

**N.J. ELEC ALLOWS CHRISTIE CAMPAIGN TO FUND
SUBPOENA RESPONSE, PROMPTING UNCERTAINTY AND
STRUCTURAL QUESTIONS**

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I. INTRODUCTION

The New Jersey Election Law Enforcement Commission (“ELEC” or “the Commission”) issued a nuanced, yet sweeping Advisory Opinion with implications for campaigns and donors alike when a campaign corporation becomes the subject of legal inquiries. Recently, after Chris Christie for Governor, Inc. (“Christie campaign” or “campaign”) was subpoenaed by the New Jersey State Legislature and United States Attorney’s Office in connection with the “Fort Lee, New Jersey Bridge Lane Closure Scandal,” ELEC relaxed its regulations to give the Christie campaign the ability to raise and expend funds for the sole purpose of paying the legal bills associated with its response, so long as the subpoenas did not relate to a “criminal inquiry.” Hence, ELEC drew the line at the moment when the campaign becomes the target of a grand jury investigation (if that moment ever comes). In addition, despite the fact that the Christie campaign was subject to the state’s public financing expenditure cap of \$12.2 million, the Advisory Opinion allowed the cap to be exceeded for the aforementioned purpose in the spirit of “public interest.”

ELEC took pains to stress that its decision was “based upon the very unique circumstances of this inquiry,” and did not intend the opinion “to serve as precedent for another set of facts and circumstances.” Nevertheless, given its solid legal footing, the Advisory Opinion represents a foundation for future campaigns to interpret the Regulations of the New Jersey Election Law Enforcement Commission (“ELEC Regulations”) as permitting them to expend campaign funds on legal fees, should they become the subject of such inquiries. Complicating the opinion, however, are glaring defects in ELEC’s institutional structure, which raise the unfortunate specter of partiality, and bring to light questions

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concerning the lawfulness of ELEC's current membership to carry out the Commission's statutorily imposed duties.

This article argues that ELEC should clarify its opinion by engaging in a rulemaking to amend the relevant provisions of the ELEC Regulations to include more specific permissible scenarios and guidance on when campaign expenditures may be used for legal fees. As to ELEC's current structure, this article urges Governor Christie to resolve the issues mentioned herein by utilizing his executive authority to appoint a fourth ELEC Commissioner to the currently vacant seat.

II. BACKGROUND

On January 16, 2014, the New Jersey Legislature issued a subpoena to Chris Christie for Governor, Inc. in connection with an inquiry into accusations that the Christie administration exacted political retribution by closing traffic lanes on the George Washington Bridge.¹ Specifically, the subpoena sought any and all documents pertaining to

all aspects of the finances, operations and management of the Port Authority of New York and New Jersey, including but not limited to, the reassignment of access lanes in Fort Lee, N.J. to the George Washington Bridge, and any other matter raising concerns about of abuse of power.²

Subsequently, on January 23, 2014, the United States Attorney's Office for the District of New Jersey issued a grand jury subpoena to the Christie campaign in connection with the same matter.³ The

1. See *Christie Campaign Organization on Subpoena List in Bridge Probe*, *Source Says*, NBCNEWS.COM (Jan. 16, 2014, 2:13 PM), http://usnews.nbcnews.com/_news/2014/01/16/22325075-christie-campaign-organization-on-subpoena-list-in-bridge-probe-source-says?lite; Susan K. Livio, *UPDATED: Christie Bridge Scandal: N.J. Assembly Panel Releases Full Subpoena List, Including Governor's Office*, NJ.COM (Jan. 17, 2014, 7:08 PM), http://www.nj.com/politics/index.ssf/2014/01/christie_bridge_scandal_nj_assembly_panel_releases_full_subpoena_list.html. For more information on what is referred to in the media as the Fort Lee, New Jersey Bridge Lane Closure Scandal, see Jessica Durando & Michael Symons, *The Backstory of Christie's 'Bridgegate' Scandal*, USA TODAY (Jan. 10, 2014, 7:22 PM), <http://www.usatoday.com/story/news/politics/2014/01/09/christie-bridge-scandal-what-happened/4392155/>. The facts surrounding the incident will not be discussed at length in this article.

2. See LEGISLATIVE SUBPOENA OF CHRIS CHRISTIE FOR GOVERNOR, INC., SELECT COMM. ON INVESTIGATION, 216th Leg., 1st Sess. (N.J. 2014), *available at* http://media.nj.com/politics_impact/other/CHRIS%20CHRISTIE%20FOR%20GOVERNOR%20INC%20.pdf.

3. See William K. Rashbaum, *U.S. Attorney Subpoenas Christie's Campaign and New Jersey G.O.P.*, N.Y. TIMES, Jan. 24, 2014 at A25; Darryl Isherwood, *U.S. Attorney Subpoenas Christie Campaign and GOP State Committee Over Bridge Scandal*, NJ.COM (Jan. 23, 2014, 9:01 PM),

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grand jury subpoena also sought campaign records relating to the lane closings—including emails, text messages, correspondence, memoranda, calendar entries, spreadsheets, and voice mail messages.⁴ And most recently, on February 10, 2014, the New Jersey Legislature issued a second subpoena to the Christie campaign seeking information related to any communications between Mayor Mark Sokolich of Fort Lee, New Jersey and the campaign, as well as any documents related to former Port Authority Director William Baroni's testimony before the New Jersey Legislature's Assembly Transportation Committee on November 25, 2013.⁵

After the issuance of the United States Attorney's subpoena, the Christie campaign hired attorney Mark D. Sheridan of Patton Boggs LLP to represent the campaign before the dual state and federal investigations and respond to the subpoenas.⁶ On January 30, 2014, Mr. Sheridan requested an Advisory Opinion from ELEC,⁷ seeking

http://www.nj.com/politics/index.ssf/2014/01/us_attorney_subpoenas_christie_campaign_and_gop_state_committee_attorney_confirms.html.

4. See Rashbaum, *supra* note 3; Michael Linhorst, *New Subpoenas in GWB Probe Also Seeking Communications Between Fort Lee Mayor and Christie Campaign*, NORTHJERSEY.COM (Feb. 12, 2014, 12:19 AM), http://www.northjersey.com/news/NJ_election_commission_OKs_Christie_campaign_s_pending_on_legal_fees.html. According to the campaign, the grand jury subpoena sought records dating back two years longer than the legislative subpoena. *Id.*

5. See Linhorst, *supra* note 4; Andrew Seidman, *Christie Campaign Gets OK to Raise Funds for Legal Fees*, PHILA. INQUIRER (Feb. 13, 2014), http://www.philly.com/philly/news/politics/nj/20140212_Christie_campaign_gets_OK_to_raise_funds_for_legal_bills.html.

6. See David Gialanella, *Patton Boggs Hired in Bridgegate by Christie Campaign, New Jersey GOP*, N.J. L.J., Jan. 27, 2014, at 1, 1, available at <http://www.njlawjournal.com/home/id=1202639734024/Patton+Boggs+Hired+in+Bridgegate+by+Christie+Campaign+New+Jersey+GOP%3Fmcode=1202615197417&curindex=0>; Darryl Isherwood, *Lawyer for Rove, Armstrong Will Defend Christie Campaign for Bridgegate*, NJ.COM (Jan. 23, 2014, 11:53 AM), http://www.nj.com/politics/index.ssf/2014/01/chris_christie_reelection_campaign_hires_powerhouse_lawfirm_in_bridgegate_probe.html.

7. Pursuant to The New Jersey Campaign Contributions and Expenditures Reporting Act, N.J. STAT. ANN. §§ 19:44A-1 et seq. (West, Westlaw through L. 2014, c. 3 and J.R. No. 1) [hereinafter "the Act"] (charging ELEC with its enforcement), ELEC, through its legal counsel, retains the authority to issue to interested parties "advisory opinions" on New Jersey election law concerning "whether a given set of facts and circumstances would constitute a violation of" the law, or whether such facts and circumstances would "render any person subject to any of the [law's] reporting requirements." *Id.* § 19:44A-6(f). Any person or committee that reasonably believes he, she, or it may be subject to the Campaign Reporting Act may request that ELEC provide an advisory opinion pursuant to the Act. *Id.*; N.J. ADMIN. CODE § 19:25-18.1 (West, Westlaw through 2014 regulations). It is customary practice that ELEC "shall render its advisory opinion within 10 days of receipt of the request thereof." N.J. STAT. ANN. § 19:44A-6(f). See Gregory E. Nagy, *What Every Lawyer Should Know About ELEC*, 253 N.J. LAW. MAG., Aug., 2008, at 54, for an extensive discussion on ELEC's Advisory Opinions and other provisions of the Act.

the Commission's opinion regarding the use of remaining campaign funds from the November 2013 gubernatorial election to respond to the subpoenas, and to pursue raising additional funds to cover the costs of the campaign's legal bills stemming from the representation.⁸ The Christie campaign retained \$126,608.00 "cash on hand" after spending over \$12.1 million on Governor Christie's re-election.⁹ Under New Jersey election law, because the Christie campaign participated in the state's public financing program in the November 2013 general election, the campaign was only permitted to spend an additional \$12,905—presumably on its legal bills—before reaching the regulations' \$12.2 million cap on total campaign expenditures, despite the fact that the campaign retained \$126,608 in remaining funds.¹⁰

III. THE REQUEST FOR AN ADVISORY OPINION BY THE CHRISTIE CAMPAIGN

A. Introduction

In its request for an Advisory Opinion from ELEC, the Christie campaign sought ELEC's permission to allow the campaign "to raise such money and make such expenditures as are necessary to respond to subpoenas issued to [the campaign] by the Joint Legislative Select Committee on Investigations . . . and the United States Attorney . . ." ¹¹ Specifically, the campaign sought to continue to solicit "postelection contributions," subject to a \$3,800 cap per "person or committee," in order to then "expend those funds in connection with responding to subpoenas and any ancillary requests

8. See Susan K. Livio, *NJ Republicans Want to Use Leftover Campaign Funds for GWB Defense*, NJ.COM (Jan. 31, 2014, 6:30 AM), http://www.nj.com/politics/index.ssf/2014/01/chris_christie_asks_elec_whether_it_can_use_campaign_money_amid_scandals.html; Susan K. Livio, *Chris Christie Campaign Wants to Raise Money to Cover Cost of Answering GWB Subpoenas*, NJ.COM (Jan. 31, 2014, 7:58 AM), http://www.nj.com/politics/index.ssf/2014/01/chris_christie_campaign_wants_to_raise_money_tt_answer_gwb_subpoenas.html [hereinafter Livio, *Chris Christie Campaign*].

9. See Livio, *Chris Christie Campaign*, *supra* note 8.

10. See *id.*; N.J. ADMIN. CODE § 19:25-15.11(a)(4) (limiting candidates who participate in the public funding "matching program" from spending over \$12.2 million on the general election due to their acceptance of taxpayer funds); Melissa Hayes, *Christie Campaign Participating in Public Financing Program*, NORTHJERSEY.COM (Aug. 20, 2013, 7:47 PM), http://www.northjersey.com/news/politics/AP_Christie_to_tap_public_funds_for_election.html. The public financing program is implemented by the state so that "candidates for election to the office of Governor may conduct their campaigns free from improper influence and so that persons of limited financial means may seek election to the State's highest office." N.J. STAT. ANN. § 19:44A-27.

11. Letter from Mark D. Sheridan, Patton Boggs LLP, to the New Jersey Election Law Enforcement Commission (Jan. 30, 2014) [hereinafter Sheridan Letter], available at <http://www.elec.state.nj.us/pdffiles/ao/2014/ao012014.pdf>.

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for information.”¹² The campaign further requested that ELEC deem such post-election contributions to be outside the statutorily imposed aggregate expenditure limit of \$12.2 million for publicly financed campaigns, in the same vein as other administrative expenditures delineated in the ELEC Regulations.¹³ Finally, the campaign asked that it be allowed to retain the post-election contributions past the statutorily imposed time limitations of six months after the November General Election—the limit usually imposed on campaign accounts before such funds are “repaid to the Commission”—in order to afford it the proper amount of time to respond to the subpoenas.¹⁴

Without such an outcome, the campaign asserted it would be unable to respond to the subpoenas, and would therefore face contempt charges from the Joint Legislative Select Committee on Investigations (“JLSCI”), as well as civil or criminal contempt charges from the United States Attorney’s Office.¹⁵ The campaign argued that a contrary opinion to that requested would lead to a “perverse result,” as it would not be in the public interest to bar it from financial resources necessary to timely respond to the state and federal requests.¹⁶ The position was further bolstered, according to the campaign, by the fact that approving the request “carrie[d] with it no risk whatsoever that the integrity of any election would be undermined.”¹⁷

B. The Facts Surrounding the Request

At the outset, the campaign acknowledged it was a publicly financed campaign that received “matching funds” from the state, and was therefore subject to the \$12.2 million cap in campaign expenditures, which it raised over and above.¹⁸ While the campaign

12. *Id.*; N.J. ADMIN. CODE § 19:25-15.45(a).

13. *See* Sheridan Letter, *supra* note 11. *See generally* N.J. ADMIN. CODE § 19:25-15.11(a)(4) (exempting certain expenditures delineated by N.J. ADMIN. CODE § 19:25-15.26, discussed *infra* Section III(C)).

14. *See* Sheridan Letter, *supra* note 11; N.J. ADMIN. CODE §§ 19:25-15.46 to -15.47 (six month limit and repayment requirement). The ELEC Regulations would otherwise have required the Christie campaign to repay “[a]ll public moneys received by [the campaign] remaining after liquidation of all lawful obligations with respect to that election” by April 5, 2014, i.e. “six months after the date of such general election.” N.J. ADMIN. CODE § 19:25-15.47.

15. *See* Sheridan Letter, *supra* note 11.

16. *Id.*

17. *Id.*

18. *See id.* In general elections, New Jersey provides an optional public financing program for gubernatorial campaigns that raise over \$380,000.00, which matches each dollar raised by the campaign 2:1 up to an \$8.2 million threshold, and mandates that such candidates who accept public funding do not (among other requirements) expend over \$12.2 million during the course of the campaign. *See* N.J. ADMIN. CODE § 19:25-15.3 (definitions applied in the “Public Financing” section of the Act); *id.* § 19:25-

retained approximately \$126,608 cash on hand at the time of the request, it previously expended \$12,187,095 on re-electing Governor Christie in November 2013, and would therefore reach the statutory cap should it spend more than \$12,905, presumably on expenses related to the legal fees.¹⁹ It also informed the Commission that included within the \$12,187,095 number were “qualified expenditures” not subject to the \$12.2 million cap.²⁰ Without the ability to exceed the cap, the campaign asserted it could not respond in a timely and thorough matter to the state and federal bodies.²¹

Turning to the specific circumstances present, the letter confirmed that the Christie campaign received subpoenas from the JLSCI, as well as the United States Attorney’s Office, “seek[ing] documents related to the closure of access lanes in Fort Lee, New Jersey to the George Washington Bridge.”²² Crucially, however, neither the JLSCI nor United States Attorney’s subpoenas suggested or alleged that the campaign was involved in criminal wrongdoing.²³ Instead, they sought documents and data to assist the panels “in their inquiries.”²⁴ The Letter then informed ELEC that responding to the subpoenas would require the campaign to “retain a vendor, at a significant cost, to image and preserve the data . . . of the . . . [campaign] and its employees.”²⁵ Further, the campaign would have to pay legal fees related to reviewing the documents for relevance and privilege.²⁶ In sum, the Christie campaign said its goal was to respond in a thorough and timely fashion, which it asserted could not be accomplished without ELEC taking action on its request in an

15.11(a)(4) (\$12.2 million cap); *id.* § 19:25-15.22(b) (\$8.2 million threshold). New Jersey also provides a similar program for gubernatorial primary elections. *See generally id.* § 19:25-16 et seq.

19. *See* Sheridan Letter, *supra* note 11.

20. *See id.* *See generally* N.J. ADMIN. CODE § 19:25-15.26 (delineating expenditures not within the expenditure cap of N.J. ADMIN. CODE § 19.25-15.11(a)(4)). For further discussion of expenditures not included in the \$12.2 million cap of N.J. Admin. Code § 19.25-15.11(a)(4), *see infra*, Section III(C).

21. *See* Sheridan letter, *supra* note 11.

22. *Id.*

23. *Id.*

24. *Id.* Both at the time of the Sheridan Letter, as well as after the ELEC hearing, discussed *infra*, the campaign made clear its intention to “respond fully and expeditiously to both subpoenas if it is permitted by law to do so.” *See id.*; Matthew Arco, *Stepien Invoked 5th Amendment, but Christie Campaign Says it Will Comply with Subpoenas*, POLITICKERNJ.COM (Feb. 11, 2014, 1:39 PM), <http://www.politickernj.com/71406/stepien-invoked-5th-amendment-christie-campaign-says-it-will-comply-subpoenas> (“Mark Sheridan . . . told reporters the campaign intends to comply with both legislative and federal subpoenas investigating the GWB controversy.”).

25. Sheridan Letter, *supra* note 11.

26. *Id.*

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expeditious manner.²⁷

C. The Christie Campaign's Legal Analysis

In requesting the Advisory Opinion, the campaign first relied on the interpretive principles found in the ELEC Regulations, which permit the Commission to “liberally construe” its governing statutes and regulations in order to discharge its statutory functions in securing a just and speedy determination of matters brought to its attention.²⁸ The campaign further noted that ELEC is authorized to “relax the application” of its regulations “whenever the interest of justice shall so require.”²⁹ Thus, the campaign asserted, ELEC should relax its regulations in the interest of justice because it would permit a prompt response to the subpoenas, as no public interest would be served by forcing it to choose between 1) violating the Act by exceeding the expenditure cap, and 2) facing contempt charges by the state and federal bodies.³⁰

The campaign noted that the ELEC regulatory provisions neither explicitly permit the expenditure of funds for responding to state/legislative or federal subpoenas, nor exempt spending over the cap for such a purpose.³¹ The campaign asserted, however, that this type of expenditure was permissible under the regulatory provision regarding use of funds for legal fees, N.J. Admin. Code § 19:25-6.10(a), or, more broadly, as an “administrative expense related to the operation of the campaign committee” under N.J. Stat. Ann.

27. *Id.* In the Letter, the campaign further informed ELEC that the responses to both JLSCI and United State Attorney's subpoenas were due on February 3 and 5, 2014, respectively, but that it had asked for an extension, in part due to the pending ELEC hearing scheduled for February 11, 2014. *Id.* The JLSCI granted the request, and—ostensibly—so did the United States Attorney's Office. Matt Friedman, *Christie Campaign Among Those Granted Temporary Subpoena Extension in Bridge Probe, Lawyer Says*, NJ.COM (Feb. 3, 2014, 2:00 PM), http://www.nj.com/politics/index.ssf/2014/02/christie_campaign_granted_temporary_subpoena_extension_lawyer_says.html; Heather Haddon, *Bridge Scandal Documents Won't Be Released Soon*, WALL ST. J. METRO. BLOG (Feb. 3, 2014, 10:43 AM), <http://blogs.wsj.com/metropolis/2014/02/03/bridge-scandal-documents-wont-be-released-soon/> (“The campaign also asked for an extension on a separate subpoena sent by the U.S. Attorney's office in New Jersey, which [are] due Wednesday, Mr. Sheridan said. A spokeswoman for the U.S. Attorney said, ‘We won't be commenting on the request.’”).

28. See Sheridan Letter, *supra* note 11; see also N.J. STAT. ANN. § 19:44A-23, -42 (commanding a liberal construction of the statutes); N.J. ADMIN. CODE § 19:25-1.3 (commanding a liberal construction of the regulations).

29. See Sheridan Letter, *supra* note 11; see also N.J. ADMIN. CODE § 19:25-1.4 (permitting relaxation in the interests of justice).

30. See Sheridan Letter, *supra* note 11.

31. *Id.*; see also N.J. ADMIN. CODE § 19:25-6.10 (delineating current ELEC allowances for expenditures on legal fees).

19:44A-11.2(a)(4).³²

Turning specifically to the legislative subpoena, the campaign analogized a response to the JLSCI to that already permitted under ELEC's existing regulations, which authorize campaigns to expend funds for legal fees stemming from "[t]he defense of an action or proceeding before the Joint Legislative Committee on Ethical Standards or *similar public body* having authority to hear such an action or proceeding and to impose sanctions against the officeholder by reason of his or her statue as a holder of public office."³³

In the campaign's view, the JLSCI is sufficiently similar to a legislative committee on ethical standards, and thus expenditures made in connection with a response to its requests are permissible as contemplated by N.J. Admin. Code § 19:25-6.10(a)(4).³⁴

As to the subpoena from the United States Attorney's Office, the campaign maintained that since the expenditures would not be made in defense of a candidate or office holder, as the campaign committee itself was the subject of the subpoenas, and since the campaign was not the subject of a criminal inquiry, ELEC Regulations were silent on the specific factual scenario at hand.³⁵ To bridge this gap, the Letter argued that expenditures made in this regard could be permissible as "overhead [or] administrative expenses associated with the operation of the campaign committee."³⁶ Thus, the expenditures could validly fall within the existing legal fees regulation, N.J. Admin. Code § 19:25-6.10(a)(4), and/or within the broader statutory provision permitting expenditures on overhead or administration.³⁷

The campaign took pains to distinguish the matter at hand from one where "legal fees and expenses [are used] for defense of a candidate or officeholder, who is the subject of a criminal inquiry or investigation," as such expenses are explicitly not permitted under N.J. Admin. Code § 19:25-6.10(b).³⁸ This distinction was the focus of *In Re Election Law Enforcement Comm'n Advisory Op. No. 01-2008*, discussed in detail *infra* Section IV, which upheld an ELEC Advisory Opinion barring candidates or officeholders from using campaign

32. See Sheridan Letter, *supra* note 11. Further bolstering the campaign's point is the fact that the ELEC Regulations only provide "*examples* of permissible uses of contributions" in connection with legal fees, rather than hard-and-fast limitations. N.J. ADMIN. CODE § 19:25-6.10 (emphasis added).

33. See Sheridan Letter, *supra* note 11 (citing N.J. ADMIN. CODE § 19:15-6.10(a)(4) (emphasis added)).

34. See *id.*

35. *Id.*

36. *Id.* (citing N.J. STAT. ANN. § 19:44A-11.2(a)(4)).

37. *Id.*

38. *Id.* (citing N.J. ADMIN. CODE § 19:25-6.10(b)).

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expenditures for legal fees in their criminal defense.³⁹ Instead, because the response here would come not in the defense of a candidate or officeholder, but of the campaign corporation, and since the campaign was not defending against criminal charges, but merely providing document information to be used by law enforcement and the legislature, the campaign asserted that such expenditures were permissible.⁴⁰

Lastly, the campaign averred that expenditures (and future funds to be raised) should not be subject to the \$12.2 million cap of N.J. Admin. Code § 19:25-15.11(a)(4), but rather, should be exempted alongside the other enumerated expenditures provided for in N.J. Admin. Code § 19:25-15.26.⁴¹ These exempt expenditures are:

1. Reasonable and necessary compliance with the reporting and certification requirements imposed by the public finance provisions of the Act . . .
2. Travel expenses of the candidate . . . or of any person other than the candidate if such travel expenses are voluntarily paid by such person without any understanding or agreement with such candidates that they shall be, directly or indirectly, repaid to that person by the candidates . . .
3. The reasonable value of food and beverage to persons who attend a testimonial affair on behalf of or in aid of a candidate and for whom a contribution in excess of the reasonable value of such food and beverages is reported . . .
4. Election night celebration or event expenses . . .⁴²

While the Christie campaign acknowledged that the expenditures in this matter did not directly fall within the list in N.J. Admin. Code § 19:25-15.26, it relied on the fact that ELEC has the inherent power to relax its provisions, and that indeed, over the years, the Commission exempted expenses that were not originally contemplated in its regulations.⁴³ Therefore, the campaign stated that ELEC should do so here, as the “interests of justice” required

39. See *In re* Election Law Enforcement Comm’n Advisory Op. No. 01-2008, 989 A.2d 1254 (N.J. 2010). This use of campaign funds was the focus because the case was decided before the prohibition was codified into the ELEC Regulations. See discussion *infra* Section IV.

40. See Sheridan Letter, *supra* note 11 (“There is nothing to suggest that [the campaign] or any employee of [the campaign] has committed any crime or is defending against criminal charges.”).

41. *Id.*

42. N.J. ADMIN. CODE § 19:25-15.26.

43. See Sheridan Letter, *supra* note 11 (referencing N.J. ADMIN. CODE § 19:25-1.4). Compare N.J. STAT. ANN. § 19:44A-7 (statutorily exempting only travel expenses), with N.J. ADMIN. CODE § 19:25-15.26 (expanding regulations to include three additional categories of exempt expenses).

relaxation.⁴⁴ The campaign and onlookers could, to some extent, anticipate ELEC's response to Mr. Sheridan's letter; the Commission was not painting on a blank canvas, as related precedent existed.

IV. RECENT HISTORY OF NEW JERSEY CAMPAIGN FUNDS USED FOR LEGAL FEES

In what has become the new normal amongst New Jersey candidates and officeholders, several individuals over the past decade have used (or at least have attempted to use) their campaign committee's funds to pay legal bills stemming from criminal and civil proceedings brought against them. In response, ELEC consistently issued restrictive Advisory Opinions⁴⁵ barring these candidates and officeholders from expending their funds for such purposes, and brought suit⁴⁶ against the campaign corporations and individuals to recoup improperly used funds.⁴⁷

The Supreme Court of New Jersey had the opportunity to weigh in on one particular ELEC Advisory Opinion in *In re Election Law Enforcement Commission Advisory Opinion No. 01-2008*, which set the bar for issues like the instant one.⁴⁸ In a 5-0 opinion,⁴⁹ the Supreme Court upheld an ELEC Advisory Opinion⁵⁰ determining that campaign expenditures for legal fees in defense of officeholder criminal charges stemming from "official corruption" were not

44. See Sheridan Letter, *supra* note 11.

45. See *supra* note 7 for discussion regarding the issuance of Advisory Opinions.

46. Pursuant to New Jersey statute and consistent with its "duty . . . to enforce the provisions" of the Act, ELEC retains the right to initiate civil actions "in any court of competent jurisdiction for the purpose of enforcing compliance with the provisions of this act or enjoining violations thereof or recovering any penalty prescribed by this act." N.J. STAT. ANN. § 19:44A-6(b).

47. *E.g.*, Complaint at 1, N.J. Election Law Enforcement Comm'n v. Coniglio (N.J. Super. Ct. Ch. Div. Dec. 3, 2013), *available at* http://www.elec.state.nj.us/pdffiles/press_releases/pr_2013/coniglio_complaint_122013.pdf; see also Christopher Baxter, *Ex-N.J. Sen. Joseph Coniglio Sued by Campaign Watchdog for \$140K*, NJ.COM (Dec. 6, 2013, 6:39 PM), http://www.nj.com/politics/index.ssf/2013/12/ex-nj_sen_joseph_coniglio_sued_by_campaign_watchdog_for_140k.html ("[ELEC] has filed suit against former state Sen. Joseph Coniglio (D-Bergen), claiming he illegally spent \$140,000 from his campaign account to pay criminal defense costs."); Press Release, New Jersey Election Law Enforcement Commission, An Essex County Superior Court Judge Has Ruled That Former Newark Mayor And State Senator Sharpe James Violated State Campaign Finance Laws When He Took \$94,004 From A Campaign Account To Pay For Criminal Defense Costs (Aug. 22, 2012), *available at* http://www.elec.state.nj.us/pdffiles/press_releases/pr_2012/pr_08222012.pdf.

48. 989 A.2d 1254 (N.J. 2010).

49. Not participating in the decision were Chief Justice Stuart J. Rabner and then-Associate Justice Roberto A. Rivera-Soto. See *id.*

50. To view the Advisory Opinion document in that matter, see N.J. ELECTION LAW ENFORCEMENT COMM'N, ADVISORY OP. NO. 01-2008 (2008), *available at* <http://www.elec.state.nj.us/pdffiles/ao/2008/ao012008.pdf>.

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“ordinary and necessary expenses of holding public office” within the meaning of N.J. Stat. Ann. § 19:44A-11.2(a)(6), and were therefore impermissible.⁵¹ As explained *infra*, ELEC had not dealt with this specific issue prior to issuing Advisory Opinion 01-2008, and therefore later codified its ruling in the ELEC Regulations while the case was pending. The Court was guided in substantial part by ELEC’s regulations in existence prior to the Advisory Opinion’s codification.

Underlying the case, former New Jersey State Senator Wayne R. Bryant was indicted by a grand jury for violations of numerous federal statutes.⁵² After dismissing one count, Mr. Bryant was subsequently found guilty of the charges against him in November 2008.⁵³ Mr. Bryant had been a State Senator from January 1995 to January 8, 2008, and although he did not run for re-election in 2007, he retained \$640,221 in his campaign account.⁵⁴ After the trial, Mr. Bryant’s campaign committee requested an Advisory Opinion from ELEC, seeking to pay Mr. Bryant’s legal fees stemming from his criminal defense from the outstanding campaign committee funds.⁵⁵

ELEC, in its Advisory Opinion 01-2008, determined that the use of campaign funds to pay the “costs of a defense to a criminal indictment” was not an “ordinary and necessary expense” of a candidate or officeholder, and therefore was not permissible under N.J. Stat. Ann. § 19:44A-11.2 or the then-existing regulations promulgated to enforce the Act.⁵⁶ Rather, ELEC opined that “a contributor would not view the use of campaign funds for criminal defense purposes as an expense that reasonably promotes an office holding purpose.”⁵⁷ ELEC further differentiated criminal legal expenses from other types of legal expenses, such as a defending a defamation lawsuit against the candidate or officeholder, a ballot recount proceeding, or an action brought before the Joint Legislative Committee on Ethical Standards; all had been permitted as “ordinary and necessary expenses” in previous Advisory Opinions, and adopted into the ELEC Regulations,⁵⁸ the idea being that a candidate or

51. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1254.

52. *Id.* at 1255-56.

53. *Id.* at 1256.

54. *Id.* at 1255.

55. *Id.* at 1256.

56. *Id.* (referencing N.J. ADMIN. CODE §§ 19:25-6.5 to -6.10).

57. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1256-57 (quoting N.J. ELECTION LAW ENFORCEMENT COMM’N, ADVISORY OP. NO. 01-2008, *supra* note 50, at 4) (internal quotations omitted)).

58. ELEC is given broad authority to “promulgate such regulations and official forms and perform such duties as are necessary to implement the provisions of [the Act.]” N.J. STAT. ANN. § 19:44A-6(b).

officeholder may reasonably be expected to pay for these fees in carrying out his or her duties.⁵⁹ ELEC likewise rejected Mr. Bryant's contentions that it look to federal law to allow the campaign to make the expenditures, reasoning that decisions of the Federal Election Commission ("FEC") "are not controlling over New Jersey's regulation of campaign finance activity for State elections."⁶⁰

On appeal⁶¹ to the Superior Court of New Jersey, Appellate Division, the court deferred to ELEC's interpretation of its regulations and upheld the Advisory Opinion, finding "nothing plainly unreasonable" with ELEC's decision.⁶² The Supreme Court of New Jersey subsequently granted certification⁶³ and analyzed the soundness of ELEC's decision, determining "whether defraying legal expenses related to defending against a federal criminal indictment alleging official corruption is an "ordinary and necessary expense[] of holding public office."⁶⁴ Relying on the applicable regulation defining

59. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1257; see also N.J. ELECTION LAW ENFORCEMENT COMM'N, ADVISORY OP. NO. 13-1995 (1995), available at <http://www.elec.state.nj.us/pdffiles/ao/1995/Advisory%20Opinion%20No.%2013-1995.pdf> (allowing expenditures for legal fees stemming from defense of an action before the Joint Legislative Committee on Ethical Standards); N.J. ELECTION LAW ENFORCEMENT COMM'N, ADVISORY OP. NO. 10-1994 (1994), available at <http://www.elec.state.nj.us/pdffiles/ao/1994/Advisory%20Opinion%20No.%2010-1994.pdf> (allowing expenditures for legal fees stemming from a recount proceeding); N.J. ELECTION LAW ENFORCEMENT COMM'N, ADVISORY OP. NO. 12-1980 (1980), available at <http://www.elec.state.nj.us/pdffiles/ao/1980/Advisory%20Opinion%20No.%2012-1980.pdf> (allowing expenditures for legal fees stemming from defense of a defamation lawsuit).

60. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1257 (quoting N.J. ELECTION LAW ENFORCEMENT COMM'N, ADVISORY OP. NO. 01-2008, *supra* note 50, at 6).

61. The Superior Court of New Jersey, Appellate Division, affirmed an adversely affected party's ability to appeal ELEC Advisory Opinions to the Appellate Division, regarding them as "analogous to a final declaratory judgment which is appealable as of right." *In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008 (Advisory Op. No. 01-2008, App. Div.)*, 960 A.2d 413, 420 n.6 (N.J. Super. Ct. App. Div. 2008) (citing N.J. Civ. Serv. Ass'n v. State, 443 A.2d 1070 (N.J. 1982)). Further, if this were not the case, the Appellate Division noted alternatively that the court "would grant leave to appeal in light of the public importance of the issue." *Id.* (citing N.J. CT. R. § 2:4-4(b)(2) (West, Westlaw through 2013 amendments)).

62. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1257 (citing *Advisory Op. No. 01-2008, App. Div.*, 960 A.2d at 419) (internal quotations and citations omitted). Determining whether an agency's decision is "plainly unreasonable" is the standard by which a court determines whether it should defer to an agency's interpretation of its regulations. See *id.* The Appellate Division also noted that ELEC's other decisions with respect to expenditures for legal fees were incomparable to utilizing funds in defense of criminal prosecution, and were previously codified in the ELEC Regulations. *Id.*

63. *In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008*, 968 A.2d 1189 (N.J. 2009) (Supreme Court of New Jersey Table of Petitions for Certification).

64. *In re Advisory Op. No. 01-2008*, 989 A.2d at 1259 (citing N.J. STAT. ANN. §

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“ordinary” as an expense that “reasonably promotes or carries out the responsibilities of a person holding elected office,” the court held that campaign funds expended in defense of a criminal indictment in the federal or state courts would not be an “ordinary incident” of public office, nor would such an expense “reasonably promote” such responsibilities thereof.⁶⁵ In caustic language, Justice Barry Albin wrote that

[d]espite blaring headlines that announce the most recent prosecution and conviction of a public official, we have yet to reach the point when it can be said that defending against a federal or state criminal indictment alleging corrupt practices is an “ordinary” expense of holding public office. A grand jury indictment is not a customary, or usual, or normal incident of holding public office, nor does it occur in the regular course of events. The vast majority of elected public officials carry out their duties honestly and honorably and will not, in the course of their long careers, be the target of a criminal prosecution.⁶⁶

Further, the court noted that ELEC’s regulations made clear that campaign contributors would “hardly contemplate” that their donations would be used to pay such expenses.⁶⁷

The high court agreed that ELEC’s then-existing regulations regarding the permissible use of campaign funds for legal fees plainly did not include fees for criminal prosecution, noting that, if anything, the regulations “fortif[ied] ELEC’s interpretation of the statutory language” explicitly excluding such expenditures.⁶⁸ The court also found that the Act’s legislative history was not at odds with ELEC’s “commonsense interpretation” of its regulations, and therefore concluded that, in sum, the Advisory Opinion was “not plainly unreasonable.”⁶⁹

In addition to the rationale regarding expenditures for criminal defense provided in *In re Election Law Enforcement Commission Advisory Opinion No. 01-2008*, in 2009, upon recommendation by the Appellate Division,⁷⁰ ELEC promulgated regulations updating the

19:44A-11.2(a)(6)).

65. *Id.* at 1259-60 (citing N.J. ADMIN. CODE § 19:25-6.7(a)).

66. *Id.* at 1259.

67. *Id.* at 1260 (referencing N.J. STAT. ANN. § 19:44A-11.2(a)).

68. *Id.*

69. *Id.* at 1260-61. As did ELEC, the Court rejected Mr. Bryant’s contentions that the Court should look to the decisions of the FEC in determining the matter. *Id.* at 1262. The Court also found no merit to Mr. Bryant’s argument that ELEC’s decision was at odds with the Constitutional presumption of innocence; the provision bore “no relevance to whether Bryant [could] use campaign funds for an impermissible purpose.” *Id.*

70. *Id.* at 1258 n.6.

permissible types of legal fees that campaign funds may be expended to pay.⁷¹ N.J. Admin. Code § 19:25-6.10(b), as of the date of this publication, now reads:

Permissible use of funds for legal fees and expenses shall not include legal fees and expenses for defense of a candidate or officeholder, who is the subject of a criminal inquiry or criminal investigation, or defense of a criminal indictment or other criminal proceeding.⁷²

There is also precedent relevant specifically to expenditure of campaign funds in excess of the \$12.2 million cap post-election to pay for legal fees. As a New Jersey Law Journal article notes, in December 1993, ELEC allowed the campaign committee for then-New Jersey Governor-elect Christie Todd Whitman to continue to raise funds after her November 1993 general election to “deal[] with claims that [its] campaign manager . . . had laid out campaign money to try to suppress the black vote.”⁷³ ELEC decided, via Advisory Opinion No. 11-1993, that “fees spent for legal defense in connection with the gubernatorial election would be considered outside of the general election expenditure cap and would be permissible expenditures in the postelection setting” if there was a reasonable connection with Governor-elect Whitman’s “candidacy or reporting requirements.”⁷⁴ However, ELEC mandated that the contribution limit for persons or committees (then, \$1,800) be kept in place.⁷⁵ The Commissioners reasoned that to lift the \$1,800 limit might “result in individuals and organizations attempting to buy influence in the Governor’s office, something the limits are designed to prevent.”⁷⁶ It is against this backdrop of agency and court action that Mr. Sheridan’s requested Advisory Opinion, No. 01-2014, was issued.

V. ADVISORY OPINION NO. 01-2014

After a hearing and oral argument earlier in the month, ELEC issued Advisory Opinion No. 01-2014 on February 20, 2014.⁷⁷ In the opinion, ELEC answered Mr. Sheridan’s questions and assertions in

71. 41 N.J. Reg. 2142(b) (May 18, 2009).

72. N.J. ADMIN. CODE § 19:25-6.10(b).

73. Mary Pat Gallagher, *Christie Campaign Bridgegate Counsel Seeks to Tap Leftover Election Funds*, N.J. L.J. (Feb. 10, 2014), <http://www.njlawjournal.com/id=1202642356777>.

74. N.J. ELECTION LAW ENFORCEMENT COMM’N, ADVISORY OP. NO. 11-1993 (1993), *available at* http://www.elec.state.nj.us/pdffiles/mtg_minutes/1993%20Minutes/12141993_PublicMinutes.pdf.

75. *Id.*

76. *Id.*

77. N.J. ELECTION LAW ENFORCEMENT COMM’N, ADVISORY OP. NO. 01-2014, at 1 (2014) [hereinafter “ADVISORY OP. NO. 01-2014”], *available at* <http://www.elec.state.nj.us/pdffiles/ao/2014/ao012014.pdf>.

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turn.

As to expending funds to respond to the JLSCI's subpoenas, the Commission found that since the documents the subpoenas sought were records of the campaign, the costs incurred in connection with producing such records were "campaign expenses in connection with an election campaign."⁷⁸ While ELEC rejected the idea that such expenses could be considered "administrative or overhead," it instead found that since its regulations permit the use of expenditures for "reasonable fees and expenses of legal representation the need for which arises directly from and is related to the campaign for public office," this matter was contemplated as permissible by its regulations.⁷⁹

Specifically, the Commission analogized the JLSCI to a "Joint Legislative Committee on Ethical standards or similar public body."⁸⁰ Since the JLSCI retained "similar jurisdiction and authority" to the regulation's already-permitted examples where legal fees may be expended, ELEC found that this matter could be no different.⁸¹ ELEC was not concerned about funds going towards "personal use of a candidate or any person associated with a candidate" since the campaign corporation itself, rather than a candidate, was the subject of the subpoena.⁸² The Commission concluded that allowing the campaign to respond to the JLSCI would also promote the broad public interest that disclosure of information would bring.⁸³

With regard to expending funds on legal fees in response to the grand jury subpoena, ELEC was careful to tread around the mandate of *In Re Election Law Enforcement Comm'n Advisory Op. No. 01-2008*, as well as the prohibitions of N.J. Admin. Code § 19:25-6.10(b), and permitted the campaign to so utilize its funds according to the mandates of both authorities.⁸⁴ ELEC acknowledged that its current regulations prohibit campaign expenditures on legal fees "for criminal defense of a[n] . . . officeholder at all states of a criminal investigation, including pre-indictment," however, the Commission "considered as significant" Mr. Sheridan's representations that the campaign corporation was not the target of the grand jury investigation, but was rather subpoenaed as a witness, and would

78. *Id.* at 4 (citing N.J. STAT. ANN. § 19:44A-11.2(4)).

79. *Id.* at 4-5 (citing N.J. STAT. ANN. § 19:44A-11.2(4); N.J. ADMIN. CODE § 19:25-6.10(a)) (internal quotations omitted).

80. *Id.* at 5.

81. *Id.* (citing N.J. ADMIN. CODE § 19:25-6.10(a)(4)).

82. *Id.*

83. *Id.* at 5.

84. *Id.* (citing *In re Advisory Op. No. 01-2008*, 989 A.2d at 1262; N.J. ADMIN. CODE § 19:25-6.10(b)).

respond on its own behalf rather than on behalf of a candidate.⁸⁵ Based on these representations, the Commission concluded that no funds would be expended in a candidate's criminal defense, which would otherwise violate N.J. Admin. Code § 19:25-6.10(b).⁸⁶

ELEC also ordered that the campaign "return to the Commission for guidance should the campaign itself receive a 'target letter' from the grand jury investigation."⁸⁷ Presumably, if the campaign received such correspondence, and continued expending funds for its legal fees, it would be doing so in connection with a "criminal inquiry," which is prohibited under N.J. Admin. Code § 19:25-6.10(b). Similar to its determination regarding the subpoena from the JLSCI, the Commission cited the public policy consideration of bringing the facts in the matter to light, which weighed in favor of allowing the campaign to respond.⁸⁸ Finally, ELEC mandated that any funds "raised for such expenditures [would] be strictly limited to the contemplated purposes and that contributors [would] be so advised."⁸⁹

As to whether the Christie campaign's expenditures would be permitted post-election, ELEC first noted that under N.J. Admin. Code § 19:25-15.47(b),

No candidate who has received public funds shall incur any debt or make any expenditure after the date of the election for any purpose other than the following:

1. To satisfy outstanding obligations incurred on or before the date of the election made for appropriate campaign purposes; or
2. To pay the reasonable and necessary costs of closing the campaign.⁹⁰

Under this regulation, then, ELEC determined that the campaign's proposed expenses were permissible "either to meet the obligations of the campaign or as necessary costs of closing the campaign account."⁹¹ The Commission was convinced that, since the election had passed, the Christie campaign's incurrence of financial obligations in this matter would not "harm[] or jeopardize[] the level playing field envisioned by the public financing law."⁹² For the same

85. *Id.* (referencing Sheridan Letter, *supra* note 11).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 5.

90. *Id.* at 6 (citing N.J. ADMIN. CODE § 19:25-15.47(b)).

91. *Id.* ELEC noted that any regulations as to restrictions on public fund usage were inapplicable in this matter, as the Christie campaign "received and spent the maximum amount of public funds." *Id.* (citing N.J. STAT. ANN. § 19:44A-35; N.J. ADMIN. CODE § 19:25-15.24).

92. *Id.*

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public policy reasons, ELEC likewise permitted post-election fundraising in connection with this matter either to meet the obligations of the campaign or to close the campaign account.⁹³ However, any such contributions would remain subject to the same dollar limit applicable to the November 2013 general election: \$3,800 per “person or committee.”⁹⁴

Further liberally relaxing its regulations, ELEC permitted the Christie campaign to exceed the \$12.2 million cap on expenditures for publicly financed campaigns for this matter.⁹⁵ While the Commission conceded that the only expenditures not subject to the spending cap under ELEC’s regulations were compliance costs, travel expenses, food and beverage costs, and election night expenses, it found that exempting the campaign’s expenses here did not “compromise the level playing field” envisioned by the statute.⁹⁶ Lastly, ELEC allowed the campaign to retain its account beyond the statutorily imposed limit of six months post-election, in order to “continue to raise funds and make expenditures for the stated purposes.”⁹⁷ Interestingly, the Commission detailed the persuasive value of its advisory opinions by citing to Advisory Opinion 01-2004 for the proposition that “no provision of the Act or Commission regulations mandated the dissolution at any particular time of a publicly financed gubernatorial candidate committee which has net liabilities.”⁹⁸

Concluding its analysis, ELEC maintained that the Advisory Opinion’s issuance was “based upon the very unique circumstances of

93. *Id.* It was reported one day after the ELEC public hearing in this matter that “[t]he New Jersey Republican State Committee [was] using Gov. Chris Christie’s scandal to raise money.” Matt Friedman, *N.J. Republicans Use Christie Bridge Scandal to Raise Money*, NJ.COM (Feb. 12, 2014, 4:14 PM), http://www.nj.com/politics/index.ssf/2014/02/nj_republicans_use_christie_bridge_scandal_to_raise_money.html. The Wall Street Journal later noted that in an ELEC report filed after the Commission’s decision, the Christie campaign listed \$156,587 in cash on hand, though it also listed “\$264,000 in legal fees as debts, meaning that the campaign could have to raise more funds to pay them.” Heather Haddon, *Christie Campaign Has Spent At Least \$314,000 in Legal Fees in Bridge Scandal*, WALL ST. J. METRO. BLOG (Apr. 24, 2014, 12:28 PM), <http://blogs.wsj.com/metropolis/2014/04/21/christie-campaign-has-spent-at-least-314000-in-legal-fees-in-bridge-scandal/>.

94. ADVISORY OP. NO. 01-2014, *supra* note 77, at 6; N.J. ADMIN. CODE § 19:25-15.45(a).

95. ADVISORY OP. NO. 01-2014, *supra* note 77, at 6 (citing N.J. ADMIN. CODE §§ 19:25-1.4, 19:25-1.6 (allowing ELEC to construe its regulations liberally)).

96. *Id.* (citing N.J. ADMIN. CODE § 19:25-15.26 (delineating expenses exempt from the statutory cap)).

97. *Id.* at 7 (citing N.J. ADMIN. CODE § 19:25-15.47 (six-month time limitation post-election for retaining funds)).

98. *Id.* (citing N.J. ELECTION LAW ENFORCEMENT COMM’N, ADVISORY OP. NO. 01-2004 (2004), *available at* <http://www.elec.state.nj.us/pdf/ao/2004/ao012004.pdf>).

[the] inquiry,” and that ELEC “[did] not intend [the] Advisory Opinion to serve as precedent for another set of facts and circumstances.”⁹⁹

VI. CONCLUSIONS AND CRITICISMS

A. *ELEC Should Engage in a Rulemaking to Codify and Clarify its Advisory Opinion*

With respect to ELEC’s ability to relax its regulations as was done in Advisory Opinion 01-2014, its decision was well-guided by the provisions that govern the agency. Based on the public demand for further information about the Bridge Lane Closure Scandal, ELEC was pragmatic in construing its regulations liberally and applying them to promote their express purposes: “the interest[s] of justice,” as it was clearly important that the campaign’s complying thoroughly with the investigation could help ferret out potential illegal activity.¹⁰⁰ On each point, agency and court precedent directed the Commission. For example, ELEC was quick to construe the regulatory provision permitting expenditure for legal fees in connection with the “defense of an action or proceeding before the Joint Legislative Committee on Ethical Standards or similar public body,” N.J. Admin. Code § 19:25-6.10(a)(4), as also permitting a response to the JLSCI subpoena.¹⁰¹ However, by not further addressing these matters in a proposed rulemaking, and instead resting on the notion that its Advisory Opinion is simply not “to serve as precedent for another set of facts and circumstances,” the Commission becomes the proverbial ostrich with its head in the sand: it ignores the modern legal and political problems oft associated with campaigns by failing to clearly demarcate when campaigns are allowed to expend funds in connection with not-yet-criminal subpoenas.

On a national and state level, legal inquiries by law enforcement and legislatures that involve campaign corporations have unfortunately become all-too-common in recent years for the state’s election law body to continue to operate without rules to govern and guide campaigns’ functions. Indeed, it is easy to find examples where subpoenas were or could have been issued to campaign corporations by federal and state bodies, and that did or could have required them to expend funds on legal fees.

Take former Illinois Governor Rod Blagojevich, who was ultimately convicted in 2011 of federal corruption charges, including quid pro quo solicitation of campaign donations in exchange for an

99. *Id.*

100. See N.J. STAT. ANN. § 19:44A-42; N.J. ADMIN. CODE §§ 19:25-1.3 to -1.4.

101. See ADVISORY OP. NO. 01-2014, *supra* note 77, at 5.

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appointment to President Barack Obama's (vacant) Senate seat.¹⁰² In 2007, years prior to his indictment, Mr. Blagojevich's campaign corporation was subpoenaed by the United States Attorney's Office for the Northern District of Illinois in "the first public indication that political financial records belonging to the governor [were] being sought."¹⁰³ While the campaign corporation itself was ostensibly not, at the time or since, the direct target of the federal investigation, it clearly had in its possession records that might have implicated individuals, including Governor Blagojevich himself; the campaign was uniquely in the role of witness.¹⁰⁴ Following his arrest in connection with the charges, the Illinois General Assembly impeached Governor Blagojevich in 2009, but not before the State House of Representatives Special Investigative Committee issued a subpoena to his campaign committee, directing it "to turn over the names of every donor and the amount of money involved" to the investigative committee.¹⁰⁵ Borrowing the rationale from ELEC's Advisory Opinion here, would it not have been in the public's interest to allow the campaign to fund legal expenses in connection with their responses?

One need not even look outside the state to find other plausible scenarios where campaign committees, lacking criminal culpability themselves, might be asked to turn over documents in connection with an investigation. Take former New Jersey Assemblyman Anthony Impoveduto, who pled guilty in 2005 to

using at least \$50,000 in campaign funds for personal expenses since August 1999. [The New Jersey Attorney General's office] said records indicated Impoveduto and his family members used four American Express cards to pay for personal expenses, which were

102. See Bob Sexter & Jeff Coen, *Blagojevich on Guilty Verdict: 'I, Frankly, Am Stunned'*, CHI. TRIBUNE (Jun. 27, 2011), http://articles.chicagotribune.com/2011-06-27/news/chi-bлагоjevich-jurors-going-into-their-10th-day-20110627_1_political-corruption-crime-spree-abraham-lincoln-roll-new-jury; *The Verdict Against Blagojevich*, CHI. TRIBUNE (Jun. 27, 2011), http://articles.chicagotribune.com/2011-06-27/news/chi-the-counts-against-bлагоjevich-20110627_1_count-bлагоjevich-verdict.

103. See Jeff Coen & Ray Long, *Feds Subpoena Governor's Campaign Fund Records*, CHI. TRIBUNE (May 23, 2007), http://articles.chicagotribune.com/2007-05-23/news/0705230228_1_subpoena-corruption-allegations-federal-investigation.

104. See generally *id.*

105. See Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed from Office*, CHI. TRIBUNE (Jan. 30, 2009), <http://www.chicagotribune.com/news/local/chi-bлагоjevich-impeachment-removal,0,5791846.story>; Joe Carroll, *Blagojevich Impeachment Panel Demands Donation List*, BLOOMBERG (Jan. 7, 2009, 6:33 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aymrAE6l6hg4&refer=us>; Chris Bury & Kate Barrett, *Illinois House Votes to Impeach Blagojevich*, ABC NEWS (Jan. 9, 2009), <http://abcnews.go.com/Politics/story?id=6611186>.

then reimbursed from the campaign.¹⁰⁶

While the ultimate target of the New Jersey Attorney General's Office was Mr. Impreveduto and his personal actions, rather than those of the campaign corporation, it is easy to surmise that the campaign did or could have received subpoenas in connection with the state's investigation.¹⁰⁷ Would it be in the public's interest to then allow the Impreveduto campaign to fund the legal fees associated with responding to an inquiry by the state?

Because these scenarios are not far-fetched, but rather, have the propensity to occur within the lifecycle of campaign committees of candidates and officeholders at varying levels of state government, ELEC should clearly answer these questions by engaging in a rulemaking to amend N.J. Admin. Code § 19:25-6.10.¹⁰⁸ More precisely, ELEC should spell out with specificity additional scenarios where campaign expenditures on legal fees are permissible in order to respond to legal inquiries like subpoenas.¹⁰⁹

ELEC should first determine the line at which such expenditures should be curtailed in the interest of justice—i.e. where the inquiry becomes “criminal.” New regulations would balance the interests of public trust in and knowledge regarding the political system, the ability for campaigns to fully cooperate with authorities, and the forceful assertion of the Commission's authority, which exists to carry out the Act's requirements to their fullest extent. Likewise, campaign committees should be able to know their options if and when these scenarios arise. While ELEC notes Advisory Opinion 01-2014 is of a limited nature, as each Advisory Opinion is based exclusively on the facts and circumstances of each individual matter, each still represents an interpretation of ELEC's applicable statutes and regulations. Thus, the public deserves to know ELEC's formal position on these issues, rather than being forced to rely upon tenuous decisions. When State Senator Bryant sought to utilize campaign funds in his criminal defense, ELEC stepped in immediately to promulgate new rules; this matter should be no

106. See Dunstan McNichol, *Ex-Hudson Legislator Gets Probation, \$10,000 Fine*, NJ.COM (Jan. 25, 2005), http://www.nj.com/corruption/stories/index.ssf?/corruption/stories/20050125sl_impreveduto_fine.html.

107. See generally *id.*

108. See *supra* note 58, for the basis of ELEC's rulemaking authority.

109. For an interesting discussion on trends as to what the FEC considers ordinary expenses for legal fees in such scenarios, see Brian Svoboda, *On Campaign Payment of Legal Fees, Contrasting Views From Christie*, LAWANDPOLITICSUPDATE.COM (Feb. 12, 2014), <http://www.lawandpoliticsupdate.com/2014/02/on-campaign-payment-of-legal-fees-contrasting-views-from-christie/> (finding that since the FEC last wrote rules on what constitutes an ordinary expense for legal fees, “the interrelationship between the criminal and political, which was frequent enough to begin with, has become more ‘ordinary’ still”).

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different.¹¹⁰

In addition, ELEC should add the phrase “legislative investigatory body” to the language found in N.J. Admin. Code § 19:25-6.10(a)(4). This is because while ELEC was quick to find that the JLSCI “is similar in jurisdiction and authority” to the Joint Legislative Committee on Ethical Standards (“JLCES”), that proposition is not so clear upon review of the latter Committee.¹¹¹ Indeed, the JLCES is charged with enforcing one specific statute: the New Jersey Conflicts of Interest Law (“Conflicts Law”), which governs ethical and financial conflicts of interests applicable to public officials and employees.¹¹² The JLCES is made up of members of the public, has specific, narrow authority to investigate violations of the Conflicts Law, and may levy fines of up to \$10,000 upon members of the State Legislature or “State officer[s] or employee[s] or special State officer[s] or employee[s] in the Legislative Branch” who violate provisions of the Conflicts Law.¹¹³ JLCES likewise has the ability to issue advisory opinions as to whether a given set of facts and circumstances would constitute a violation of the provisions of the Law.¹¹⁴

By contrast, the JLSCI is specifically

charged with investigating all aspects of the finances, operations, and management of the Port Authority of New York and New Jersey and any other matter raising concerns about abuse of government power or an attempt to conceal an abuse of government power including, but not limited to, the reassignment of access lanes in Fort Lee, New Jersey to the George Washington Bridge.¹¹⁵

The JLSCI is comprised of current members of the New Jersey State Senate and General Assembly, and lacks the authority to levy fines or penalties—save for the imposition of contempt orders; rather, it may “report possible violations of any law, rule, regulation, or code

110. See ADVISORY OP. NO. 01-2014, *supra* note 77, at 5.

111. See *id.*

112. See N.J. STAT. ANN. §§ 52:13D-12, -22; see also Joint Legislative Comm. on Ethical Standards v. Perkins, 432 A.2d 116, 121 (N.J. Super. Ct. App. Div. 1981), *certif. denied*, 343 A.2d 444 (N.J. 1982) (“The Legislature has established . . . administrative agencies to enforce the provisions of the Conflict of Interest Law N.J.S.A. 52:13D-22 empowers the Joint Legislative Committee on Ethical Standards to give advisory opinions and to initiate, receive, hear and review complaints regarding violations of the Act.”).

113. See N.J. STAT. ANN. § 52:13D-22(b), (h)(4)(i), (h)(4)(j).

114. *Id.* § 52:13D-22(g).

115. S. Con. Res. 49, 216th Leg., 1st Sess. (N.J. 2014), available at http://www.njleg.state.nj.us/2014/Bills/SCR/49_I1.PDF (authorizing the creation of the JLSCI).

to appropriate federal, State, or local authorities . . .”¹¹⁶ This sweeping authority allows the committee to refer to law enforcement New Jersey employees or officials, as well as individuals with *no connection* to state government, who may have perpetrated violations of law, but does not directly allow for the imposition of monetary penalties or the ability to render advisory opinions. Both bodies do, however, maintain the ability to compel individual testimony and document production, as well as provide for legal assistance to the committees and the retention of subpoena power through a joint resolution of the Legislature.¹¹⁷ While it is seemingly the legal assistance and potential for subpoena power of the JLCES that led ELEC to conclude the JLSCI is a “similar public body,” the “authority and jurisdiction” of the two committees have striking dissimilarities.¹¹⁸ Thus, while ELEC may validly construe its controlling regulations liberally in the name of public interest, the lack of clarity in the Advisory Opinion shows the need for the ELEC Regulations to specify that expenditures for legal fees in connection with responses to investigatory committees of the State Legislature are permissible.

B. ELEC’s Current Structure Creates Unnecessary Problems

Advisory Opinion 01-2014 also leaves itself open for criticism due to the current structure of ELEC. The Governor, with advice of the State Senate, is tasked with maintaining, by appointment, four members on the Commission—two from each party—so that it can carry out its tasks, which include issuing Advisory Opinions.¹¹⁹ However, since 2011, there has been a vacant commissioner seat that not only tips the partisan balance of the Commission, but also fails to give both its Advisory Opinions and public discourse before the agency the full weight of its statutorily granted authority.

Indeed, in 2010, Governor Christie replaced Democratic Commissioners Jerry Fitzgerald English and Albert Burnstein with Democrats Walter Timpone and Judge Laurence Weiss.¹²⁰ He also appointed Republican Ronald DeFilippis to a seat alongside the

116. *Id.*

117. *See id.*; N.J. STAT. ANN. §§ 52:13D-22(f); 52:13-1.

118. *See* ADVISORY OP. NO. 01-2014, *supra* note 77, at 5.

119. *See* N.J. STAT. ANN. § 19:44A-5. While ELEC issues its Advisory Opinions “through its legal counsel,” the individual Commissioners themselves approve the Commission’s decisions explained by counsel through the Advisory Opinions. *See id.* § 19:44A-6(f).

120. Michael Symons, *Christie Makes 41 Nominations; Dumps Two of Three ELEC Members*, APP.COM CAPITOL QUICKIES BLOG (May 11, 2010), <http://blogs.app.com/capitolquickies/2010/05/11/christie-makes-41-nominations-dumps-two-of-three-elec-members/>.

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incumbent Republican commissioner, Judge Amos Saunders.¹²¹ However, Mr. Weiss passed away in 2011, leaving a Democratic commissioner seat vacant, and due to lack of a new gubernatorial appointment, the seat has remained vacant for over two years to date.¹²²

This longstanding vacancy creates impracticalities that were recently illustrated by ELEC's issuance of Advisory Opinion 01-2014. In connection with the Bridge Lane Closure Scandal, Commissioner Timpone, an attorney with McElroy, Deutsch, Mulvaney & Carpenter LLP, had been representing Bridget Kelly, Governor Christie's former deputy chief of staff, in her defense.¹²³ However, he discontinued his representation on January 22, 2014, citing a conflict with his role as an ELEC commissioner.¹²⁴ Due to this former representation, Mr. Timpone also recused himself from both ELEC's public meeting and voting on Advisory Opinion 01-2014.¹²⁵

Due to the vacancy and Mr. Timpone's recusal, ELEC was left with only two out of four commissioners to rule on the issue raised by the Christie campaign.¹²⁶ Therefore, if even one commissioner found in favor of the campaign, the lack of commissioners would have the practical effect of binding ELEC into either accepting Mr. Sheridan's arguments 2-0 and issuing an Advisory Opinion confirming its acceptance, or ending in a 1-1 deadlock, which, for practical purposes, would be "as good as a win for Sheridan because ELEC would not be able to go after the campaign committee for using the funds"¹²⁷

21. Michael Symons, *Christie Continues ELEC Makeover*, APP.COM CAPITOL QUICKIES BLOG (May 14, 2010), <http://blogs.app.com/capitolquickies/2010/05/14/christie-continues-elec-makeover/>; Wally Edge, *Christie Taps Morris Republican for ELEC*, POLITICKERNJ.COM (May 18, 2010, 4:09 PM), <http://www.politickernj.com/wallye/39193/christie-taps-morris-republican-elec>.

22. Gallagher, *supra* note 73. Former ELEC Chairwoman Jerry Fitzgerald English called it "outrageous" that so much time had passed without a gubernatorial appointment to Mr. Weiss' former seat. *Id.*

23. Heather Haddon, *Christie Administration and Former Aide Hire Top Lawyers*, WALL ST. J. METRO. BLOG (Jan. 16, 2014, 8:41 AM), <http://blogs.wsj.com/metropolis/2014/01/16/christie-administration-hires-gibson-dunn-crutcher-in-bridge-investigation/>.

24. Ted Sherman, *Attorney for Former Chris Christie Aide it Out, Citing Conflict*, NJ.COM (Jan. 22, 2014, 5:43 PM), http://www.nj.com/politics/index.ssf/2014/01/attorney_for_former_chris_christie_aide_in_gwb_scandal_is_out_citing_conflict.html.

25. Gallagher, *supra* note 73.

26. *Id.*

27. *See id.*; *see also* discussion *infra* note 128. A deadlock among the commissioners would also likely result in ELEC not issuing an Advisory Opinion on the matter, as it tacitly would have found no violation in connection with the matter. *See* N.J. STAT. ANN. § 19:44A-6(f) (stating that, upon request, ELEC is merely *authorized* to issue

This result is reached because ELEC's applicable statutory and regulatory schemes require the Commission to *identify* and subsequently pursue violations civilly in "courts of competent jurisdiction" by *majority vote* of the Commissioners.¹²⁸ Without a consensus that the Christie campaign's actions constituted a violation, the campaign could expend funds on legal fees without concern that ELEC would institute court proceedings.¹²⁹ This structural problem is dizzying; because Governor Christie did not appoint a fourth ELEC commissioner, the views of a single Commissioner in this matter had the ability to command the rest of the Commission into affirmatively or tacitly accepting the arguments of Governor Christie's own campaign—right or wrong.

Further, ELEC's current makeup could call into question its decision-making and ability to have a truly open dialogue, considering that in this matter, the only commissioners left to consider an Advisory Opinion request from a Republican campaign were the two Republicans: Mr. DeFilippis and Mr. Saunders.¹³⁰ Such appearance issues are contemplated in, and combated by ELEC's statutory scheme, which provides for a four-member partisan balance on the Commission.¹³¹ So, although ELEC was on strong legal footing on the substance of its latest Advisory Opinion, the current structure of the Commission may blemish its otherwise reputed stature that goes hand-in-hand with its opinions. These problems would be easily remedied if Governor Christie invoked his executive authority to appoint a new Democratic commissioner to ELEC's vacant seat, which he can and should do.

Advisory Opinions, and that if it fails to do so within the statutorily imposed timeframe, ELEC is then precluded from instituting proceedings in connection with the request); § 19:44A-6.1 (granting ELEC authority to issue Advisory Opinions); N.J. ADMIN. CODE § 19:25-20.17 ("The Commission *may* render advisory opinions as to the applicability of the Act . . . to a given specific set of facts and circumstances." (emphasis added)).

128. Compare N.J. STAT. ANN. § 19:44A-6(b) (allowing ELEC to institute proceedings to enjoin expenditure violations of the Act in state court and assess penalties for such violations), with *id.* § 19:44A-6(f) (allowing ELEC to determine whether a given scenario constitutes a violation of the Act via Advisory Opinions). While N.J. Stat. Ann. § 19:44A-6(f) does not itself specify the number of commissioner votes required to determine a violation, throughout ELEC's statutory scheme, determining whether a scenario constitutes a violation requires a "majority vote of the authorized membership thereof." See, e.g., *id.* §§ 19:44A-41(d), -22(2)(d). That would, with the current ELEC membership makeup, consist of two of three commissioners, even should one recuse himself from the decision. See Gallagher, *supra* note 73; see also *infra* Section VI(C).

129. See discussion *supra* note 128.

130. See Gallagher, *supra* note 73.

131. See N.J. STAT. ANN. § 19:44A-5 ("No more than two [commission] members shall belong to the same political party, and no person holding a public office or an office in any political party shall be eligible for appointment to the commission.").

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Quorum to Issue the Advisory Opinion*

Having laid out the structure under which ELEC is currently operating, it remains an open question whether the Commission, operating with only two commissioners due to the recusal and vacancy, had the authority to issue Advisory Opinion 01-2014 in the first place. This is because ELEC, like many state agencies, may require a quorum of its four commissioners in order to conduct any and all business, such as issuing an Advisory Opinion. And as noted above, the Commission's applicable statutes and regulations make it abundantly clear that the body needs a "majority vote of the authorized membership thereof" in order to identify and pursue violations of the Act. Taken together, the Commission's voting authority comes under a cloud of suspicion.

New Jersey courts consistently find that the State Legislature's prescribed meaning for the phrase "authorized membership thereof" for purposes of quorum and other valid actions of a statutorily-created body, is "the complete board, the full membership, *not a reduced number of members as they are at the time of voting.*"¹³² In this vein, New Jersey courts affirm that a vacancy on the body does not affect the "denominator" required to constitute a quorum or majority needed for valid body action; if a vacancy occurs, the body simply needs to have a heightened number of affirmative votes or individual members present in order to conduct business.¹³³ Likewise,

for purposes of determining whether a legal quorum is present, *it is not relevant* whether a member is physically absent, is disqualified because of interest, bias, or prejudice, or other good cause, *or voluntarily recuses herself or himself*. A member who is disqualified

132. See *Ross v. Miller*, 178 A. 771, 772-73 (N.J. 1935) (emphasis added); *Campbell v. Borough of N. Plainfield*, 961 A.2d 770, 783-84 (N.J. Super. Ct. App. Div. 2008); *Mountain Hill, LLC v. Middletown Twp.*, 801 A.2d 412, 418 (N.J. Super. Ct. App. Div. 2002); see also *Johnson v. Montville Twp.*, 264 A.2d 75 (N.J. Super. Ct. App. Div. 1970) (accepting that, under the applicable statute, a two-thirds majority of "all members of the governing body" for purposes of a municipal zoning committee meant the "full authorized membership thereof"); *Farmer v. Meeker*, 163 A.2d 729 (N.J. Super. Ct. Law Div. 1960) ("The vote of the five-member township committee by which the amendment was declared adopted was three in favor, one opposed, and one abstaining. This is admittedly less than the two-thirds vote required by the statute in the event of a protest.").

133. See *Campbell*, 961 A.2d at 784-85 (finding that, where a municipal council failed to fill a member vacancy on the municipal planning board by not operating within the statutorily-imposed timeframe for so doing, the continued vacancy did not reduce the "full authorized membership, or denominator" required for action by the board from seven to six: "The scheme allows for no reduction in case of vacancies").

from participating in a particular matter may not be counted in determining the presence of a legal quorum.¹³⁴

While the existing case law often centers on the legislature's drafting of statutes germane to municipal government, the same framework applies to state administrative bodies under the holding of *King v. N.J. Racing Comm'n.*¹³⁵ In *King*, the Supreme Court of New Jersey held that since the four-member New Jersey Racing Commission required a "majority of the Commission" to constitute a quorum in order to conduct business, the absence of one Commissioner compounded with the voluntary recusal of another Commissioner, created a lack of quorum.¹³⁶

This jurisprudence is applicable to ELEC's action on the Christie campaign matter. As previously mentioned, ELEC has been operating for over two years without a fourth commissioner.¹³⁷ ELEC's membership was further diminished by the recusal of Commissioner Timpone from the public hearing and subsequent Advisory Opinion vote stemming from the Commission's deliberations in this matter.¹³⁸ Therefore, it seems that if ELEC requires a three-member quorum of its commissioner membership to issue Advisory Opinions, a requirement the statutes and regulations do not clearly demarcate, the lack of two commissioners from the "authorized membership thereof" likely vitiates the validity of ELEC's Advisory Opinion 01-2014.¹³⁹ This assertion is supported by the Act, which requires commissioners to affirmatively vote by majority of its "authorized membership" to identify violations in order to subsequently pursue them in court.¹⁴⁰ Without at least three commissioners to vote, there could not possibly be a majority out of four, and therefore, ELEC's current structure may have prevented the Advisory Opinion from carrying with it the requisite number of affirmative commissioner votes necessary for most public agencies to properly conduct their administrative business.

While the ostensive invalidity of ELEC's decision is likely to go

134. See *King v. N.J. Racing Comm'n.*, 511 A.2d 615, 618 (N.J. 1986) (emphasis added).

135. See *id.*; see also *Campbell*, 961 A.2d at 784-85 (discussing *In re Fichner*, 660 A.2d 545 (N.J. Super. Ct. App. Div. 1995), *aff'd*, 677 A.2d 201 (N.J. 1996), and noting in *Fichner*, which concerned the State Board of Master Plumbers, the Appellate Division found the disqualification of members of the Board did not diminish the Board's "denominator" for quorum purposes).

136. See *King*, 511 A.2d at 618-19 (accepting the rationale of the case law *supra* note 132, as applied to a state agency).

137. See Gallagher, *supra* note 73.

138. *Id.* For purposes of quorum, the reason for Commissioner Timpone's recusal is irrelevant. See *King*, 511 A.2d at 618.

139. See discussion *supra* note 128; *King*, 511 A.2d at 618; *Campbell*, 961 A.2d at 784-85.

140. See N.J. STAT. ANN. §§ 19:44A-41(d), -22(2)(d).

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unchallenged (due to, *inter alia*, lack of standing for parties who would challenge the decision),¹⁴¹ the problems associated with ELEC's decision-making stem directly from Governor Christie's failure to appoint a fourth commissioner. One commissioner, like Mr. Timpone, cannot shoulder blame for ELEC's structural deficiencies, as conflicts and recusal in connection with a lawyer's ethical duties commonly arise in the course of his or her profession. However, recusal should not operate to then stifle an agency from engaging in its statutorily mandated business or invite parties to take actions without fear of enforcement by the regulatory bodies that govern those actions. Once again, these issues plaguing ELEC's structure would be substantially cured by the gubernatorial appointment of a commissioner to the vacant seat.¹⁴²

141. Advisory Opinion 01-2014 faces a potential challenge in the "potential class-action lawsuit, *GW Car Serv. LLC v. State*[, No. 2:14-cv-01319 (N.J. Super. Ct. Law Div. Jan. 13, 2014)]," a suit consisting of car companies suing the State of New Jersey over economic damages stemming from the Bridge Lane Closure Scandal. See Michael Booth, *Christie Campaign Gets Green Light To Use Election Funds for Legal Fees*, N.J. L.J., Feb. 17, 2014, at 1, available at <http://www.njlawjournal.com/id=1202642531799>; Martin Bricketto, *Livery Cos. Sue NJ Over 'Bridgegate' Closures*, LAW360 (Jan. 14, 2014, 7:21 PM), <http://www.law360.com/articles/501104>. The attorney for the plaintiffs in the suit, Michael J. Epstein of Epstein Law Firm P.A., wrote to ELEC in connection with this matter, stating that if ELEC allowed the Christie campaign to utilize their existing funds, the account would be depleted—drying up funds "which may be necessary to compensate our clients, as well as potential class members who have suffered as a result of these improper unlawful lane closures." See Joshua Alston, *Christie Campaign Can Spend Funds On 'Bridgegate' Costs*, LAW360 (Feb. 11, 2014, 4:44 PM), <http://www.law360.com/articles/508867/christie-campaign-can-spend-funds-on-bridgegate-costs>. Mr. Sheridan rebutted Mr. Epstein's claims on behalf of the campaign, stating that "[w]ere the commission to deny [the campaign's] request, this money would not be available for damages in any civil lawsuit. It would go back to the state." *Id.* The Commission evidently agreed with Mr. Sheridan through their eventual allowance of expenditures notwithstanding Mr. Epstein's pleas.

142. In light of the foregoing, even with all four commissioners appointed, a minimum of three commissioners must participate to establish quorum, and three must also actually vote in agreement in order to establish "a majority of the authorized membership thereof." See N.J. STAT. ANN. §§ 19:44A-41(d), -22(2)(d).