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Study Advocates Immediate Reform for Ethics Watchdog

Joel Stashenko, New York Law Journal

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Albany's chief ethics watchdog commission has failed to fulfill its primary mission—to stem corruption by public officials and restore New Yorkers' trust in government, according to a study released Friday.

[The report](#), from the New York City Bar Association and Common Cause New York, said the state's Joint Commission on Public Ethics (JCOPE) should reform its operations immediately and not wait for the completion of a mandated review of its operations by a commission to be appointed by officials later this year.

"JCOPE has the burden of proof to persuade the public of its independence, vigor and commitment, and in its first two years it has not in our judgment carried that burden," the report said. "In many respects, JCOPE appears reactive rather than proactive. Much of its activity entails processing assigned work flow."

The commission has "performed well" in more routine tasks of enacting regulations and responding to requests for advice from public officials about possible ethical conflicts, according to the report called "Hope for JCOPE."

"However, it is our view that JCOPE is an agency that must be proactive and aggressive in the cause of ethical government by following investigations wherever they may lead and by making full use of its statutory powers," the study said.

Critics have complained that the commission is ineffective at rooting out government corruption, which continues largely to be prosecuted in New York by the U.S. attorneys for the Southern and Eastern districts.

The report recommends a number of changes. They include:

- Giving its executive director the ability to issue, without prior approval of the commission, person-of-interest or target letters to advance investigations;
- Banning legislators, their staffs and their relatives from having business relationships with not-for-profit organizations that receive state funding;

- Erecting a firewall between JCOPE commissioners and the officials who appointed them that would prohibit discussion of pending actions.
- Issuing guidance about officials' ethical duty to report criminal or fraudulent behavior among other public officials;
- Promulgating a code of ethics for lobbyists.

The city bar was represented in the review group by its Government Ethics Committee, which is chaired by Jeremy Feigelson of Debevoise & Plimpton, and a subcommittee chaired by Evan Davis of Cleary Gottlieb Steen & Hamilton and Daniel Karson, chairman of the investigative firm Kroll Associates.

Davis said in an interview Friday that those preparing the study do not believe JCOPE should feel obligated to compete with U.S. attorneys or district attorneys in investigating legislators and government officials for criminal activity.

Rather, the report said JCOPE can and should focus on setting a tone of scrupulous honesty by public officials throughout state government.

Davis, one-time counsel to former governor Mario Cuomo, said the city bar and Common Cause believe JCOPE could adopt provisions of the Code of Ethics contained in §74 of the state Public Officers Law to direct all state and legislative employees that they are responsible for reporting any criminal behavior by co-workers.

"Under the existing state Code of Ethics there is a duty to report crime and fraud, just like lawyers have under ethics canons," Davis said. "The commission could easily give guidance that there is an ethical duty to report misconduct. That would be a big help."

Davis said the commission should also be proactive toward lobbyists' conduct. He noted that in its annual report to the Legislature last year, JCOPE asked for the lawmakers to adopt such a code.

"That is so passive. Why don't they enact something?" Davis asked. "We actually think that they have the power to promulgate, as part of their training guidance for lobbyists under the lobbying law, what they [lobbyists] should and should not do."

Davis said he hoped the city bar's participation in the study would give added credence to the report's recommendations that JCOPE has the legal authority to move forward unilaterally on several fronts, such as applying an obligation to all employees to report co-workers' illegal conduct and a lobbyist code of conduct.

JCOPE was reviewing the report Friday, said spokesperson John Milgrim.

The city bar and Common Cause also recommended reducing the commission's overall size to 13 from 14 by lowering the number of appointees of the governor to four from six and of legislative leaders to six from eight. They advocated that the chief judge, attorney general and comptroller each get one appointment. Those changes would need the approval of the Legislature and governor.

Touro Law School Dean Patricia Salkin said she supported the recommendation that JCOPE should set rules and guidelines for conduct by public officials.

"One of its primary responsibilities really ought to be education and training," said Salkin, who co-chaired a New York State Bar Association task force on government ethics along with former U.S. attorney Michael Garcia, now a partner at Kirkland & Ellis, before JCOPE was formed ([See summary of the task force's 2011 report](#)).

"If the rules are set out clearly, if the rules are explained, if there is guidance and technical assistance available and all understand it in a transparent way, you do create a more ethical environment," she said.

Salkin was not involved in the city bar/Common Cause study. The state bar has not taken a position on the agency's performance.

Under the 2011 statute that created JCOPE, legislative leaders and Gov. Andrew Cuomo are to appoint an eight-member panel by June 1, 2014. It is to report back to the state leaders by March 1, 2015.

JCOPE and the ethics body created in the Legislature at the same time, the Legislative Ethics Commission, are also supposed to finish internal reviews of their own performances by Feb. 1, 2015.

The joint city bar/Common Cause report said that once those studies are evaluated, it is unlikely that any legislative changes would result until 2016.

Common Cause Executive Director Susan Lerner worked on the report for her group along with Sharon Barbour, Andra Troy and Timothy Vogeler.

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