



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.<sup>1</sup> Today, however, the Committee, along with a number of good government groups,<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> 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).

<sup>2</sup> News Release (Feb. 26, 2020), [https://www.nypirg.org/pubs/202002/release\\_jcopemustgo.pdf](https://www.nypirg.org/pubs/202002/release_jcopemustgo.pdf).

<sup>3</sup> 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**

*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.*

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.<sup>4</sup> 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.<sup>5</sup> The Democratic Assembly leader has three appointments and the Republican Assembly leader has one appointment, regardless of which party controls the chamber.<sup>6</sup> 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.”<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

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

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<sup>4</sup> Exec. Law § 94(2).

<sup>5</sup> Exec. Law § 94(2), (5).

<sup>6</sup> Exec. Law § 94(2), (5).

<sup>7</sup> Exec. Law § 94(3), (7).

<sup>8</sup> Exec. Law § 94(9)(a).

<sup>9</sup> *Hope for JCOPE*, at 14-15.

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

Although vacancies on the Commission are to be filled within 30 days,<sup>12</sup> the requirement has not always been followed. In 2019, the Republican Assembly leader appointed a commissioner after a two-year vacancy.<sup>13</sup> Currently, two of the four appointments allotted to the Democratic legislative leaders have been unfilled for more than a year.<sup>14</sup> 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.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

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<sup>10</sup> 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>

<sup>11</sup> 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>.

<sup>12</sup> Exec. Law § 94(5).

<sup>13</sup> 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>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *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>.

<sup>17</sup> *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/>

<sup>18</sup> 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").<sup>19</sup> 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.<sup>20</sup> For an SBIR referred to LEC, however, JCOPE must publish the SBIR only if LEC fails to do so within a time certain.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup>

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<sup>19</sup> 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).

<sup>20</sup> Exec. Law § 94(14-b).

<sup>21</sup> Legislative Law § 80(9-b).

<sup>22</sup> Exec. Law § 94(13)(a).

<sup>23</sup> Exec. Law § 94(13)(a).

<sup>24</sup> 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.<sup>25</sup>

#### **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,”<sup>26</sup> a sample of which includes:

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

<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup> Additionally, Joseph Percoco, a former top aide to Governor Cuomo, was convicted of bribery,<sup>30</sup> and Alain Kaloyeros, who oversaw state economic development projects, was convicted of fraud for rigging bids on state contracts.<sup>31</sup>

These criminal prosecutions have generated criticism of JCOPE’s own efforts to aggressively combat corruption.<sup>32</sup> 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.”<sup>33</sup> 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.”<sup>34</sup> While likely correct, the position glosses over the tools at JCOPE’s disposal and its ability to penalize misconduct, including, and perhaps

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

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

<sup>29</sup> 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>.

<sup>30</sup> 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/>.

<sup>31</sup> 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>.

<sup>32</sup> 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>.

<sup>33</sup> *Id.*

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

particularly, the giving and receiving of gifts.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.<sup>38</sup>

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

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

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<sup>35</sup> 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).

<sup>36</sup> *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>.

<sup>37</sup> 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>.

<sup>38</sup> 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>.

<sup>39</sup> 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](https://www.timesunion.com/news/article/Syracuse-firm-embroiled-in-bid-rigging-bribery-15930220.php?mc_cid=303cb99c0f&mc_eid=e40c002b54).

CONY.<sup>40</sup> JCOPE issued broad subpoenas to CONY and related parties, brought affirmative lawsuits to enforce the subpoenas, and successfully defended their authority to issue them.<sup>41</sup> 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.<sup>42</sup>

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.”<sup>43</sup>

#### **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,<sup>44</sup> former Assembly Member Angela Wozniak,<sup>45</sup> former Assembly Member

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<sup>40</sup> 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>.

<sup>41</sup> 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/>.

<sup>42</sup> 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).

<sup>43</sup> 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>.

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

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

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

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.<sup>49</sup> 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.<sup>50</sup>

#### IV. ADVISORY OPINIONS AND APPROVALS

JCOPE commissioners issue formal advisory opinions that apply the ethics laws to a specific issue or set of facts.<sup>51</sup> The advisory opinions bind the Commission and the person making a good-faith request for the opinion.<sup>52</sup> Such person can introduce the advisory opinion as a defense in a civil or criminal action.<sup>53</sup> JCOPE staff issue informal advisory opinions, "upon request, on questions where formal opinions have already established precedent."<sup>54</sup> 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

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

<sup>47</sup> 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>.

<sup>48</sup> 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>.

<sup>49</sup> 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>.

<sup>50</sup> 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>.

<sup>51</sup> 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](https://jcope.ny.gov/system/files/documents/2020/07/2019_-_annual-report-final-web-as-of-7_29_2020.pdf)

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

anticipated to generate more than \$5,000 in income.<sup>55</sup> 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.<sup>56</sup> 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.<sup>57</sup> While the Commission is authorized to delegate authority to the executive director to act in the name of the Commission in certain circumstances,<sup>58</sup> some argued that nothing authorized JCOPE staff to decide outside-income requests.<sup>59</sup> 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.<sup>60</sup>

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.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup> 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.

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

<sup>56</sup> 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>.

<sup>57</sup> *Id.*

<sup>58</sup> Exec. Law § 94(9)(a).

<sup>59</sup> 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>.

<sup>60</sup> *Id.*

<sup>61</sup> Exec. Law § 94(16).

<sup>62</sup> 19 NYCRR § 932.1.

<sup>63</sup> 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.<sup>64</sup> 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,<sup>65</sup> 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.<sup>66</sup> 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.”<sup>67</sup> JCOPE declined to answer questions regarding the scope of its investigation on confidentiality grounds.<sup>68</sup>

Notwithstanding the confidentiality provisions, JCOPE has been hobbled by disputes over disclosures of confidential information since its inception.<sup>69</sup> 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

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<sup>64</sup> Exec. Law § 94(9-a)(a).

<sup>65</sup> Exec. Law §§ 94(19)(a) and (b).

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

<sup>67</sup> Hope for JCOPE, at 20.

<sup>68</sup> Hope for JCOPE, at 19.

<sup>69</sup> 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.<sup>70</sup>

## 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."<sup>71</sup> 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,<sup>72</sup> 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.<sup>73</sup> 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.

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<sup>70</sup> 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>.

<sup>71</sup> *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.

<sup>72</sup> 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>.

<sup>73</sup> *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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> The newly-established state Public Campaign Finance Board will have seven members. Eleven members compose the state’s Commission on Judicial Conduct.<sup>77</sup>

### **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.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> 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

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<sup>74</sup> 2015 Ethics Review Commission Report, at 9.

<sup>75</sup> 2015 Ethics Review Commission Report, at 9-10.

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

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

<sup>78</sup> 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>.

<sup>79</sup> 2015 Ethics Review Commission Report, at 11.

<sup>80</sup> 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,<sup>81</sup> the state Public Campaign Finance Board,<sup>82</sup> the New York City Conflicts of Interest Board,<sup>83</sup> 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,<sup>84</sup> 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.<sup>85</sup>

### **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.

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<sup>81</sup> Judiciary Law § 41(6).

<sup>82</sup> Election Law § 14-207(1).

<sup>83</sup> N.Y.C. Charter § 2602(h).

<sup>84</sup> 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>.

<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.

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

<sup>87</sup> New York Ethics Review Commission Report, at 10.

<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>
- 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.<sup>91</sup>

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<sup>89</sup> 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>.

<sup>90</sup> 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.

<sup>91</sup> 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

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