

**MINUTES OF THE PUBLIC SESSION OF THE
NOVEMBER 17, 2015
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT THE COMMISSION'S OFFICE LOCATED AT
540 BROADWAY
ALBANY, NEW YORK**

Chair: Daniel J. Horwitz (ALB)

Members: Hon. Joseph Covello (ALB)
Marvin Jacob (Webex)
Seymour Knox, IV (ALB)
Hon. Eileen Koretz (NYC)
Gary J. Lavine (ALB)
Hon. Mary Lou Rath (BUF)
David A. Renzi (Webex)
Michael A. Romeo, Sr. (Webex)
Hon. Renee R. Roth (NYC)
Michael K. Rozen (Webex)
George H. Weissman (ALB)

Members

Absent: David Arroyo
Dawn L. Smalls

Staff: Monica J. Stamm, General Counsel
Kevin T. Gagan, Chief of Staff
Martin L. Levine, Director of Lobbying and Financial Disclosure Compliance and Senior Counsel
John P. Harford, Special Counsel and Director of Ethics and Lobbying Compliance
Walter J. McClure, Director for External Affairs
Emily A. Logue, Investigative Counsel
Stacey Hamilton, Manager of Education Program and Special Counsel
Patrick E. Coultry, Chief Investigator
Terence Mulderrig, Senior Investigator
Peter Smith, Confidential Investigator
Lori Donadio, Confidential Legal Assistant
Deborah Novak, Executive Assistant

I. CALL TO ORDER

Chair Horwitz called the November 17, 2015 Commission Meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION

October 7, 2015

Commissioner Covello noted that on page 11 of the Public Session Minutes “Commissioner Covello asked if JCOPE received any information and/or documentation from the Moreland Commission”, but he was more interested in the analytics software than the data that the U.S. Attorney might have obtained. General Counsel Stamm explained that the Moreland Commission had retained a consultant to process the data, so there was no equipment or software for JCOPE to request. JCOPE is working with ITS to develop its own data analytics programming. Chair Horwitz said a change will be reflected in the minutes to more accurately reflect Commissioner Covello’s concern.

A motion was made by Commissioner Knox, which was seconded by Commissioner Covello, to approve the minutes from the Public Session of the October 7, 2015 Commission Meeting, as amended. The motion was approved by unanimous vote.

III. REPORT FROM STAFF

Update on Redesign of Lobbying Application

Martin L. Levine, Director of Lobbying and Financial Disclosure Compliance and Senior Counsel, provided an update regarding the redesign of the online lobbying filing system and addressed questions regarding the timeline. The Commission is currently in the requirements phase of the project, establishing the business rules that define what JCOPE, the public and other stakeholders need from the project. The next phase is design specification, where those needs are converted into software, then building the database, coding, testing, implementation and roll out by December 31, 2016.

SEARCH FOR EXECUTIVE DIRECTOR

Chair Horwitz explained that since the Commission’s last meeting the Search Committee met. The Committee has reviewed about 70 resumes, but the solicitation of resumes has

not yet closed. Additional resumes are coming in which need to be distributed and reviewed. The Committee has identified some candidates who will be scheduled for interviews in the upcoming weeks. The Committee also decided that the period of time for the public solicitation of resumes should be extended. The Committee discussed the propriety and the risks/rewards of using a search firm, but given the cost and the time that it will take, the Committee decided to continue its ongoing public process to gather resumes. If the Committee is not satisfied with the applicants, it can revisit the issue of a search firm at a future date.

Chair Horwitz stated that staff has received requests for the resumes from several Commissioners, in addition to the Committee, including Commissioners Weissman and Roth, and they are being distributed. General Counsel Stamm stated that if anyone else would like a book of resumes, to let her know.

REPORT FROM MANAGEMENT COMMITTEE

Commissioner Lavine presented the report in the absence of the Committee Chair, David Arroyo. Commissioner Lavine stated that the Committee has begun a review of the management of the Commission, with a concentration on human resources issues, to ultimately facilitate a self-assessment of management. The discussions included hiring protocols during the search for an executive director and concluded that staff will proceed in the normal course, as authorized by the full Commission, and notify the Committee of new employees. The Committee discussed that the staffing plan should not be addressed until the new executive director is in place. It was determined that, in the interim, as part of the Committee's due diligence, a survey would be taken of all staff to elicit input with respect to agency functions, allocation of resources, and performance. As part of the diagnostic, the Committee will review the current job descriptions, and eventually staff will provide a presentation to the full Commission on the day-to-day operation of the agency.

IV. REGULATIONS

Proposed Regulations for an Exemption from Publicly Disclosing Client Information in Financial Disclosure Statements

General Counsel Stamm presented an update on the draft regulations, which covers the process for seeking an exemption from publicly disclosing client information as required in the annual financial disclosure statement. As set forth in the statute, there are some automatic categories of client matters that do not need to be disclosed. For all other matters, the statute allows filers to seek an exemption. The filer can go to the Office of Court Administration (“OCA”) or to JCOPE. While JCOPE has been developing regulations, OCA has been developing parallel regulations. Based on communications with OCA, its draft should be ready later this week. OCA has adopted some of the ideas in JCOPE’s proposal, and JCOPE has included some of OCA’s ideas in the draft regulations that have been circulated. These client disclosures go into effect December 31, 2015. In order to have something in place by January 1, 2016, staff suggests proceeding on parallel tracks, adopting regulations on an emergency basis, and also proceeding with the full rulemaking process required under SAPA. The rulemaking process requires soliciting formal comments. Since that process will not be completed by January 1, 2016, the regulations are before the Commission for discussion, and emergency adoption.

Commissioner Covello asked if the regulations were going to be identical so there would be no advantage going to one agency as opposed to the other. General Counsel Stamm explained that the statute established some differences in the processes. For example, the statute requires that OCA make a determination in 3 days, but that same requirement is not imposed on JCOPE. With respect to substance, the regulations are likely to be very similar based on discussions, but OCA has not yet publicized its version. The discussions with OCA and the Legislative Ethics Commission, as well as the informal comment period, have been productive. LEC has sent a letter to the Commission voicing its concerns, and staff will continue to have discussions, but recommends that the

Commission proceed with the formal rulemaking process and adopt the regulations on an emergency basis so that a process is in place by January 1.

Commissioner Weissman stated that he would like to review the LEC's concerns and see what OCA is proposing, and suggests that the emergency rulemaking be postponed until the Commission's next meeting, December 15, 2015, which would still have them in place by January 1, 2016. General Counsel Stamm advised that the LEC's letter has been circulated to the full Commission, and she also received an email from LEC staff this morning which appears to be consistent with the letter. OCA is contemplating proceeding with its rulemaking process at the same time as JCOPE. OCA will also solicit comments, but its process is not the same.

Commissioner Jacob asked for an explanation of LEC's point in its letter, dated October 26, 2015, and stated that the LEC takes the position that JCOPE's regulations are inconsistent with the statute. General Counsel Stamm explained that the draft regulations provide for an exemption from *public* disclosure of the client information. Based on staff's interpretation of the language in the statute, a covered person may seek an exemption from either JCOPE or OCA, and if the exemption is granted, the information would be disclosed in the FDS filed with JCOPE. If we were to receive a public request for the FDS, that information would be kept confidential and redacted from the financial disclosure statement. Chair Horwitz stated that JCOPE, the enforcement agency, would have the information, so that it can decide if there is a potential conflict of interest, but if the exemption is granted, the public never sees that information.

General Counsel Stamm stated that staff is relying on the language in the statute which was amended as part of the bill to make it clear that the exemption is from *publicly* disclosing the name of the client. The LEC is arguing that there is another provision in the statute, §73-a(7) that requires that if an exemption is granted, it would not be included in the FDS that is filed with JCOPE. In other words, if someone seeks an exemption from OCA, not JCOPE, and OCA grants the exemption, then it's LEC's position that JCOPE will never have the information.

Chair Horwitz asked if the Commission was to adopt the regulation that reflects LEC's position, and a filer applies to OCA and gets an exemption, how would JCOPE, as an enforcement agency, be able to determine, whether or not there is a conflict of interest with a filer, whether a member of the legislature, a member of a commission, or any other FDS filer, if there is a violation of Public Officers Law. Commissioner Weissman stated that the only way JCOPE would be prompted to look into the question of an exemption would be through a complaint or an audit. Chair Horwitz explained that if there is nothing disclosed in the FDS, then the auditor would have no information to prompt a question. Commissioner Weissman stated that when auditing a filing, JCOPE can always ask the covered person if they have an exemption. If JCOPE received a complaint, JCOPE could go to the target of the complaint, and it would be in their best interest to notify JCOPE if they had an exemption.

Chair Horwitz stated that Commissioner Weissman is presuming JCOPE will receive a complaint, but if not, how does JCOPE get the information. Embedded in JCOPE's authority is an audit function so that it can go through a process of evaluating FDS's to determine whether there are potential conflicts. JCOPE's statutory framework has an audit function so that it does not have to rely on complaints. Chair Horwitz stated he is trying to understand fundamentally the LEC's, and now Commissioner Weissman's position, how, if an exemption is granted, the enforcement and regulatory authority of this body, which is vested with enforcing the Public Officers Law, is supposed to do its job without the relevant information. Commissioner Weissman feels that the real area of concern deals with the exemption from OCA. If a complaint is received that alleges a conflict of interest, JCOPE could go to one of two places: OCA, depending on what its regulations say about sharing information with JCOPE and the target of the complaint. Chair Horwitz reiterated that this presumes that JCOPE is going to get a complaint. The OCA does not have authority to enforce the Lobbying Act or the Public Officers Law, so unless OCA agrees that all information will be provided to JCOPE, the only way JCOPE would be able to evaluate a conflict of a FDS filer, a legislator or somebody else, is if a complaint is filed.

Commissioner Weissman stated that he does not believe JCOPE has the ability to go behind the OCA exemption. General Counsel Stamm explained that the draft regulations do not contemplate reconsidering an exemption granted by OCA; rather the regulations interpret the exemption as an exemption from *public* disclosure only.

Commissioner Jacob wants to know where in the statute JCOPE gets the authority to do what is being proposed, as there often has been a problem going beyond the statute. Commissioner Roth also thinks that some of these positions go beyond the statute. Chair Horwitz explained that he is not articulating a position at this point; he just wants to understand the LEC's position and make sure that the reforms that were included in the budget bill, which were designed to address a particular deficiency in the FDS filings, are going to be met, and that JCOPE's enforcement and audit functions are not going to be vitiated.

General Counsel Stamm explained that the regulations are based on the statutory language for the exemption itself, which is in two places. In the most recent version of the statute at §73-a(b-2) states "with respect to a client represented in other matters, not otherwise exempt, the reporting individual may request an exemption to *publicly* disclosing the name of that client from the Joint Commission pursuant to paragraph (i) of subdivision §94 of the Executive Law, or from the Office of Court Administration" Commissioner Covello stated that this is placing a lot of weight on the word "publicly."

General Counsel Stamm explained that in 2011 there was a different client disclosure and a different exemption. In 2011, the exemption did not include the language "from publicly disclosing the name of the client." That language was added in 2015. Whereas in 2011 it may have just been an exemption of the disclosure requirement, in 2015 that language was modified to say "from publicly disclosing the name of the client". The staff has interpreted that language to effectively be the same as the redactions that have been done for years, where filers apply to JCOPE to seek an exemption from publicly disclosing information required in the FDS. As explained, the LEC has pointed to language in §73-a(7), arguing that it provides that the information would remain

confidential once the exemption is granted. Staff at JCOPE has interpreted the language differently. The language in §73-a(7) is “the name of the client may not be disclosed by the reporting individual, unless and until the Joint Commission or the Office of Court Administration, formally advise to the reporting individual that he or she must disclose such names, and the reporting individual agrees to represent the client”. Staff has interpreted this language to mean that, after a decision has been made, the filer has an opportunity to decide whether or not to engage with the client, and if the filer decides not to go forward and engage with the client, then the filer will not have to disclose the information. This interpretation is comparable to an existing provision in §94(19)(c), which has the same kind of language with respect to exemptions and redactions and gives a filer 30 days after the decision on an exemption is made to decide whether or not to continue the activity. If the decision is made to continue, it would have to be disclosed in the FDS filing.

Commissioner Covello stated that from a lawyer’s point of view, any disclosure of a client’s identity is public disclosure, whether it is to JCOPE or anyone else. Commissioner Covello is concerned that lawyers on commissions like JCOPE, who volunteer, or receive nominal compensation, would have to tell their clients that they must disclose them to this Commission, whether there is a conflict or not. The client may not retain them and choose to retain the law firm next door. Why would anyone want to stay on a commission, and serve the public, when it might affect their business. Commissioner Covello feels that the Commission has an opportunity to narrowly construe the provision in a way that would not require disclosure if a filer has an exemption, whether it comes from OCA or not, and thinks that it would be wrong to broaden it. Chair Horwitz stated that all of the Commissioners, many of who are practicing lawyers, are sensitive to the point raised. Those are important considerations. That having been said, the Commission needs to give consideration to LEC’s and the other points raised. Chair Horwitz does not believe the consideration about volunteer members of boards, like the Commission, is not something that the Legislature or the Governor were contemplating when they put this statute together. This statute came out of a particular set of legal issues and investigations that highlighted some gaps in the

Public Officer's Law and financial disclosure requirements. Staff will take these comments into consideration and the Commission will continue discussions.

Commissioner Jacob noticed that, pursuant to §942(2)(d) of the regulations proposed by staff, the exemption request can only be made via email to JCOPE. He asked if a hand delivered or mailed exemption request was allowed, or if the statute required email. Commissioner Jacob asked if he wanted to make an exemption request by hand, why that should not be allowed. General Counsel Stamm stated that it is not in the statute; it is in the regulations. The idea was that it would be more efficient to require electronic filing. If the Commissioners want to allow hand delivery, the statute would not preclude it.

Commissioner Weissman thinks the statute should be read considering all the provisions. Based on a quick scan of Commissions and Authorities that had gubernatorial appointees that were policy-makers as well as those appointed with advice and consent of the Senate, Commissioner Weissman believes there are at least four or five hundred unpaid or per diem Commissioners, but he does not know how many are in professions that have clients. Commissioner Weissman thinks the Commission should construe this statute in the way it was written, and that these types of statutes have always been narrowly construed. Chair Horwitz does not disagree with the statutory analysis, but thinks that one must examine the statute in the context in which it was enacted; what prompted the Legislature and the Governor to enact this particular statute; what problem was the government trying to solve. The answer is a perceived and acknowledged gap in the FDS filings that were on the books at the time. The purpose of this statute is to facilitate more wholesome disclosure by the FDS filers, whether they are on a gubernatorial appointed board, members of the legislature, members of the executive branch, or staff. Commissioner Covello stated that one should look to the legislative intent, and Commissioners have a live feed telling them what the legislative intent was, and it should not be ignored. Chair Horwitz said hopefully we will come to ground and move forward in a way that the framers of the statute intended, which was for more disclosure and not less. The Commission will continue to have a dialogue and come back to this issue in December.

V. **ADVISORY OPINIONS PURSUANT TO EXECUTIVE LAW §94(16)**

Campaign Solicitations by Elected Officials

General Counsel Stamm said the Advisory Opinion was posted on JCOPE’s website for public comment, and staff has engaged in discussions with counsel for the Attorney General, the Comptroller’s office, the Governor’s office, and counsel for the Legislature through the LEC, to discuss the scope and breadth of the Advisory Opinion. JCOPE has received formal comments from the Comptroller’s office and the City Bar, which will be circulated to the Commission and posted on the website after the meeting. The LEC is going to meet this week, and then the staff of both agencies will regroup. Some issues have been raised that need to be discussed further before the Advisory will be re-presented to the Commission for a vote. The Advisory Opinion proposes a rule that would restrict elected officials from soliciting directly from subjects of enforcement powers. JCOPE has been asked to clarify terms such as the “subject” of enforcement powers and the nature and scope of enforcement powers. OSC has raised concerns that the rule as proposed may be overbroad. In addition, questions were raised about the knowledge requirements for the elected official relative to the enforcement powers and to the subject, which includes relatives of the subject (as defined in §73 of the Public Officers Law) and also individuals who have a financial interest in the subject. Specifically, questions have been raised about what knowledge component there is for an elected official and their campaign staff with respect to those entities that may be removed from the subject. These issues need to be analyzed to determine whether the opinion should be clarified so that the elected officials have sufficient information to comply with the guidance. Staff will continue those discussions, post and circulate the written comments that have been received, and come back in December.

Chair Horwitz asked about other comments. General Counsel Stamm explained that, as she had mentioned, the City Bar formally submitted comments that suggest the Advisory Opinion does not go far enough. The bar suggests that the restrictions imposed on the four statewide elected officials and legislative members from soliciting for campaigns should be similar to those in Advisory Opinion 98-12, which restricts state employees

from soliciting from anyone who does business with the state, including soliciting from lobbyists.

Reporting Obligations under the Lobbying Act for Consultants

General Counsel Stamm said after several months of discussion and soliciting informal comments from the public and interested parties, staff has a draft advisory opinion on the reporting obligations under the Lobbying Act for consultants. Staff proposes to post the draft on the website and solicit comments. Director Levine summarized the opinion, which addresses the applicability of the Lobbying Act to some activity engaged in by consultants. It is based on an extensive review of JCOPE's predecessor's opinions and its powers under the Lobbying Act. Staff incorporated input from its outreach efforts. The activities of consultants have been broken into two contexts: direct lobbying and grassroots advocacy.

Commissioner Jacob raised the issue of whether this advisory opinion is consistent with JCOPE's authority, an issue he has raised previously. Both proposed opinions are revisiting opinions from the New York State Ethics Commission and the New York State Lobbying Commission. Under §94(16) of the Executive Law, the Commission only can issue advisory opinions in response to requests for guidance. Here, the Commission should follow Executive Law §94(1) which requires certain steps when revisiting, replacing or rewriting an opinion of a predecessor agency. By not taking the steps set forth in §94(1), JCOPE could be challenged in the future. General Counsel Stamm stated that JCOPE has received requests over the last several years for guidance on when a consultant is lobbying under the Lobbying Act. For this purpose, the Commission is acting under its authority under the Lobbying Act, §1-d(f) which is to issue advisory opinions to those under its jurisdiction. JCOPE's predecessors have addressed some aspects of grassroots lobbying, and staff has considered that precedent, but is recommending expanding upon it under JCOPE's general authority to issue advisory opinions.

Commissioner Jacob stated that this does not resolve the issue with respect to the other Advisory Opinion which is revisiting 98-12, and he is not aware of anyone requesting an advisory opinion under §94(16). If §94(16) is being interpreted to apply to questions asked over the phone, Commissioner Jacob respectfully disagrees and thinks the Commissioners need to be protective of their jurisdiction and should continue to consider the legislation and the law as they implement it. Chair Horwitz stated that Commissioner Jacob has raised a cogent analysis of what the statute provides, but the Commission has been proceeding on this basis for months. Regarding the question about a challenge, these are advisory opinions, and provide guidance only. If the Commission goes forward with either one of the advisories there would not be grounds for a legal challenge because they are just advisory opinions. An advisory opinion may come into play in an enforcement case, if JCOPE is trying to establish that someone was on notice of the Commission's view of the law, which goes to intent to violate a statute. But if that does not happen, there would not be grounds to challenge the opinion. There is ample authority in the statute for the Commission to move forward in the manner that they have been proceeding. The Commission will continue discussing these issues and engage in a process to solicit comments from the public as well as the Legislature, the Executive Branch, and the LEC. To the extent that there is any question of whether JCOPE is meeting the spirit of the law, there is no doubt that the Commission has gone out of its way to solicit public view on these particular points.

Commissioner Jacob stated that if staff has consulted with the LEC and others as required under §94(1), then a reference to §94(1) should be added to the Advisory Opinion. Commissioner Weissman said that in terms of the first proposed opinion, §94(16) provides that JCOPE cannot issue opinions regarding legislators, candidates for the legislature, or employees of the legislature. He believes that in order to do so, JCOPE must work with the LEC.

Commissioner Weissman returned to the proposed regulations on client exemptions and asked whether the Commission is precluded from including categories of matters that are automatically exempted in the statute so filers could look to one source for guidance.

General Counsel Stamm stated that the regulations could include the general statutory exemptions. With respect to the proposed advisory opinion on consulting under the Lobbying Act, no vote is required, so the plan is to post the draft on the website to engage with the public and the community about the substance of the opinion and then come back to the Commission.

VI. NEW AND OTHER BUSINESS

Report of Ethics Review Commission

On behalf of the Commission, Chair Horwitz thanked the Ethics Review Commission for its hard work in issuing its report. Several staff and Commissioners met with the Review Commission and provided background and statistical information. The report had many important and productive recommendations, some of which require legislative reform and some are similar to recommendations that JCOPE had included in its February Report. Other recommendations already have been initiated by JCOPE, including improving technology and developing internal management and hiring policies. The Review Commission recommended additional improvements to training, which continues to be a high priority. JCOPE expanded its training group last year and continues to expand guidance programs and materials. There are additional suggestions in the report that the Commission should continue to consider and possibly set up subgroups to address. For example, the Review Commission talked about disclosing more statistical information in JCOPE's annual report, including the number of matters that involve special voting requirements, how many votes were taken, and how many matters involve the legislative and executive branches. Another example is the recommendation regarding providing more information about JCOPE's operations, including payroll, budget information and other records that are not required to be kept confidential by statute. JCOPE has regulations regarding records which were put together in the beginning by a committee. The Commission could reconstitute that committee to take a look at what information is not required to be kept confidential and be made publicly available. More thought could also be given to JCOPE's existing meeting guidelines, which are posted on the website, to determine if revisions are required to allow more business to be conducted in the public session. Either the record access committee or the management committee could

discuss these issues. The Chair asked that anyone who is interested in participating in any of the committees to let him know.

Proposed Meeting Schedule – January through June 2016

Chair Horwitz stated that a proposed meeting schedule for the first six months of 2016 has been circulated and if anyone has conflicts, please let staff know.

VII. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW §94(19)(b)

A motion was made by Commissioner Covello, which was seconded by Commissioner Knox, to enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by unanimous vote.

VIII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Chair Horwitz announced that, during the Executive Session, the Commission discussed certain litigation matters, commenced a Substantial Basis Investigation, and authorized communications with third parties regarding a number of other investigative matters. The Commission also closed several investigative matters and received updates on ongoing investigations.

IX. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Weissman, which was seconded by Commissioner Covello, to adjourn the Public Meeting. The motion was approved by unanimous vote of those Commissioners present. Commissioner Rozen was not present for this portion of the meeting.