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## What Every Lawyer Should Know About ELEC

by Gregory E. Nagy

The New Jersey Election Law Enforcement Commission (ELEC) was established in 1973 to administer new campaign finance disclosure laws designed to reform a political reporting system that up to that time had been largely ignored and ineffective.<sup>1</sup>

Over the ensuing years, as public standards for ethical conduct by elected officials evolved, ELEC's duties were expanded to include new laws. For example:

- in 1974, oversight over the nation's first gubernatorial public financing program in the 1977 general election;<sup>2</sup>
- in 1981, administration of reporting by organizations making lobbying communications to state legislators;
- in 1992, registration of persons conducting lobbying;<sup>3</sup>
- in 1993, enforcement of comprehensive limits on and candidate uses of political contributions;<sup>4</sup> and
- in 1996, identification of the candidates or entities paying for political advertising.<sup>5</sup>

More recently, as political activity and government contracting has assumed a higher profile, the agency's workload has expanded to include administration of pay to play reporting of political contributions by business entities holding public contracts,<sup>6</sup> reporting by businesses and other regulated entities making lobbying communications to Executive Branch officials,<sup>7</sup> and pilot programs for public financing of legislative elections.<sup>8</sup>

In sum, as state government financing and regulation has

expanded into many areas of citizens' lives, public awareness of ethical conduct in government has become increasingly sensitized, and the demand for professional guidance in the areas of ELEC's jurisdiction has never been greater.

### Compliance

ELEC's statutory and regulatory provisions can be difficult to apply. Recordkeeping and disclosure reporting of financial transactions often generate complexity, especially political and lobbying communication activities that may require interpretive applications. Further, client exposure can be considerable, especially for businesses or individuals that are not accustomed to regulation in those areas. For example, a business entity, or one of its owners, making a political contribution of as little as \$300.01 in violation of pay to play restrictions, can jeopardize the entity's eligibility to seek or hold public contracts for several years.<sup>9</sup> Similarly, the business enterprise whose employees engage in communications with a state government official, unaware that those communications fall within the definition of "influencing governmental processes,"<sup>10</sup> can be subject to injunctive enforcement action, investigation and civil penalties.<sup>11</sup>

Initially, it is useful to realize what ELEC does *not* administer. Questions concerning registration of voters, handling of nomi-

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nating petitions or other matters concerning the administration of elections should be addressed to the Division of Elections in the Department of State (where it was transferred on April 1, 2008, from the Office of the Attorney General), or the appropriate county superintendent of elections or county board of elections (in those counties without a superintendent). Similarly, matters concerning withholding or "check offs" for political contributions by employees must be addressed to the Department of Labor and Workforce Development.<sup>12</sup>

The ELEC website, at [www.elec.state.nj.us](http://www.elec.state.nj.us), is a useful tool for gaining an understanding of how the agency is organized, and what campaign finance and lobbying information can be accessed. Further, databases can be accessed for contributor data, copies of candidate and committee reports, and copies of past enforcement complaints and final decisions. Information concerning lobbying registration is available, but not copies of lobbying quarterly or annual reports. An unofficial text of ELEC's regulations is also accessible.

ELEC is governed by a four-member, bipartisan commission, and is allocated to the Department of Law and Public Safety for purposes of the New Jersey Constitution, but is independent of its control. Members are appointed by the governor and confirmed by the Senate for three-year terms.<sup>13</sup> The commission typically meets monthly, but gathers more frequently as the need arises. The commissioners appoint an executive director, who is the day-to-day head of the staff. The full-time staff is organized into three major sections: compliance, law and operations.

Typically, most attorney contacts with ELEC are informal requests on behalf of clients seeking guidance on compliance matters, and these questions are directed to ELEC's compliance section. ELEC justifiably takes considerable pride in the expertise and helpful-

ness of its staff, and oral advice that is supported by clear statutory or regulatory authority can ordinarily be relied on, although it is advisable to make and maintain a written record of the consultation. However, some inquiries raise novel questions of law that may require a more formal treatment.

One option is to seek a written advisory opinion. Upon receipt of a written, signed request on a form provided by ELEC on its website, the commission must issue its response to questions raised under the Campaign Contributions and Expenditures Reporting Act<sup>14</sup> within 10 business days, or the requesting party is protected from prosecution on the facts pertinent to the specific question raised.<sup>15</sup> Questions raised concerning lobbying regulation are accepted at the commission's discretion, and do not enjoy any statutory mandate for a response time.

The requestor must be identified, must demonstrate that the contemplated activity has not already been undertaken, and must have standing to raise the question.<sup>16</sup> The request is a public record, and ELEC's response will be discussed at a public commission meeting. Thus, the applicant may receive unwanted public attention, a factor that as a practical matter discourages many clients from seeking advisory opinions.

Access to advisory opinions issued since 1998 is available on ELEC's website, while earlier opinions may be requested from staff or through an Open Public Records Act (OPRA)<sup>17</sup> request.

ELEC does *not* have statutory jurisdiction over the prohibition against political contributions by highly regulated industries (such as banks, insurance companies and others), which statutes provide criminal penalties at N.J.S.A. 19:34-32 and 19:34-45. However, ELEC will accept requests for advisory opinions pertinent to those statutes and refer them to the attorney general

for response, but the 10-business day response period is inapplicable, thus the response time can be lengthy.

## Investigations

ELEC has broad statutory authority to conduct investigations of possible violations of campaign finance, pay to play and lobbying laws; to conduct hearings; to impose civil monetary penalties; to seek injunctive relief in superior court; and to refer possible criminal violations to criminal authorities.<sup>18</sup> Further, it will receive requests to undertake investigations from the public, and a confidential investigation request form is available on its website.

Typically, a client will become aware that he or she is the subject of an investigation upon receipt of a letter from ELEC's review and investigation staff. However, before any contact is received from ELEC, it is not unusual for a political opponent to announce to the press that he or she has filed a "complaint" with ELEC, and that the client is being "investigated." Obviously, in that situation the identity of the person or party seeking the investigation may be self-evident. But, it is important to keep in mind that the submission of a request for an investigation does not necessarily require ELEC to undertake the investigation, nor is the request available as a public document. It is not the practice of ELEC to confirm or deny the receipt of a request for an investigation, or to confirm or deny that it is actively conducting an investigation. Further, ELEC is not required to open every request it receives for an investigation. During 2007, of the 158 requests for investigation it received, only 124 were presented to the commission.<sup>19</sup>

Thus, not all requests become active investigations, and therefore the public representation by an opponent that ELEC is "investigating" his or her political adversary may, in fact, be incorrect. Further, since it is ELEC's practice *not* to pub-

licly comment on the existence of active investigations, counseling a client to be circumspect in responding to public accusations of ELEC violations is advisable.

If ELEC determines to open an investigation, either as a result of a request or at its own initiative, typically the subject will receive a letter from the agency seeking a response, and possibly specific information or documents. It is, of course, a good practice for the attorney representing a client subject to an investigation to immediately submit a letter of representation, so all communications are made through the attorney. At that early stage, it is important for the attorney to analyze what statutory or regulatory violations may have occurred, if any, and to discourage clients in their zeal to exonerate themselves from volunteering information or records that have not been sought or are otherwise not pertinent and possibly raise potential violations that are beyond the scope of the initial investigation.

Often a client will suspect that the investigation was requested by a specific political or business adversary, and will ask the attorney to obtain confirmation from ELEC. However, ELEC will not disclose the identity of an informant, and OPRA explicitly protects that identity from being disclosed,<sup>20</sup> as do the discovery rules of the Office of Administrative Law (OAL).<sup>21</sup>

ELEC has broad subpoena powers to require production of campaign finance records and testimony.<sup>22</sup> Also, it has a mandate to conduct random audits of lobbying records,<sup>23</sup> and may in the course of an investigation apply to superior court for orders commanding production of lobbying records.<sup>24</sup> Thus, voluntary compliance with requests for pertinent records may ultimately spare expense, although, of course, requests that seek unnecessarily voluminous or immaterial documents may have to be resisted and litigated.

As a practical matter, utilization of professional accounting services may be helpful where the investigation concerns a reporting omission, error or other discrepancy. Most importantly, where a disclosure error or omission is clearly evident, amended reports should be filed as soon as practical because the penalties for late filing are less severe than those for non-filing.<sup>25</sup>

Mitigating circumstances, such as lack of political experience or illness, should be brought to ELEC's attention during the investigative phase, since they may be helpful in avoiding a formal complaint.<sup>26</sup> However, care should be exercised to protect client privacy in the event that the matter becomes public at a future date.

Sometimes ELEC's performance in closing investigations can be regrettably slow, particularly when its limited staff is focused on a more pressing matter. In some cases months may pass before ELEC responds to submitted information, and some investigations remain open years after the election or reports at issue. Although clients may express understandable impatience, ELEC's policy to refrain from any public statement about an investigation in progress protects a client's reputation during this period. Further, an investigation that remains open more than four years after the date of the pertinent election or reporting obligation transaction may jeopardize ELEC's ability to bring a formal complaint, because after four years treasurers are no longer required to maintain campaign records.<sup>27</sup>

### Complaints

If ELEC determines to bring a formal complaint, its practice is to attempt to serve the respondent before the complaint is released to the public on its website. Complaints are released on the first and third Wednesdays of each

month.<sup>28</sup> In the typical case, a respondent will have notice of the complaint, and thus an opportunity to prepare a public statement if desirable before public notice is made.

The majority of complaints undertaken by ELEC are for campaign finance violations, most of which are for candidates who have failed to file election reports. Another violation that often results in complaints is the failure of New Jersey continuing political committees (CPCs) to file notices of contributions or expenditures over \$1,000 received or made prior to an election (commonly referred to as 48-hour notices).<sup>29</sup> Overlooking pre-election reporting requirements of CPCs is a common error of businesses and other groups that maintain them, because CPCs are accustomed to reporting on a quarterly calendar year basis, not on election-cycle reporting dates. Dollar-for-dollar monetary penalties can be imposed, and thus can be substantial,<sup>30</sup> so a good pre-emptive measure is to thoroughly review this requirement with clients that maintain CPCs.

Historically, the great majority of ELEC complaints are voluntarily settled without the necessity of a hearing, and ELEC's legal staff can be approached for settlement negotiations. The statutory penalties provided at N.J.S.A. 19:44A-22, and the regulatory penalty criteria at N.J.A.C. 19:25-17.3, *et seq.*, must be closely examined before any judgment on an appropriate penalty amount can be reached.

Note that the commission continues to be independent of the Department of State, as it was when it was independent of the Office of the Attorney General before the April 1 transfer, although ELEC itself is still assigned to the Department of Law and Public Safety for constitutional purposes. Because of its independence, ELEC is authorized to appoint its own legal counsel, and is not represented by deputy attorneys general.

Instead, its full-time legal staff acts as its prosecuting arm, while its part-time outside counsel advises the commission in its adjudicative capacity. Legal staff is typically not authorized to enter into settlements until approved by a vote of the commissioners, but in practice the commissioners seldom deviate from agreements reached with its staff.

Settlement negotiations may include matters beyond the amount of the monetary penalty. Since the agency's final decision will be a public record posted on its website, some consideration may be given to inclusion of pertinent exculpatory statements. In cases where the penalty amount is substantial, a negotiated schedule of partial payments may be helpful, and should be memorialized in the settlement documents.

If a settlement cannot be reached and a hearing is requested, the commission will in all likelihood refer the matter to the OAL rather than conduct the hearing itself. Upon completion of the hearing, the initial decision and the parties' exceptions will be referred back to the commission for final decision consideration.<sup>31</sup> ELEC's legal staff, which typically represents the commission during the initial decision proceedings, is prohibited from making *ex parte* communications to the commission, except for limited purposes of obtaining settlement authority.<sup>32</sup>

### Summary

ELEC's workload has increased substantially in the last three years, as best illustrated by the increase in sheer numbers of reports filed with it: from slightly under 24,000 in 2004 to almost 34,000 in 2007.<sup>33</sup> Its resources for conducting investigations and meaningful enforcement are severely challenged. Up to the date of the preparation of this article, ELEC's website does not show any complaint activity out of the new

pay to play reporting requirements for business entities, or for lobbying registration or reporting since the inclusion of Executive Branch lobbying.

According to the *Star Ledger*, more than 1,600 companies reported to ELEC a total of \$5.4 billion in public contracts on their 2007 pay to play disclosure reports.<sup>34</sup> In lobbying activity, the dollar amount of reported spending jumped from less than \$28 million in 2005 to more than \$55 million in 2006.<sup>35</sup>

With this dramatic increase in activity, coupled with heightened public interest in elections and ethics reform, it would be surprising if there is not greater demand for investigations and enforcement in these areas, as well as enhanced demand for ELEC's services as campaign finance watchdog. ◊

### Endnotes

1. L. 1973, c. 83, eff. April 24, 1973, N.J.S.A. 19:44A-1, *et seq.*
2. L. 1974, c. 26, eff. May 6, 1974, N.J.S.A. 19:44A-27, *et seq.*
3. L. 1981, c. 150, eff. May 22, 1981, and L. 1991, c. 243, eff. Jan. 1, 1992, N.J.S.A. 52:13C-18, *et seq.*
4. L. 1993, c. 65, eff. April 7, 1993.
5. L. 1995, c. 391, eff. Feb. 1, 1996, N.J.S.A. 19:44A-22.2, *et seq.*
6. L. 2004, c. 19, eff. Jan. 1, 2006, codified as N.J.S.A. 19:44A-20.3 through 20.12); L. 2005, c. 51, portions retroactive to Oct. 15, 2004 and portions eff. Jan. 1, 2006, codified as N.J.S.A. 19:44A-20.13 through 20.25 and L. 2005, c. 271, eff. Jan. 5, 2006, codified as N.J.S.A. 19:44A-20.26 and 20.27.
7. L. 2004, c. 27, eff. June 16, 2004.
8. L. 2004, c. 121, eff. Aug. 11, 2004.
9. See N.J.S.A. 19:44A-20.13, *et seq.*
10. N.J.S.A. 52:13C-20, defining "influencing governmental processes."
11. N.J.S.A. 52:13C-23, 13C-23.1 and 13C-32.

12. N.J.S.A. 34:11.44 and 34:11-44a.
13. N.J.S.A. 19:44A-5.
14. N.J.S.A. 19:44A-1, *et seq.*
15. N.J.S.A. 19:44A-6(f).
16. N.J.A.C. 19:25-18.1.
17. An electronic OPRA request can be submitted to ELEC through the OPRA website, [www.nj.gov/opra](http://www.nj.gov/opra). Select the Department of Law and Safety, and select ELEC on the divisions menu.
18. N.J.S.A. 19:44A-6(b)(9) and (10) and 52:13C-23, *et seq.*
19. ELEC 2007 Annual Report, p.19.
20. N.J.S.A. 47:1A-3(a).
21. N.J.A.C.1:1-10.1.
22. N.J.S.A. 19:44A-6b(9).
23. N.J.S.A. 52:13C-24.
24. N.J.S.A. 52:13C-36.
25. N.J.A.C. 19:25-17.3A and 19:25-17.3B.
26. N.J.A.C. 19:25-17.3C(e).
27. N.J.S.A. 19:44A-12.
28. See ELEC website [www.elec.state.nj.us](http://www.elec.state.nj.us), Complaints and Final Decisions.
29. N.J.A.C. 19:25-8.6 and 19:25-8.9.
30. N.J.A.C. 19:25-17.3A(e).
31. N.J.A.C. 1:1-18.6.
32. N.J.A.C. 1:1-14.5.
33. ELEC 2004 Annual Report, p. 28, and ELEC 2007 Annual Report, p. 26.
34. *Star Ledger*, "'Pay-to-play' list shows who gave and who got," April 8, 2008.
35. *Lobbying in New Jersey 2007*, ELEC, Aug. 2007, p. 5.

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