

## State Appellate Court Finds New York State Ethics and Lobbying Agency Unconstitutional



# Client Alert

By [Karl J. Sleight](#)

May 13, 2024 | **CLIENT ALERTS**

A unanimous decision affirming a lower court finding has thrown New York ethics and lobbying regulation into uncharted waters.

The factual backdrop of the mid-level appellate Court's ruling was based on litigation filed by former Governor Andrew Cuomo, who sued the Commission on Ethics and Lobbying in Government ("COELIG"), seeking to prevent COELIG from clawing back sale proceeds from the former governor's book, "American Crisis: Leadership Lessons from the COVID-19 Pandemic."

The governor had previously received a favorable decision in September 2023 from the Albany County Supreme Court, which held that COELIG was constitutionally infirm.

In reviewing the lower Court's decision, the Appellate Division, Third Department held that despite legislative actions enjoying a "strong presumption of constitutionality ... the Legislature, though well-intentioned in its actions,

violated the bedrock principles of separation of powers.” The gravamen of the case centered on the current governor’s enforcement powers, which were, in the eyes of the Third Department, limited due to Executive Law §94 in a fashion that violated the state constitution. COELIG is made up of 11 members selected by the governor, the legislature, the attorney general, and the comptroller. The Third Department specifically took issue with the fact that Governor Hochul has less than half of the appointments to COELIG, which the Third Department concluded deprived her “of all discretion in determining the methods of enforcement of these laws.” Notably, it was the perceived total control of the former governor over COELIG’s predecessor, the Joint Commission on Public Ethics (“JCOPE”), that led to its demise and the pursuit of an ethics regulatory agency free from dominance by the governor’s office.

The underlying statute, Executive Law §94, includes a standard severability clause designed to fend off a total collapse of the statute in the event of a constitutional challenge like the challenge here. Although a topic of discussion at the lower court, it was not addressed in the Third Department decision.

The Third Department’s decision may lead to some short-term chaos in the regulatory field. One possible fix would be for the legislature and the governor to embark on yet a new model of an ethics and lobbying regulatory agency. The legislature is set to adjourn for the year on June 6, 2024, so time is short for lawmaking during the present calendared session.

The attorney general may seek to appeal this case to the State’s highest court, the Court of Appeals. A stay of the Third Department decision pending review and decision by the Court of Appeals would be put into place, which would avoid disruption at COELIG. Given the constitutional and practical implications, absent a quick legislative action, this should be expected. Whatever happens, doing nothing is not an option for state government officials.

For further questions on the impact of the Third Department’s decision, contact Karl J. Sleight, former executive director of the New York State Ethics Commission and Lippes Mathias partner, at 518.462.0110, ext. 1460 or [ksleight@lippes.com](mailto:ksleight@lippes.com), or Joan P. Sullivan, former counsel at the New York State Ethics Commission and Lippes Mathias partner, at 518.462.0110 x1461 or [jsullivan@lippes.com](mailto:jsullivan@lippes.com).

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