senate Leader, Is Convicted of Corruption in Retrial*, N.Y. Times (July 17, 2018), <https://www.nytimes.com/2018/07/17/nyregion/dean-skelos-corruption-son-senate-ny.html>.

³⁰ Joseph Spector, *Joseph Percoco, Cuomo’s Former Top Aide, Ordered to Prison*, lohud.com (Mar. 7, 2019), <https://www.lohud.com/story/news/politics/politics-on-the-hudson/2019/03/07/joseph-percoco-cuomos-former-top-aide-ordered-prison/3091932002/>.

³¹ Robert Gavin, *Kaloyeros Guilty of Bid-Rigging at SUNY Poly*, Albany Times-Union (July 13, 2018), <https://www.timesunion.com/news/article/Kaloyeros-guilty-of-bid-rigging-at-SUNY-Poly-13066166.php>.

³² Bill Mahoney, *JCOPE Watches Another Ethics Scandal from the Sidelines*, Politico (Sept. 28, 2016), <https://www.politico.com/states/new-york/albany/story/2016/09/jcope-watches-another-ethics-scandal-from-the-sidelines-105862>.

³³ *Id.*

³⁴ 2015 Ethics Review Commission Report, at 3 (emphasis in the original).

particularly, the giving and receiving of gifts.³⁵ The role that JCOPE can play in this area takes on added significance in light of the diminished ability of federal prosecutors to combat public corruption following the U.S. Supreme Court's 2016 *McDonnell* decision, which narrowed the scope of federal bribery law.³⁶

Notably, JCOPE has taken significant enforcement action relating to lobbying activity at the state and local level. In 2016, JCOPE reported that it settled two enforcement actions against companies for alleged Lobbying Act violations that were uncovered during the criminal prosecutions of Silver and Skelos.³⁷ In one case, a real estate management company agreed to pay \$200,000 for alleged Lobbying Act violations and acknowledged that it retained a law firm knowing that a portion of the fees paid to the firm would be shared with Silver, who would perform no work in connection with the legal services. In the other case, a company agreed to pay \$70,000 for alleged Lobbying Act violations and acknowledged that it paid Skelos' son for a no-show job at the request of Skelos and to protect its interests.

Similarly, a federal criminal prosecution of the late State Senator Thomas Libous revealed that the senator's son was paid for a no-show job in 2006. In August 2016, following the senator's conviction, JCOPE voted to commence an investigation of the lobbyist who facilitated the no-show job based on an alleged lobbying violation that prohibits the giving of a gift of more than \$75 to a public official. The lobbyist denied the allegations in their entirety, but agreed to settle the matter for \$10,000.³⁸

Currently, JCOPE is pursuing enforcement action for alleged lobbying violations against a development company that was ensnared in the Percoco and Kaloyeros criminal cases.³⁹

Although the aforementioned JCOPE matters grew out of federal investigations, and in contrast to JCOPE's statements about its "limited" investigatory abilities, JCOPE has undertaken lengthy and wide-ranging investigations of its own. At least since 2015, JCOPE has investigated the activities of a lobbying non-profit associated with New York City Mayor Bill de Blasio, Campaign for One New York ("CONY"), and the lobbyists and their clients who donated to

³⁵ See Exec. Law §94(17)(c) (empowering the Commission to administer oaths or affirmations, subpoena witnesses, compel their attendance and require the production of any books or records).

³⁶ *McDonnell v. United States*, 136 S. Ct. 2355 (2016); see also Amy Davidson Sorkin, *The Supreme Court's Bribery-Blessing McDonnell Decision*, New Yorker (June 27, 2016), <https://www.newyorker.com/news/amy-davidson/the-supreme-courts-bribery-blessing-mcdonnell-decision>; Noah Feldman, *Influence Peddling Gets First Amendment Protection*, Bloomberg Opinion (June 27, 2016), <https://www.bloomberg.com/opinion/articles/2016-06-27/influence-peddling-gets-first-amendment-protection>.

³⁷ JCOPE Settles Alleged Lobbying Act Violations With Companies Named in Silver, Skelos Trials (Dec. 28, 2016), <https://jcope.ny.gov/news/jcope-settles-alleged-lobbying-act-violations-companies-named-silver-skelos-trials>.

³⁸ JCOPE Settles with Lobbyist on Alleged Lobbying Law Gift Violation (Mar. 17, 2017), <https://jcope.ny.gov/news/jcope-settles-lobbyist-alleged-lobbying-law-gift-violation>.

³⁹ Brendan J. Lyons, *Syracuse Firm Embroiled in Bid-Rigging, Bribery Case Fighting State Ethics Probe*, Albany Times-Union (Feb. 8, 2021), https://www.timesunion.com/news/article/Syracuse-firm-embroiled-in-bid-rigging-bribery-15930220.php?mc_cid=303cb99c0f&mc_eid=e40c002b54.

CONY.⁴⁰ JCOPE issued broad subpoenas to CONY and related parties, brought affirmative lawsuits to enforce the subpoenas, and successfully defended their authority to issue them.⁴¹ Although JCOPE has not reported any findings against CONY, JCOPE announced six settlements over a two-year period against entities and persons who contributed to or solicited contributions for CONY. The settlements included an acknowledgement that (1) the Lobbying Act prohibits a lobbyist or lobbying client from giving a gift to a public official, unless under the circumstances, it is not reasonable to infer that the gift was intended to influence such public official, and (2) a JCOPE rule prohibits a lobbyist or lobbying client from giving a gift to a third party, including a charitable organization, on behalf of or at the designation or recommendation of a public official, when such gift cannot be offered or given to the public official under the Lobbying Act. At least one more CONY donor is being investigated by JCOPE.⁴²

JCOPE has not reported any significant action involving state officials who received gifts. And at least with respect to the conduct at issue in the criminal convictions of Silver and Skelos, JCOPE apparently declined enforcement action because the officials were already punished. In reporting the actions stemming from those criminal prosecutions, JCOPE stated that “[w]hile the lawmakers who sought to use their official positions to secure unwarranted privileges were punished criminally, the clients of lobbyists who facilitated these acts and provided those public officers with benefits faced the consequences of their actions.”⁴³

d. Sexual Harassment Cases

Section 74 of the Public Officers Law protects against misconduct by members of the Legislature involving use of the office or public resources to further personal interests. Under Section 74, JCOPE settled matters involving sexual harassment claims against former Assembly Member Vito Lopez,⁴⁴ former Assembly Member Angela Wozniak,⁴⁵ former Assembly Member

⁴⁰ Chris Bragg, *JCOPE Continues Long-Running Probe of De Blasio Donors*, Albany Times-Union (March 16, 2018), <https://www.timesunion.com/7day-state/article/JCOPE-continues-long-running-probe-of-de-Blasio-12759530.php>.

⁴¹ Jillian Jorgensen, *Bill De Blasio Has Had 'Enough' of JCOPE*, Observer (May 10, 2016), <https://observer.com/2016/05/bill-de-blasio-has-had-enough-of-jcope/>; J. David Goodman, *De Blasio's Nonprofit Must Comply With Ethics Panel's Subpoena, Judge Says*, N.Y. Times (Sept. 12, 2016), <https://www.nytimes.com/2016/09/13/nyregion/bill-de-blasio-campaign-for-one-new-york-subpoena.html>; Bernadette Hogan, *Probe Into De Blasio's Old Charity Given Green Light By State Judge*, N.Y. Post (July 15, 2020), <https://nypost.com/2020/07/15/probe-into-de-blasios-old-charity-given-green-light-by-albany-judge/>.

⁴² The donor unsuccessfully sued JCOPE to quash the subpoena, claiming, among other things, that JCOPE lacked the authority to adopt rules defining “gift.” *Broadway Stages, Ltd. v. N.Y.S. Joint Commn. On Pub. Ethics*, 2020 N.Y. Slip Op. 20162 (Sup. Ct., Albany Co., July 8, 2020).

⁴³ JCOPE Settles Alleged Lobbying Act Violations With Companies Named in Silver, Skelos Trials (Dec. 28, 2016), <https://jcope.ny.gov/news/jcope-settles-alleged-lobbying-act-violations-companies-named-silver-skelos-trials>.

⁴⁴ Former Assemblyman Vito Lopez (Feb. 12, 2013), <https://jcope.ny.gov/former-assemblyman-vito-lopez>.

⁴⁵ Former Assembly Member Angela Wozniak (Aug. 15, 2019), <https://jcope.ny.gov/former-assembly-member-angela-wozniak>.

Dennis Gabryszak,⁴⁶ and former state Senator Marc Panepinto.⁴⁷ JCOPE is also pursuing a matter involving sexual harassment against former state Senator Jeffrey Klein.⁴⁸

In 2018, victims of sexual harassment in the State Legislature, including some of the victims of legislators in the above JCOPE matters, created a Sexual Harassment Working Group. The group took issue with JCOPE's processes for handling of sexual harassment claims, including JCOPE's failure to inform the victims of the status of their complaints and its intrusive questioning. JCOPE's handling of sexual harassment claims came under further scrutiny in 2018 when it cleared Sam Hoyt, a former high-level economic development official in the Cuomo Administration.⁴⁹ Following the Hoyt decision, many argued that JCOPE is neither structured, nor qualified, to handle sexual harassment claims.

In February 2019, the State Legislature held a public hearing on sexual harassment in the workplace, the first in 27 years. The Legislature heard from members of the Sexual Harassment Working Group and JCOPE staff, who testified that it conducted 43 cases involving sexual harassment since its inception. The hearing included a discussion of proposals for JCOPE to hire victim specialists and set up a separate unit to handle sexual harassment cases.⁵⁰

IV. ADVISORY OPINIONS AND APPROVALS

JCOPE commissioners issue formal advisory opinions that apply the ethics laws to a specific issue or set of facts.⁵¹ The advisory opinions bind the Commission and the person making a good-faith request for the opinion.⁵² Such person can introduce the advisory opinion as a defense in a civil or criminal action.⁵³ JCOPE staff issue informal advisory opinions, "upon request, on questions where formal opinions have already established precedent."⁵⁴ Additionally, JCOPE issues approvals as required by law, including approvals of requests to earn outside income. With respect to outside-income approvals, statewide elected officials, heads of state agencies, and other state policy makers must obtain JCOPE approval before pursuing outside activity that is

⁴⁶ Former Assembly Member Dennis Gabryszak (Dec. 31, 2015), <https://jcope.ny.gov/former-assemblymember-dennis-gabryszak>.

⁴⁷ JCOPE, LEC Settle Public Officers Law Violations with Former Senator Marc Panepinto (Feb. 7, 2019), <https://jcope.ny.gov/news/jcope-lec-settle-public-officers-law-violations-former-senator-marc-panepinto>.

⁴⁸ Jimmy Vielkind, *Lawsuit Challenges New York Ethics Commission*, Wall Street Journal (Jan. 3, 2021), <https://www.wsj.com/articles/lawsuit-challenges-new-york-ethics-commission-11609718401>.

⁴⁹ Karen DeWitt, *Report Clearing Sam Hoyt of Sexual Harassment Leaves Unanswered Questions*, WBFO (June 11, 2018), <https://news.wbfo.org/post/report-clearing-sam-hoyt-sexual-harassment-leaves-unanswered-questions>.

⁵⁰ Rachel Silberstein, *Victims Offer Harrowing Testimony at Sexual Harassment Hearing*, Albany Times-Union (Feb. 15, 2019), <https://www.timesunion.com/news/article/Sexual-harassment-hearing-exposes-gaps-in-state-s-13613624.php>.

⁵¹ JCOPE's 2019 Annual Report at 13, https://jcope.ny.gov/system/files/documents/2020/07/2019_-_annual-report-final-web-as-of-7_29_2020.pdf

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

anticipated to generate more than \$5,000 in income.⁵⁵ The approvals serve to ensure that any person's outside activities are consistent with his or her obligations to the public.

JCOPE staff has undoubtedly issued hundreds of informal opinions and approvals without incident, but the lines between formal and informal decisions have reportedly become blurred.⁵⁶ One of the more significant and publicly discussed issues in this regard relates to JCOPE approval for Governor Cuomo to earn outside income on book deals.⁵⁷ While the Commission is authorized to delegate authority to the executive director to act in the name of the Commission in certain circumstances,⁵⁸ some argued that nothing authorized JCOPE staff to decide outside-income requests.⁵⁹ JCOPE subsequently debated a resolution to clarify that the commissioners must approve all formal requests to earn outside income. The resolution failed to pass on a deadlock 6-6 vote, with six legislative appointees voting in favor and six gubernatorial appointees voting against.⁶⁰

We do not opine on whether the approval of Governor Cuomo's request was proper, but note that a lack of clear lines of responsibility raises the potential for confusion and abuse. A likely factor at issue here may be the lines of responsibility as between JCOPE and LEC. JCOPE is empowered to render formal advisory opinions for the executive branch, not the legislative branch.⁶¹ Additionally, JCOPE's regulations relating to outside activities and approval procedures relate to statewide elected officials and state agency heads and policy makers, not to legislators and legislative employees.⁶² By contrast, LEC, which is composed solely of legislators and legislative appointees, issues formal advisory opinions for legislators and legislative employees that interpret and apply the same laws that JCOPE administers.⁶³ Thus, it appears that this is an issue, fundamentally, about who gets to decide and for whom, grounded in the tension that exists in the bifurcated JCOPE/LEC structure. JCOPE acts by majority vote, except in the circumstances described above, and so requiring formal approval of all outside income requests, for example, could be viewed by the gubernatorial appointees as ceding its prerogative to decide such matters for the executive branch to the legislative branch, which has not only the decisive eight votes on the Commission but also a separate ethics body in the LEC to decide such matters without any executive branch interference or scrutiny.

⁵⁵ Outside Activities, <https://jcope.ny.gov/outside-activities>.

⁵⁶ Chris Bragg, *After Cuomo Book Approval, Ethics Commissioners Quash Greater Scrutiny*, Albany Times-Union (Nov. 18, 2020), <https://www.timesunion.com/news/article/After-Cuomo-book-approval-ethics-commissioners-15734220.php#photo-19991381>.

⁵⁷ *Id.*

⁵⁸ Exec. Law § 94(9)(a).

⁵⁹ Chris Bragg, *After Cuomo Book Approval, Ethics Commissioners Quash Greater Scrutiny*, Albany Times-Union (Nov. 18, 2020), <https://www.timesunion.com/news/article/After-Cuomo-book-approval-ethics-commissioners-15734220.php#photo-19991381>.

⁶⁰ *Id.*

⁶¹ Exec. Law § 94(16).

⁶² 19 NYCRR § 932.1.

⁶³ Legislative Law § 80(7)(i).

V. CONFIDENTIALITY RESTRICTIONS

JCOPE is subject to strict confidentiality provisions, which require that JCOPE commissioners and staff sign a non-disclosure statement and generally prohibit the public disclosure “during the pendency of a matter” of any testimony or information obtained by JCOPE.⁶⁴ Moreover, with the exception of a handful of expressly enumerated records, JCOPE is exempt from the Freedom of Information Law, as well as the Open Meetings Laws,⁶⁵ granting it a high degree of opacity for a governmental body.

It is true that this level of confidentiality is similar to that granted to other government ethics agencies, as these provisions seek to protect the integrity of investigations, safeguard the reputations of innocent public servants, and encourage public servants to seek advice. However, JCOPE’s confidentiality provisions have appeared to serve, at times, as a means to hide political interference rather than the purposes for which they are intended.

For example, former Assembly Speaker Sheldon Silver authorized secret payments of state funds to settle sexual harassment claims against Assemblyman Vito Lopez. Following reporting that JCOPE voted to investigate the sexual harassment claims against Lopez but declined to investigate the confidential settlement authorized by Silver, JCOPE convened again and voted to conduct a “full investigation” of the matter.⁶⁶ JCOPE ultimately found that Lopez committed ethical violations, as noted above, but gave no indication that it had investigated Silver or other participants involved in the settlement. As noted in the 2014 Hope for JCOPE report, “[a]s 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.”⁶⁷ JCOPE declined to answer questions regarding the scope of its investigation on confidentiality grounds.⁶⁸

Notwithstanding the confidentiality provisions, JCOPE has been hobbled by disputes over disclosures of confidential information since its inception.⁶⁹ The apparent inability of JCOPE to consistently maintain confidentiality, particularly in politically sensitive matters, further undermines the purposes of the confidentiality provisions discussed above. The problem of these

⁶⁴ Exec. Law § 94(9-a)(a).

⁶⁵ Exec. Law §§ 94(19)(a) and (b).

⁶⁶ Karen DeWitt, *Ethics Panel Launches Probe*, NCPR (Sept. 11, 2012), <https://www.northcountrypublicradio.org/news/story/20457/20120911/ethics-panel-launches-probe>.

⁶⁷ Hope for JCOPE, at 20.

⁶⁸ Hope for JCOPE, at 19.

⁶⁹ Danny Hakim, *New York Ethics Inquiry Won't Look at Speaker's Actions*, N.Y. Times (Sept. 6, 2012), <https://www.nytimes.com/2012/09/07/nyregion/ethics-inquiry-limited-to-assemblyman-lopez-not-speaker-silver.html?searchResultPosition=21>; Vivian Wang, *Did an Ethics Commission Leak Private Information to Cuomo?*, N.Y. Times (Dec. 2, 2019), <https://www.nytimes.com/2019/12/02/nyregion/ethics-cuomo-ny-jcope.html>; Brendan J. Lyons, *JCOPE Commissioners Mull Filing Criminal Complaint Over Alleged Leak*, Albany Times-Union (June 22, 2020), <https://www.timesunion.com/news/article/JCOPE-commissioners-mull-filing-criminal-15357984.php>.

disclosures is compounded by the seeming lack of an impartial investigatory body that can bring some measure of accountability to those involved in the disclosures.⁷⁰

VI. LOBBYING REGULATION

Although not the focus of this report, we briefly note one issue relating to JCOPE's statutory authority to regulate lobbying activity. In 2018, after two years of rulemaking, JCOPE adopted comprehensive lobbying regulations that clarified the scope of lobbyist registration and reporting requirements. These regulations, arguably the most sweeping and impactful in JCOPE's history, were challenged by various groups on the basis that they exceeded JCOPE's statutory delegation of authority. JCOPE settled the matter by stipulating that the regulations amount to a "statement on how it intends to administer and enforce the Lobbying Act."⁷¹ Whether the settlement was a tacit acknowledgment of the strength of the legal challenge or primarily due to other considerations, such as the launch of an online lobbying platform,⁷² it identifies a potential challenge to JCOPE's ability to effectively regulate lobbying activity that could be remedied by legislative amendment.

VII. REFORMS

The breadth of JCOPE's activities over the past ten years is extraordinary, and what is summarized herein is but a fraction of those activities. But even within this summary, there are a range of significant issues that could potentially benefit from greater legislative oversight and attention, including the scope of JCOPE's authority to issue regulations and JCOPE's role in addressing sexual harassment. Fundamentally, though, JCOPE's mission continues to be challenged by the structural flaws that have been apparent from day one.⁷³ Over the past ten years, the New York City Bar Association evolved from a view that the JCOPE's governing law can be amended to remedy these structural flaws to the view that JCOPE should be abolished and replaced with a new entity established by constitutional amendment. We discuss these two approaches to reforming JCOPE in turn.

⁷⁰ Casey Seiler, *Political Hurdles In Scandal Leaks*, Albany Times-Union (Sep. 12, 2012); Chris Bragg, *Cuomo Leak Probe Echoes '09, With Different Results*, Albany Times-Union (Nov. 18, 2019), <https://www.timesunion.com/news/article/News-14844159.php>.

⁷¹ *York Group Associates LLC, et al. v. N.Y.S. Joint Commn. on Pub. Ethics, et al.*, Index No. 907166-18, Stipulation of Settlement and Dismissal, dated December 19, 2018.

⁷² Chris Bragg, *JCOPE's New Regs Constrained by Settlement*, Albany Times-Union (Dec. 19, 2018), <https://www.timesunion.com/news/article/JCOPE-s-new-regs-constrained-by-settlement-13478865.php>.

⁷³ *Ethics Reform*, *Albany Style*, N.Y. Times (June 6, 2011), <https://www.nytimes.com/2011/06/07/opinion/07tue1.html>.

a. Revamp JCOPE

i. *Reduce the Size of the Commission*

The 14-member Commission is too large, as even JCOPE members and staff have acknowledged.⁷⁴ In 2015, the New York Ethics Review Commission concluded that a “smaller body may enable JCOPE to function more nimbly and effectively,” recognizing concerns about meeting quorum requirements and accommodating a potentially wide array of viewpoints under tight statutory timeframes.⁷⁵ A smaller commission could also help remedy the persisting issues of extended vacancies and of finding qualified persons. Given that an even-numbered commission typically results in deadlock, as evidenced by votes taken by the Commission as currently composed, it has been recommended that a smaller commission have an odd number of members. Five members compose the New York City Conflicts of Interest Board and the New York City Campaign Finance Board.⁷⁶ The newly-established state Public Campaign Finance Board will have seven members. Eleven members compose the state’s Commission on Judicial Conduct.⁷⁷

ii. *Eliminate Special Voting Requirements*

The minority veto provision does not appear to be used as a blunt tool, as both Republicans and Democrats have been the subject of successful JCOPE investigations.⁷⁸ But the extent to which it is used is cloaked in confidentiality. For this reason, in 2015, as an alternative to eliminating the minority veto, it was recommended that JCOPE disclose the number of cases in which it is used each year, as well as the vote tallies in each case, without identifying individual JCOPE members and how they voted.⁷⁹ While such a disclosure could have a salutary effect, it is clearly outweighed by another invidious aspect of the voting requirement, one that is becoming apparent by virtue of extended vacancies on the Commission. Currently, two out of the four appointments allotted to the Democratic legislative leaders are vacant.⁸⁰ If the Democratic leaders decline to fill a third vacancy, their members and staff will no longer be subject to any enforcement action until the vacancies are filled. There have been various proposals to modify the minority veto, but it is noteworthy that a simple majority vote requirement applies to the Commission on

⁷⁴ 2015 Ethics Review Commission Report, at 9.

⁷⁵ 2015 Ethics Review Commission Report, at 9-10.

⁷⁶ COIB Board Members, <https://www1.nyc.gov/site/coib/about/board-members.page>; CFB Board Members, <https://www.nyccfb.info/about/board/>.

⁷⁷ Commission on Judicial Conduct Members, <http://www.scjc.state.ny.us/General.Information/Gen.Info.Pages/members.html>.

⁷⁸ JCOPE, LEC Settle Public Officers Law Violations with Former Senator Marc Panepinto (Feb. 7, 2019), <https://jcope.ny.gov/news/jcope-lec-settle-public-officers-law-violations-former-senator-marc-panepinto>; JCOPE Settles Public Officers Law Allegations Against Former Assembly Member and Senate Staffer (Aug. 15, 2019), <https://jcope.ny.gov/news/jcope-settles-public-officers-law-allegations-against-former-assembly-member-and-senate>.

⁷⁹ 2015 Ethics Review Commission Report, at 11.

⁸⁰ Chris Bragg, *Despite State Law, Democrats’ Seats on Ethics Panel Remain Vacant*, Albany Times-Union (Nov. 16, 2020), <https://www.timesunion.com/news/article/Despite-law-Democrats-seats-on-JCOPE-remain-15731298.php>.

Judicial Conduct,⁸¹ the state Public Campaign Finance Board,⁸² the New York City Conflicts of Interest Board,⁸³ and the New York City Campaign Finance Board.

Given the longstanding standoff between the gubernatorial and legislative appointees over the appointment of an executive director, the requirement that at least one Republican appointee and one Democratic appointee of both the Governor and the Legislature approve the appointment has also proven unworkable.

iii. *Amend Appointment Method*

The three appointments allotted to the Democratic Assembly leader or the Republican Senate leader should be considered alongside the voting procedures, whereby the three legislative appointees can block any legislative investigation involving a person affiliated with their respective parties. The appointment method may have served to protect the majority leaders who were in power at the time,⁸⁴ while also ensuring party balance, but it serves no legitimate purpose in advancing public trust. The appointment method is also incomprehensible, particularly now that the Senate is controlled by the Democrats. If the Legislature is to make appointments to JCOPE, such appointments should be divided evenly among the four legislative leaders.

It has also been recommended that appointment authority be conferred on a broader range of parties, such as the state comptroller, attorney general, or chief judge, as many have recommended. However, devising an appointment structure in this manner is potentially questionable, absent a constitutional amendment.⁸⁵

iv. *Increase Transparency*

JCOPE and the public would be better served by greater transparency. While transparency is a poor substitute for a better appointment process, JCOPE's strict confidentiality provisions exacerbate the problems of politicization and political interference.

As discussed above, JCOPE's confidentiality provisions should be used to protect the integrity of investigations, encourage public servants to seek advice, and safeguard the reputations of innocent public servants. These are reasonable purposes for confidentiality provisions so long as those provisions are tailored to those ends, but the value of confidentiality is undermined where it is used to cloak a lack of independence.

⁸¹ Judiciary Law § 41(6).

⁸² Election Law § 14-207(1).

⁸³ N.Y.C. Charter § 2602(h).

⁸⁴ Danny Hakim, *New York Ethics Inquiry Won't Look at Speaker's Actions*, NY Times (Sept. 6 2012), <https://www.nytimes.com/2012/09/07/nyregion/ethics-inquiry-limited-to-assemblyman-lopez-not-speaker-silver.html>.

⁸⁵ N.Y. Const. Article V, § 4.

In fact, the integrity of investigations and the reputations of innocent public servants are not protected where the institution responsible for adjudicating government ethics complaints is not trusted to be impartial, undermining the very purposes of these confidentiality provisions. Under circumstances of political interference, including but not limited to the use of the minority veto, the integrity of investigations and the reputations of accused public servants would be better protected by greater transparency.

JCOPE has proposed an amendment to its governing statute to permit, upon approval of the commissioners, disclosure of the status of a potential investigative matter where the existence of the substance of the matter has been made public.⁸⁶ This change would be an improvement. Additionally, although not a panacea for JCOPE's transparency ills, JCOPE should also be subject to the Freedom of Information Law and Open Meetings Law. Indeed, the New York Conflicts of Interest Board is subject to the same. Finally, if the minority veto is retained, which, for the reasons discussed above, it should not be, then JCOPE should disclose as much information as the law permits regarding the usage of the minority veto. Nothing in Executive Law Section 94 prohibits the disclosure of the number of times the minority veto is used and by whom. An option that might better balance the benefits of confidentiality against the benefits of transparency would be legislation that more narrowly tailors JCOPE's confidentiality provisions by requiring JCOPE to disclose the final investigative reports on which the minority veto is used, including the votes of the commissioners. At that point in time, the investigation would be concluded and would no longer need confidentiality to be properly effectuated, and the reputational impact to the public servant who is its subject would be minimal, as the Commission would already have determined that no violation occurred.

b. Abolish JCOPE and Replace it with a State Government Integrity Commission

While the above reforms could go a long way toward making JCOPE more effective and establishing some public trust in its independence, they do not adequately address the substantial control that the appointing authorities exercise over JCOPE. Many organizations, including this Committee, have called for firewalls to be erected between the commissioners and their appointing authority. In 2015, the New York Review Commission recommended that, in lieu of firewalls, JCOPE develop "internal guidelines" to govern their interactions with such authorities.⁸⁷ To the extent such guidelines exist, the consequences for failing to comply can only be negligible at best, as commissioners may only be removed by their appointing authority.⁸⁸ That is, if a commissioner disclosed confidential information to his or her appointing authority to pressure another commissioner, the commissioner who made the disclosure can only be removed by the appointing authority, a highly unlikely scenario.

⁸⁶ Proposed Legislative Amendments, <https://jcope.ny.gov/proposed-legislative-amendments>.

⁸⁷ New York Ethics Review Commission Report, at 10.

⁸⁸ Exec. Law § 94(7).

To properly address these and other concerns raised above, the City Bar supports Senate Bill 855 / Assembly Bill 1929, a resolution to amend the State Constitution to establish a State Government Integrity Commission.⁸⁹ The principal features of this proposal include:

- The current bifurcated JCOPE/LEC structure would be eliminated and replaced with a single Commission, ensuring consistent enforcement in both the legislative and executive branches.
- Like the Commission on Judicial Conduct, members would be appointed by all three branches of government, a majority of whom would be appointed by the judiciary whose conduct is not being regulated by the Commission. Specifically, commissioners would be appointed as follows: (1) two by the Governor, (2) one by each of the four legislative leaders, and (3) seven by members of the judiciary.⁹⁰
- The Commission would have the power to sanction serious misconduct through censure, suspension, demotion or removal of a non-elected public official and through the power to censure an elected official. Removal of elected officials would remain governed by the existing constitutional process.
- Unlike JCOPE, where a minority of members can block an investigation or adverse finding, the Commission would act by majority vote.
- Unlike JCOPE, where the person appointing a member can remove that member for what the appointing authority deems to be substantial neglect of duty, members of the Commission could be removed for cause only through a process by which a majority of the Commission votes to make an application for removal to the Court of Appeals.
- Ex parte communications between Commission members and their appointing authorities and related staff would be barred, and no member could have held office, been employed in state government or any political party, or been engaged as a lobbyist in the three years prior to his or her appointment or during his or her term.
- Because of its mandate to avoid the reality or appearance of corruption and conflicts of interest, the Commission would be responsible for the administration and enforcement of the campaign finance laws.⁹¹

⁸⁹ Report on A.1282/S.594 by the New York City Bar Association Committee on Government Ethics and State Affairs (Apr. 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2017378-CommissionPublicIntegrity.pdf>.

⁹⁰ Although the Committee supports a smaller JCOPE, for the reasons stated above, the Committee nonetheless supports the proposal to establish the 13-member State Government Integrity Commission, as the entire proposal achieves a broad range of goals necessary for effective ethics oversight.

⁹¹ In 2019, this Committee issued a report discussing the cumbersome statutory procedures designed to inhibit strong enforcement of the state's campaign finance laws. See *Safeguarding New York's Elections: The Unfinished Business of the Moreland Commission to Investigate Public Corruption* (Sept. 2019), <https://s3.amazonaws.com/documents.nycbar.org/files/2019557-MorelandAssessmenElectionLaw.pdf>.

VIII. CONCLUSION

The Committee recognizes the challenges of both establishing an ethics bodies and administering the state's ethics laws in a manner that is free of political influence and compromise. But as the ten years of JCOPE make clear, much more can and must be done now to move closer toward the ideal. As always, the Committee stands ready to assist with this task, not only for the sake of the public, but also for the many persons of integrity who commit to public service.

Government Ethics & State Affairs Committee
Edward L. Murray, Chair

February 2021

Contact

Maria Cilenti, Senior Policy Counsel | 212.382.6655 | mcilenti@nycbar.org
Elizabeth Kocienda, Director of Advocacy | 212.382.4788 | ekocienda@nycbar.org



The League of Women Voters of New York State
62 Grand Street, Albany, New York 12207
Phone: 518-465-4162 Fax: 518-465-0812
www.lwvny.org E-Mail: lwvny@lwvny.org

THE LEAGUE OF WOMEN VOTERS *of New York State*

PUBLIC HEARING: NEW YORK STATE'S SYSTEM OF ETHICS OVERSIGHT AND ENFORCEMENT

TESTIMONY TO THE NEW YORK STATE SENATE STANDING COMMITTEE ON ETHICS AND INTERNAL GOVERNANCE

August 25, 2021

Held Remotely Via Zoom

Introduction

Thank you for the opportunity to testify. Since the creation of the Joint Commission on Public Ethics (JCOPE) in 2011 and the Legislative Ethics Commission (LEC) in 2007, countless state legislators, high ranking state employees, and even the incumbent Governor have been accused of corruption and sexual harassment without any sort of repercussions for their actions. The most extreme cases of corruption have been prosecuted, but many offenders have managed to get away unscathed by either enforcement agency. Although the League and our good government partners have long called for reformation of JCOPE and the LEC, ethics violations continue to persist in our state government.

JCOPE and LEC have failed to deter corruption, but not for lack of trying, the agencies were designed to fail. One of the most obvious design flaws of New York's current enforcement operations is that there is no single agency to investigate accusations of corruption and harassment. Executive and Legislative branch employees should be subject to the jurisdiction of one agency, not two. A more organized structure would combine JCOPE and the LEC to create a single Commission. This would ensure consistent enforcement in both branches of government and mirror a single agency structure similar to what the majority of states have.

The League believes that JCOPE and the LEC need to be replaced with one effective and independent ethics enforcement agency. This single entity should aim to achieve the greatest level of transparency and accountability, and should have a meaningful mechanism to punish bad actors. A more effective watchdog agency would be completely independent of the elected officials and staff it was meant to oversee, and would give whistle blowers a clear process to report corruption and harassment to the agency.

While the proposed constitutional amendment to create a New York State Integrity Commission (S.855 (Kreuger)/A.1929 (Carroll)) addresses some of these concerns, it has several flaws that the League believes must be addressed. The current amendment does not adequately address the League's concern for independence in the appointment process, each Commissioner is appointed by an elected official or a judge that was appointed by an elected official. The proposed amendment does not address how it would interact with the new Public Campaign Finance Board as the new campaign finance authority. The League is also concerned that the amendment does not adequately address the critical need to ensure funding and staff support for such a robust agency. Many state Commissions are doomed to fail before they even begin their work because of a lack of independent funding and support.

The League believes the bill sponsors should consider the following areas for improvement before moving forward with this amendment.

Reform Recommendations

I. Commission Independence

JCOPE and the LEC lack needed independence and protection from political control. All Commission members are appointed by the officials they regulate and the four members of the LEC are incumbent legislators. It's easy to see why this structure is problematic; legislator and party appointees have an innate bias because of their relationship with the very legislators and staff they are meant to be regulating.

While the amendment attempts to address the need for impartiality, the proposed Commission appointment structure still allows heavy influence from seated legislators. Although Appellate Judges are elected, the Chief Judge of the State of New York and the Presiding Justices of the Appellate Division are appointed by the Governor. The remainder of the appointments are directly appointed by the Legislative Leaders or Governor.

The League would prefer a simplified joint appointment structure that ensures impartiality by adding additional restrictions and limitations on the individuals who can be appointed. All state commissions benefit from appointing members that are as diverse as the people they serve with regard to race, ethnicity, and gender; especially in a commission meant to address issues of workplace harassment and discrimination. We would urge the bill sponsors to consider including language in the amendment to guarantee commissioners fulfill a minimum diversity requirement.

II. Campaign Finance

The proposed amendment states that the new Commission will oversee all campaign finance enforcement, removing the Board of Elections (BOE) as the chief campaign finance authority. Although it would be beneficial to take away this burden from the BOE it is unclear if removing this power from the agency will impact the newly implemented Public Campaign Finance Board. Not only does the BOE and Public Campaign Finance Board share a designated office space, the two agencies are directly intertwined. The four Board of Elections Commissioners serve as part of the Public Campaign Finance Board Commission, and both agencies are charged with ensuring proper campaign finance reporting.

Removing the BOE as the oversight authority would almost add a third agency to the new State Integrity Commission. The BOE has an entire division dedicated to following up with non-filers and ensuring candidates are properly completing their disclosure forms. The new public campaign financing system is even more complicated and would add a major burden to the Commission. Rather than removing the BOE as the main enforcement agency, the bill sponsors should consider eliminating the Chief Enforcement Counsel and allowing the BOE to recommend certain campaign finance cases to the State Integrity Commission.

III. Funding

In order for this new agency to function it is critical that the constitutional amendment ensure adequate funding is provided. Many new Commissions, including the New York State Public Campaign Finance Commission and Independent Redistricting Commission, struggled to begin their work because promised funding was delayed. The Independent Redistricting Commission also had dedicated language within the State Constitution mandating that the legislature provide funds. Even with this declaration, it took over a year for the Commission to be properly funded.

Including language in the amendment to mandate the legislature provide funds may not be enough. The League would urge that the bill sponsors consider adding stronger implementation language to ensure that funding will be given in a timely manner.

IV. Office Space, Staffing, and Public Accessibility

Similar to funding issues, both the Public Campaign Finance and Independent Redistricting Commissions have had issues hiring their staff, securing office space, and allowing for public accessibility by establishing a website and government email addresses. While we understand that these administrative functions can be written into implementing language for the Commission, we urge the sponsors to begin considering the need for this support before the amendment is passed.

Citizen led Commissions in other states, such as California's Redistricting Commission, often designate a pre-established agency to support the Commission until it is fully functioning. The New York State Integrity Commission may benefit from the support for an outside agency while it sets up its initial structure.

Conclusion

Though we have cited several criticisms of the proposed amendment, it cannot be understated what an improvement this amendment would be over the current structure. The amendment will give the enforcement office the teeth it needs to route out corruption and make New York State a model for ethics reform. We hope that the bill sponsors will consider addressing the four areas of concerns we have raised and ensure that the New York State Integrity Commission is truly independent, with the proper funding and support to be effective.



CITIZENS UNION OF THE CITY OF NEW YORK

Testimony before the Senate Ethics Committee

New York State's system of ethics oversight and enforcement

August 25, 2021

Citizens Union appreciates the opportunity to testify before you today regarding New York's ethics system. Unfortunately, that system is broken and needs a complete reinvention. JCOPE, the agency charged with enforcing state laws regarding ethics, has been structurally burdened since its inception a decade ago, and enough questions and concerns about its ability to perform the needed function have surfaced to make clear a major change is necessary. We believe JCOPE should be replaced by a constitutionally established, independent ethics agency. Others are testifying today with extensive specifics as to how JCOPE has not fulfilled the objective of upholding the State's ethics laws and enforcing those laws against wrongdoers, and so we will not restate those here.

The major flaw of the JCOPE framework is the ability of the Governor or a political party in the Legislature to block an investigation. Indeed, if certain appointments are not made, it could be impossible to launch an investigation against a member of a particular political party because not enough commissioners from a party or official would be in place to vote for an investigation. However, there is much more wrong.

Any effective ethics agency must be able to operate independently of those it has been tasked with regulating. Yet JCOPE is widely viewed as lacking independence. We recognize that at least many of the JCOPE staff and commissioners are hard-working and conscientious.

Nevertheless, that cannot overcome the leaks, failures to pursue well-publicized ethical lapses and the perception that the Governor, and to a considerable extent the legislative leaders, have an outsized influence over the agency.

Citizens Union has been working with other concerned groups to develop a constitutional amendment to replace JCOPE with a far more independent agency, and to make other structural and operational improvements. Much of what we would like to accomplish is in the constitutional amendment (S.855/A.1929) sponsored by Senator Krueger and Assembly Member Carroll, and we applaud them for their leadership on this issue. We recognize the key to a truly independent agency is in how the commissioners and staff are selected. To that aim, we and others are working to develop a proposal to better enhance that independence. Citizens Union understands the need for the solution to be practical, and that public credibility is essential to the agency's success. Government employees and the public must feel they can approach the agency with confidence that their concerns will be effectively and fairly addressed.

A strong ethics proposal must strive to establish a new ethics commission seen as accountable, whose members are both capable and independent. This involves creating an appointment procedure to achieve those aims. The commission should be much smaller than the current 14-member JCOPE. Means of creating independence include a role for the judicial branch. This branch would provide a different perspective to that of the executive and legislative branches. In addition, judicial conduct is overseen by the state Commission on Judicial Conduct and would not be included under the new ethics agency.

Consideration should be given to joint appointments of individual commissioners, to avoid having a commissioner seen as the one representing a particular official's interest. And one commission member can be appointed by the remaining members, to further remove that commissioner from perceived fealty to an individual.

We recognize the complexities in designing an independent framework and are looking to other sources, including commissions in other states, for insights.

Independence also involves insulating the commissioners from the appointing authorities during their term of service. This can be done by assuring they can be terminated only for cause, and not leaving that decision to the officials who appointed them but rather to the commission. In addition, commissioners might be limited to only one perhaps six-year term, so that their reappointment would not be a concern. Commissioners, however selected, should have certain qualifications, such as not holding or recently having held elected or party office, and should have expertise in relevant areas.

While we believe a constitutional amendment is necessary to fix this broken system, there are legislative changes that would be helpful now; for example, to eliminate the blocking provisions and allow for more disclosure of investigations in certain circumstances, balancing the need for confidentiality against the importance of transparency. Such measures are before the Legislature.

Citizens Union welcomes today's hearing for inviting public input as to how to improve the process. We encourage those who testify or otherwise provide input to the Committee, in addition to identifying the failings of JCOPE, to recommend constructive solutions to the problems. In addition, we look forward to additional hearings to further explore how to achieve real ethics reform.

We urge first passage of a constitutional amendment in 2022 and second passage in 2023, so that the amendment can be placed on the ballot in November of that year. We also believe this is an opportune time for the Legislature to review more broadly the State's accountability and oversight structure and process.

We cannot allow the current system to continue. It's not fair to state employees or the public. The Legislature and Governor must make ethics reform a priority and act during the next session to create substantial, meaningful reform.

Citizens Union testimony delivered by Alan Rothstein, Board Member and Co-Chair of the Policy Committee

New York State's System of Ethics Oversight and Enforcement Hearing **WRITTEN TESTIMONY FROM COMMON CAUSE NEW YORK** **August 25th, 2021**

The events of the last few weeks have not only produced a new Governor but forcefully shown the wholesale failure of ethics oversight in the Executive branch. Attorney General Leticia James's report detailing the cascade of failures in protecting state employees and the impunity with which Governor Cuomo's enforcers and enablers wielded power, threats and humiliation as cudgels shocked many.

We can not, however, say we are surprised as the toxic culture on the Second Floor was openly flaunted and done so publicly on social media, directed at the media and organizations such as ours. The brazen behavior was ultimately sanctioned by the lack of ethics oversight for elected officials in this state.

As many of our esteemed partners have undoubtedly noted and presented in excruciating detail, the state of ethics oversight and enforcement is so lax it is, in effect, nonexistent. The New York State Joint Commission on Public Ethics (JCOPE) is operating as it was intended - a farcical structure that was created through political wheeling and dealing by former Senate Majority Leader Dean Skelos and former Assembly Speaker Shelly Silver who've both since been convicted on federal corruption charges.

Reforming JCOPE is no longer an option, it must be torn down and replaced with something entirely new that instills confidence in New Yorkers and is not the punchline to a bad joke. We must break the cycle where demand for ethics reform results in an ineffective entity being replaced with a new ineffective entity. Our testimony therefore will not focus on JCOPE's greatest failures, but instead focus on the road ahead:

- **Ethics oversight must be truly independent.** The status quo is simply broken. While this will require a constitutional amendment, it is imperative to finally create a truly independent and effective ethics oversight body. Commissioners can not be indebted to their political appointer and function as a rubber stamp for that elected official.

- **Any future ethics oversight body must expand to represent the millions of New Yorkers who are politically unaffiliated voters.** The current appointment structure for Commissioners is simply a function of the control exerted by the two major political parties despite the fact that there are more politically unaffiliated voters¹ than registered Republican voters statewide.
- **The leadership of the future ethics oversight body should reflect New York.** There needs to be diversity from the top down which should reflect the geographic, gender and ethnic diversity of the state.
- **Ethics oversight must be accompanied by enforcement ability.** The need to get permission to conduct investigations, issue subpoenas or refer civil violations for enforcement to the State Legislature or other agencies hobbles the effectiveness of any oversight body.
- **There should not be a blanket confidentiality requirement mandating secrecy of deliberations and of ethics enforcement.** The need for confidentiality to protect the privacy of investigated individuals must be balanced against the need for transparency to restore public confidence in the independence and effectiveness of the ethics oversight process.
- **Harassment and discrimination is its own specialized area of the law and should not be included in the jurisdiction of any new ethics oversight body.** While some aspects of harassment claims may overlap some aspects of ethics, appropriate harassment and discrimination claims should be handled by a completely separate and unrelated entity made up of staff and decision makers with the requisite experience in this particularized area of expertise. We do not support the creation of a harassment and discrimination unit within any new ethics oversight body. We are a supporter of the NY Bold Agenda, which includes various bills and proposals for legislation to combat harassment and discrimination. A copy of the NY Bold Agenda is attached.

¹ Politically unaffiliated voters in this context refers to voters who have declined to enroll in a political party for voting purposes.

Accordingly, we make the following initial recommendations regarding a new ethics oversight entity for further discussion and refinement.

- **The new body should be composed of 5 members.**
 - The Attorney General and the Comptroller should convene a blue ribbon panel of no less than 9 law schools deans out of the total of 15 law school deans in New York to create a pool of 18 potential appointees.
 - The pool should contain 6 candidates registered Democratic, 6 candidates registered Republican, and 6 candidates not registered in any political party and should reflect the geographic, gender and ethnic diversity of the state.
 - The pool can not contain any individual who has held elective, judicial, or political party office or been a registered lobbyist within the last 4 years.
 - The Solicitor General should be empowered to choose 2 appointees who are registered Democratic, 2 appointees who are registered Republican and 1 unaffiliated appointee not registered in any political party to constitute the members of the new ethics body, striving to reflect the diversity of New York in the appointments.
 - The 5 members shall be appointed to 5 year staggered terms, except for the initial term.
 - 1 Democrat and 1 Republican to serve an initial 2 year term
 - 1 Democrat and 1 Republican to serve an initial 3 year term
 - The unaffiliated member to serve an initial 5 year term.
 - The 5 members shall choose their own chair.
 - The management staff of the new body shall be chosen in consultation with the Solicitor General, without regard to political affiliation, based on professional experience and familiarity with ethics.
- **The new ethics body should be able to:**
 - Open and conduct investigations without approval by any other entity or individual
 - Have the ability to issue its own subpoenas and conduct depositions

- Assess fines and other appropriate sanctions (training, suspension, etc.) for civil violations
- Publicly refer findings of criminal conduct to the Attorney General for prosecution
- **The blanket secrecy provision which burdens JCOPE should not be carried over to the new ethics entity.**
 - Consideration should be given to allowing the public release of reports that conclude or end an investigation.
 - Institute a black-out for public release in the period preceding an election

What can be done in the meantime.

- All measures which exempt state contracts from Comptroller review and approval must immediately be repealed or rescinded.
- The Attorney General should be given the authority to instigate and conduct investigations into public corruption, wherever it might occur, including investigations into the Executive and the Legislature.
- A consent and reporting system should be set up covering volunteer political and other work undertaken by Executive and Legislative staff, to ensure that state assets and state compensation are not being misused.

Equally importantly, a cultural shift must occur in Albany.

Strengthening laws and establishing improved oversight is only half of the challenge. Those changes will not be completely successful without a change in the culture. If those who are appointed to positions like ethics oversight, the New York State Inspector General's Office and the Governor's Office of Employee Relations are chosen because of their expectation that they will function independently and they are instructed and permitted to do their job independently, corruption will be curtailed. The Fair Political Practices Commission of California is responsible for ethics, campaign finance and lobbying oversight for California state government. Established by initiative, its five members are appointed by the governor. Yet, they are expected to, and do function, independently. The members of the New York City Campaign Finance Board are appointed by the Mayor, yet they also function independently, in a body that is

expressly charged with being nonpartisan, because they and the public expect that level of ethical conduct.

The appointments that Governor Hochul make to JCOPE, who she appoints as Inspector General and chooses for GOER, can set the tone and shift the culture for ethics in our state, as will action by the Legislature to replace JCOPE with an effective, independent entity. We look forward to working with our new Governor and the Legislature to assist with this long overdue cultural shift.

We commend Senator Biaggi for convening this public hearing and hope to see an ongoing public conversation that will shape the future of ethics oversight in New York.

**TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
SENATE ETHICS AND INTERNAL GOVERNANCE COMMITTEE
REGARDING
NEW YORK STATE'S SYSTEM OF ETHICS OVERSIGHT AND ENFORCEMENT
August 25, 2021
Albany, N.Y.**

Good afternoon. My name is Blair Horner and I am Executive Director of the New York Public Interest Research Group (NYPIRG). NYPIRG is a non-partisan, not-for-profit, research and advocacy organization. Consumer protection, environmental preservation, health care, higher education, mass transit, voting rights and governmental reforms are our principal areas of concern. We appreciate the opportunity to testify on the need for reforming and strengthening oversight of New York State's ethics laws.

In summary, NYPIRG strongly believes that the Joint Commission on Public Ethics (and the Legislative Ethics Commission) should be *replaced* with an independent ethics enforcement agency that would monitor and enforce ethics for the executive and legislative branches. Both entities were established with fatally flawed structures because of political concerns, not the public's best interests. This testimony will go into detail as to why we believe that that action should be taken and how we recommend that you go about this important reform.

At the outset, since JCOPE is the state's current ethics watchdog, the public deserves to know how it operates and how it makes its decisions. We begin our comments by urging that you focus on *how* JCOPE attempts to fulfill its mission. The public has – at best – incomplete information on the inner workings of JCOPE. Some of the secrecy surrounding the Commission is based in state law and some due to decisions made by JCOPE itself.

Despite the secrecy, the media has done extensive reporting on the agency and the best information on JCOPE comes from that coverage – in particular, the work of Albany's *Times Union*, which has contributed significantly to the public understanding of the agency. Given that JCOPE is a public agency doing work on behalf of the public and is funded through the public's taxes, it is critically important that the public have a comprehensive understanding of how JCOPE operates. Your hearing can help fill in those gaps.

Based on our review of the media's reporting on JCOPE, we recommend that the agency's commissioners and senior staff present testimonies to your committee to address, at a minimum, the following questions:

How does JCOPE decide which issues are allowed to be decided by staff versus by the commissioners?

As you know, in both book deals involving the governor approval was granted by the staff without, it appears, full Commission approval. It has been reported that some commissioners believe that such approval should have gone to the full Commission.¹ Exploring how JCOPE handled those decisions

¹ Bragg, C., "JCOPE authorizes 'steps' in unnamed 'investigative matters'" Albany *Times Union*, April 9, 2021, <https://www.timesunion.com/news/article/At-special-meeting-JCOPE-authorizes-steps-in-16089789.php>.

would help better understand the agency's views of where the lines are drawn when it comes to its own staff-decision-making and interpretations of the law. Moreover, if changes are needed, such reforms would remove the issue of precedence that is often the basis of agency decisions.

As noted in the governor's counsel's 2020 letter to the Commission's staff, there is precedent for staff being granted authority to approve such activities. However, in both cases, the governor received significant compensation. We have not seen evidence that the staff were aware of the *amount* of the compensation – which would seem to be important information. Did the staff have additional correspondence that would shed light on these approvals?

Does JCOPE have a small group of commissioners and senior staff that meets informally and makes decisions on its behalf?

There have been public complaints made by commissioners that JCOPE's decision-making hinges on a small number of commissioners working with senior staff.² Digging deeper into the inner workings of the agency will help inform your efforts to develop proposed changes that may be needed to ensure that JCOPE's decision-making is reasonable and appropriate.

Does the staff (or members of the Commission) brief the executive or its legislative appointing authorities in advance of JCOPE decisions? How does the Commission and/or staff monitor, investigate, and enforce the confidentiality requirement in state law?

As you know, JCOPE commissioners have alleged that the governor was told of the private discussions over how the agency was to respond to allegations that a former top aide to the governor misused public resources.³ And it has been confirmed that the governor learned of how the Speaker's Commission appointments voted with respect to a particular matter under review that was related to the governor's activities. What happened? Given that the law requires that such conversations remain secret, how that information became available would inform both policymakers and enforcers of weaknesses in the current system.

How does the Commission set boundaries for the use of public resources by officials?

Related to the issue above, has JCOPE issued clear guidelines regarding the use of public resources for private activities? For example, when the governor sought JCOPE approval for his two book agreements, the Executive Chamber's employees requested such approval on correspondence written on state letterhead. In both cases it appears that the governor's counsels were working on those requests during work hours.

Another issue is whether guidance, if any, was issued regarding executive staff volunteering their time to work on the governor's second book. Where has JCOPE drawn the lines for what it considers appropriate use of public resources?

Of course, there are other questions that could be raised. For this inquiry, the important action is to get top officials in JCOPE to testify on how the agency works. While NYPIRG believes that the agency should be replaced by an independent entity, JCOPE exists now and is charged with an important mission. The public – and policymakers – need to know how JCOPE makes important decisions. Top officials must testify.

In terms of comprehensive reform, JCOPE is fatally flawed and must be replaced. Nowhere is the public's trust more susceptible to harm than when lawmakers act in ways that skirt not only the letter, but

² Ibid.

³ Bragg, C., "Internal rancor continues at JCOPE," *Albany Times Union*, February 25, 2020, <https://www.timesunion.com/news/article/Internal-rancor-continues-at-JCOPE-15083970.php>.

also the spirit, of ethics laws. New York has seen its share of ethical lapses, yet little has been done. Prison sentences, convictions, plea deals, scandals and other allegations of ethical misconduct have been on the front pages of the state's newspapers far too often. As a result, the ways in which the state regulates political ethics has been a front-burner issue. Unfortunately, little is clear when it comes to New York State's ethics laws. The laws are loophole-riddled and poorly—if at all—enforced. Changes are needed to comprehensively reform the state's ethics laws.

The *Public Integrity and Reform Act of 2011* established a new Joint Commission on Public Ethics (“JCOPE”) to oversee executive branch ethics, lobbyist and client reporting and conduct, and empowered to investigate, but not punish, legislators. The legislation also created a new Legislative Ethics Commission (LEC) that would have sole responsibility for issuing punishment for unethical actions by legislators and legislative employees. The LEC's membership totals nine—all appointees of the legislative leaders with four of the nine being currently sitting legislators.

The JCOPE commission members are appointed by the Governor (six of the 14 members with three being enrolled Republicans); the Senate Majority Leader and Speaker each appoint three members; and the Senate and Assembly Minority Leaders each get one appointment. The JCOPE chair is chosen by the Governor; the executive director is chosen by the commissioners and does not have a fixed term but may only be terminated as specified in statute. Financial penalties were toughened, and courts now can strip corrupt public officials of their pensions. Financial disclosure requirements were beefed up and made public.

Both new ethics oversight entities were fatally flawed: Ethics watchdogs must be independent, not political creatures. Yet, the structure of both agencies indicates their design was driven by fear of real independence.

From the public point of view, ethics watchdogs must be independent of all public officials subject to their jurisdiction, or else its actions will always be suspect, undermining the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in commission members of high integrity, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity; similarly, their close relationships are free of even the appearance of conflict of interest.

Including legislators on the LEC destroys the independence of the LEC and discourages legislators and staff from seeking opinions or filing complaints for fear of breaches of confidentiality and retaliation.

Similarly, JCOPE's basic commission structure is flawed. First, the appointment (and removal) process by which three members are appointed (and removable) by the Speaker of the Assembly, three by the Temporary President of the Senate, one by the minority leader of the Assembly, one by the minority leader of the Senate, and six by the Governor, severely undermines the independence and accountability of JCOPE.

Thus, although JCOPE has little actual authority over the Legislature and although the legislative branch constitutes less than two percent of the state's work force, the majority of its membership comes from legislative appointees.

And with 14 members, JCOPE is too big to function smoothly, and even numbered panels are prone to gridlock. Large boards are inherently unwieldy, inhibit substantive discussion, and make decision-making more difficult.

Moreover, these factors are combined with the mandate that at least two of the members of JCOPE voting in favor of a full investigation of a legislative member or staff member must be appointees of a legislative leader or leaders of the same major political party as the subject of the investigation. This makes it virtually impossible to pursue an investigation of a member in the good graces of the leaders of either house.

This appointment process virtually guarantees the factionalizing and politicizing of JCOPE—anathema to an effective ethics system. This gives political leaders an effective veto over investigating or sanctioning any member—or any lobbyist or client—who they want to protect for any reason.

And we have seen that factionalization play out. In a public letter to the editor in the *Times Union*, four JCOPE commissioners bemoaned being out of the loop in the search for a new executive director:

*Designed to be independent, the incessant interference continues. If the next executive director is not hired from outside state government after an exhaustive search, the public trust will be inexorably destroyed.*⁴

JCOPE is unique in another way: It allows elected officials among its members. Typically, ethics boards have explicit prohibitions on the participation of elected officials.

Moreover, allowing elected officials to serve on the board of JCOPE, which has regulatory authority over the lobbying industry, creates an inherent conflict of interest (in fact, the first chairperson was not only an elected official, but one who also served as the head of a lobbying group).

There can be no doubt that the state’s ethics watchdogs need a thorough review. Both agencies have been frequently criticized as lacking structural independence and operating in secrecy.⁵ The criticism was at least implicitly validated in JCOPE’s policy reform recommendations from February 2015:

“Increasing Transparency and Disclosure. Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE’s current exemptions from the ‘Freedom of Information Law’ and ‘Open Meetings Law’ should be modified to increase the transparency of JCOPE’s operations while still protecting the integrity of JCOPE’s sensitive compliance and investigative functions.”⁶

Even when compared to the rest of the nation, New York’s ethics enforcement ranks poorly; in a 2015 comparison of state ethics laws, New York’s ethics enforcement received a grade of “F.” Not surprisingly, that same group listed New York’s oversight of procurement as an “F” as well.⁷

⁴ Albany *Times Union*, <http://www.timesunion.com/tuplus-opinion/article/Letter-Ethics-panel-hire-a-questionable-move-6408151.php>.

⁵ King, H., “Three Years In, New York Ethics Commission Still Looking to Find Footing,” *Gotham Gazette*, <http://www.gothamgazette.com/index.php/government/5479-three-years-in-new-york-ethics-commission-still-looking-to-find-footing>.

⁶ New York State Joint Commission on Public Ethics, “Report From The New York State Joint Commission On Public Ethics February 2015.”

⁷ The Center for Public Integrity, State Integrity Investigation project, New York State ranking available, <https://www.publicintegrity.org/2015/11/09/18477/new-york-gets-d-grade-2015-state-integrity-investigation>.

In addition, the LEC must be abolished, and its powers (except imposition of penalties) transferred to a new state ethics watchdog, which would have full power over the Legislature (except for penalties)—to provide advice and ethics training, to administer and enforce annual disclosure, and to enforce the ethics laws.

Thirty-nine states provide external ethics oversight through an independent ethics commission that has statutory authority and staffing that are independent of the rest of state government. Ethics commissions in only six states, including New York, do not have jurisdiction over state legislators.

Moreover, the new ethics watchdog must be reduced in size from its current unwieldy fourteen members.

One model is New York State's Commission on Judicial Conduct. The Commission is established in the state Constitution, which helps limit political pressures on decision making. Under this model, most of the appointments to this new Ethics Commission would be made by the courts, thus granting it sufficient independence. All its members and staff must be prohibited from *ex parte* communications with their appointing authorities and its budget would be constitutionally protected. It is essential that the law protect the budget of the new ethics watchdog, perhaps as a percentage of the net total expense budget of the state or as a fixed amount with an inflation adjustment.

As you know, the selection process for this new entity is critical. NYPIRG has been collaborating with a wide range of interested organizations and we have developed an outline as to how best to ensure that those selected are as independent of the political system as possible. Here is that outline:

- JCOPE should be eliminated (as well as the Legislative Ethics Commission) and replaced by a new ethics commission to be established by constitutional amendment.
- The commission should be smaller in size than JCOPE, even as small as five commission members, to bring about more accountability for those making the decisions.
- The method of appointment is important for facilitating independent action. A method of joint appointments, in which the appointment power is shared by two or more parties, could be an improvement on the existing method of direct appointments. For example, the Democratic leaders in the legislature could make one appointment to the commission, and the Republican legislative leaders do the same. (Note: The legislature makes joint appointments to the new state campaign finance board in this way.) Similarly, two appointments could be designated to the three elected officials in the executive branch.
- There should also be an additional joint appointment that breaks what should be an even number of appointments between the legislative and executive branches. One option is to have the four commissioners appointed by the legislative and executive branches appoint a fifth member. Another option is to have the chief judge (perhaps in consultation with the 4 presiding justices) recommend a pool of candidates from which the four commissioners appointed by the legislative and executive branches select the fifth member.
- This joint appointment method could hopefully encourage moderation and reduce the likelihood that a commissioner is beholden to any one appointing authority.
- To avoid situations where a joint appointment is not made because the appointing authorities cannot come to an agreement, the law can spell out consequences for inaction, including that the appointing authority devolves to another authority or the commission, itself.
- There should continue to be restrictions on who can be appointed to the commission, including restrictions for individuals who held elective office or party office.

A constitutional amendment takes time. We thank the Senator for advancing bills that incrementally fix broken processes at JCOPE and better protect state employees from harassment and retaliation while a more comprehensive solution is crafted. NYPIRG has supported the following bills, while recognizing that much more must be done to improve ethics oversight and create a more independent enforcement entity:

- S6261 – simplifies JCOPE voting rules for appointment and removal of the executive director through action by a simple majority of Commission members.
- S6263 – makes a technical change in the financial disclosure form to eliminate an outdated question.
- S6964-A – removes the requirement that legislators, state employees, and statewide officials cannot be found guilty of ethical violations by JCOPE without the votes of at least two members of their own political party and changes the structure of the JCOPE commission by ensuring that each of the legislative conferences have the same number of appointees.
- S1500 – requires legislators and candidates for member of the legislature to provide a link to their financial disclosure statements on their official state and campaign websites.

While not the topic of today's hearing, we also urge that you look at the state's Inspector General. The office reports to the governor's office and we urge you to examine whether the IG is sufficiently independent to conduct its important work.

Thank you for the opportunity to testify.



LETIZIA TAGLIAFIERRO
Inspector General

Empire State Plaza • Agency Building 2, 16th Floor • Albany, New York 12223 • (518) 474-1010 • ig.ny.gov

Testimony of New York State Inspector General Letizia Tagliafierro to the New York State Senate's Ethics & Internal Governance Committee

Thank you, Chairperson Biaggi, Ranking Member Palumbo, and the distinguished members of this Committee for the opportunity to provide this testimony as the Committee seeks to examine New York State's system of ethics oversight and enforcement, identify improvements, and discuss alternative approaches to enforcing ethics.

At the Offices of the State Inspector General, New Yorkers are served every day by dedicated and professional employees who espouse public service. This office works tirelessly to preserve public integrity, prevent fraud and abuse of taxpayer resources, and ensure that our fellow State workers at executive agencies and authorities operate with integrity and in compliance with all laws and regulations.

We also assist agencies in finding ways to better serve the public. Through our review, audit and investigative functions, we have made hundreds of recommendations to help State agencies and authorities operate more efficiently and transparently. The taxpayers of the State of New York deserve nothing less.

Under New York State Executive Law Article 4-A, the Inspector General has jurisdiction over all executive branch agencies, departments, divisions, officers, boards, and over most public authorities and public benefit corporations. The Inspector General's functions and responsibilities include receiving and investigating complaints concerning allegations of corruption, fraud, criminal activity, conflicts of interest and abuse. The Inspector General also reviews the policies and procedures of covered agencies regarding the prevention of these types of misconduct. The Inspector General's responsibilities include oversight of the State agencies involved in infrastructure projects, and based on the nexus of state spending, also has jurisdiction over the contractors working on those projects.

The Inspector General's Case Management Unit (CMU) is responsible for receiving and processing complaints and allegations made to the Offices of the Inspector General. The CMU fields all complaints and then reviews and processes each to determine jurisdiction. Each complaint is logged in to a centralized database and then addressed and/or investigated by investigative and legal staff. The CMU may also refer matters to other agencies as appropriate and supports the investigative work of the entire office. All case-related information is treated as confidential information.

If a specific matter falls outside of the office's jurisdiction (i.e., a federal or local government agency), the CMU will advise the complainant of such and will make a referral to the proper entity to review their matter. Some complaints are ultimately determined to be best handled by the executive agency or authority complained of and are therefore referred to those entities to address via existing internal processes. However, even in these cases the Office of the Inspector General tracks and monitors each referral to ensure that the agency/authority responds in an appropriate manner.

The Inspector General provides training for State agencies and other organizations, including the New York Prosecutors Training Institute and the District Attorney's Association of New York, related to the OIG's authority and State employees' obligation to report fraud, conflicts of interest, criminal activity, and abuse including workers' compensation and welfare fraud investigations.

The Office has long-standing partnerships with numerous law enforcement agencies across the state, including district attorneys, police departments, the New York State Police, the Federal Bureau of Investigation and more. With regard to the infrastructure and integrity monitoring, the Inspector General coordinates with the appropriate oversight agencies, whether it be the U.S. Department of Transportation, the New York State Department of Transportation, Empire State Development, the New York State Thruway Authority, the Port Authority of New York and New Jersey or other relevant agencies.

In calendar year 2020, the Office of the Inspector General received 3,591 complaints. The majority of these complaints involved the Department of Corrections and Community Supervision (DOCCS), with many consisting of complaints from inmates at correctional facilities across the state. We also received a significant number of complaints involving the Department of Labor (mostly regarding unemployment insurance matters), OPWDD and CUNY.

The CMU classifies each complaint into one of 22 categories, ranging from misuse of state resources to improper hiring practices to discrimination. The Inspector General's Office received a total of seven complaints in the ethics category in 2020.

More information about these statistics may be found in the Office for the Inspector General's [inaugural annual report](#), found on our web site.

I wish to highlight several points about the Office of the Inspector General to the Committee as it considers its goal to examine New York State's system of ethics oversight and enforcement, identify improvements, and discuss alternative approaches to enforcing ethics:

- The Office of the Inspector General is not a prosecutorial body. We cannot file criminal charges, hand up indictments, or make arrests. This is an investigative body that refers findings to local, state, and/or federal law enforcement agencies for prosecution as deemed appropriate.
- Our jurisdiction is limited to the executive agencies and authorities outlined in Executive Law Article 4-A. By statute, the Inspector General is appointed by the Governor and reports to the Secretary to the Governor.
- With respect to certain provisions of the Public Officers Law and Lobbying Act, the Office of the Inspector General has complementary and parallel investigative jurisdiction with JCOPE. However, as mentioned above, the OIG does not have the authority to enforce violations that fall under the jurisdiction of JCOPE. As such, complaints and investigations regarding violations of New York's Public Officers Law or the Lobbying Law are routinely referred to JCOPE. Similarly, JCOPE routinely refers matters to our office that deal with potential state employee misconduct, fraud and/or abuse. Additionally, matters that come before our office and are fully investigated may have findings that warrant referral to JCOPE for further redress (as findings relate to violations of the Public Officer's Law and/or the Lobbying Law).
- The office does have the authority to issue subpoenas, a tool it uses in the regular course of business to gather evidence as part of an investigation.

Beyond the State Inspector General's statutory jurisdiction over executive agencies and related entities, the Offices of the New York State Inspector General encompasses three other distinct offices that protect taxpayer funds, ensure public assistance programs are employed responsibly and provide access to important safeguards for workers across the State:

- The Office of the Welfare Inspector General (OWIG), as established by §74 of New York State Executive Law, is tasked with maintaining the integrity of New York State's public assistance programs.
- The Office of the Workers' Compensation Fraud Inspector General (WCFIG), as established by §136 of the New York State Workers' Compensation Law, is responsible for investigating violations of the laws and regulations pertaining to the operation of the workers' compensation system.

- The Gaming Inspector General, consolidated into the Office of the Inspector General in June 2021 as part of the enacted New York State Budget, investigates allegations of corruption, fraud, criminal activity, and conflicts of interests or abuse in the New York State Gaming Commission. The Gaming Inspector General promotes transparency, accountability, honesty and integrity of New York's gaming activities, Gaming Commission employees, and those that conduct business with the Commission. This includes all lawful gaming and horseracing activity conducted in New York State.

I hope this testimony is useful in your committee's goal to examine New York State's system of ethics oversight and enforcement, identify improvements, and discuss alternative approaches to enforcing ethics.

Please feel free to contact my office if you have any questions.

Thank you.

Written Testimony

Michael N. Volforte

Director

Governor's Office of Employee Relations

July 12, 2021

Senator Biaggi and the rest of the New York Senate Standing Committee on Ethics and Internal Governance thank you for the opportunity to provide written testimony for this hearing on New York's system of ethics oversight and enforcement.

The Governor's Office of Employee Relations (GOER), much like other agencies, takes its commitment to ethics very seriously and works to ensure compliance by its staff with the provisions of the Public Officers Law and Executive Order No. 3 which requires certain covered employees of each agency to undergo regular ethics training. Each agency is responsible for managing the requirements of the Public Officers Law for its employees. GOER maintains a section in its online Administrative Procedures Manual, *Ethics and Conflicts of Interest*, which summarizes and explains various ethical provisions of the Public Officers Law and Civil Service Law and our policy and expectations for employees with respect to those provisions. GOER also requires our employees to review this section of our Manual on an annual basis as part of an overall review of all agency policies. In addition, GOER maintains an Agency Ethics Officer who ensures the agency complies with annual requirements for designating financial disclosure filers and any required training. Additionally, GOER's Ethics Officer provides guidance on acceptable outside activities for GOER staff, coordinates and approves annual approvals and renewals of our employee's approved outside activities/employment and advises agency personnel on conflicts of interest and other public officers law provisions.

Since 2017, GOER has maintained annual *Ethics for New York State Employees* training for all employees in executive controlled agencies as part of the State's mandatory annual training program. This training is available in online and paper versions to accommodate all employees, regardless of their access to a computer during the workday. The training applies to

both financial disclosure filers and non-filers and takes individuals through various provisions of sections 73 and 74 of the Public Officers Law including, but not limited to, conflicts of interest, outside activities, outside employment, nepotism, gifts, honoraria, political activity and post-employment restrictions. The training summarizes and explains various provisions and provides links to the actual provisions of law or rules being reviewed by the participant. The training also takes the participants through various factual situations and applies the ethics provisions by questioning the participant about the proper application of the provisions being discussed. This training requirement is in addition to any other training required of employees by the Joint Commission on Public Ethics or an individual employee's agency.

Thank you for the opportunity to highlight GOER's commitment to ensuring our own employees are informed of, and comply with, their obligations under the applicable ethical provisions and supporting our fellow agencies' commitments to do the same through the annual mandated training offering.