

## **Alert** | New York Government Law & Policy



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### **NY State Ethics Commission Violates Separation of Powers Doctrine: Appellate Court**

*New York appellate court affirms lower court finding that state ethics commission is unconstitutional*

On Sept. 11, 2023, the Albany County Supreme Court issued a decision invalidating the statutory authority for the Commission on Ethics and Lobbying in Government (COELIG), examined in a prior [GT Alert](#). As was expected, the State promptly obtained a stay of that court’s decision and sought an appeal. On May 9, 2024, the Appellate Division, Third Department [issued a decision](#) resoundingly affirming the lower court’s finding—holding that the enactment of the COELIG-authorizing statute “though well intentioned ... violated the bedrock principles of separation of powers.”

The facts of the case emanated from an investigation by COELIG’s predecessor, the Joint Commission on Public Ethics (JCOPE), which examined whether former Gov. Andrew Cuomo violated the Public Officers Law in publishing a book while in office. After the enactment of the new Executive Law provisions and the transition to the new agency, COELIG completed the investigation and ultimately charged Cuomo with ethics violations.

Cuomo challenged COELIG’s authority to enforce the Public Officers Law on constitutional grounds. Specifically, COELIG is composed of five members nominated by the executive branch (three by the governor, one by the attorney general, and one by the comptroller), and then another six members nominated by legislative leaders (essentially two by the Senate majority leader, two by the Assembly speaker, and one from each minority leader). All nominations are subject to review by the independent

review committee (IRC), consisting of the deans of New York’s accredited law schools. No appointment of a nominee may be made unless and until the IRC approves, a process that is mandated to occur within a 30-day period beginning with the nomination. Cuomo argued that the IRC’s ability to make final determinations on appointees violated the separation of powers doctrine.

In September 2023, the Albany County Supreme Court agreed with Cuomo’s arguments and declared Executive Law § 94 (10) and (14) unconstitutional. On May 9, 2024, the New York State Appellate Division, Third Department issued a unanimous decision affirming the lower court’s decision. The Appellate Division’s decision focuses on the fact that the Executive Law provision creating COELIG “revokes the Governor’s enforcement power with respect to the ethics laws, thereby depriving her of all discretion in determining the methods of enforcement of these laws.” As crafted, the Executive Law only allows the governor to “maintain[] extremely limited control and oversight,” given that the governor may only appoint five of the 11 members and that she has no authority to remove them. Additionally, the Appellate Division highlights how “appointments must be approved by the IRC, an external nongovernmental entity made up of people who are in that position solely by virtue of their employment and do not answer to the populace.” Thus, although COELIG was created as an executive agency charged with enforcing ethics law, it was done in a way that is “outside the control of the executive branch, ... usurp[ing] the Governor’s power to ensure the faithful execution of the applicable ethics laws.”

This decision leaves the role and power of COELIG in question. COELIG, however, promptly issued a public response to the decision, expressing an intent to seek a stay and a plan to seek review by the Court of Appeals. The agency also expects the regulated community to continue to comply with the state’s ethics and lobbying laws. Nonetheless, its ability to enforce the ethics laws and seek penalties are now in question.

Adding to the complexity is that the legislature has about a month left to its scheduled session calendar, leaving a narrow window of time for the State to consider statutory changes in 2024, assuming that no special session will be called. It may be difficult for the State to resolve the constitutional question in a way that also addresses the original intent of giving the public greater comfort that the appointing authorities of the ethics commissioners are not beholden to elected officials. Any effort to make a constitutional change—as some legislators called for even before the litigation—would require a multi-year effort of passing resolutions in two separate legislative sessions and then putting a question before the voters of the state.

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