

Proposed Change to Application of the Two-Year Bar in Adjudicatory Proceedings

The Joint Commission on Public Ethics (the “Commission”) has a legislative mandate under Executive Law §94(1) to conduct a comprehensive review of prior opinions and guidance issued by its predecessors and to address any inconsistencies. In so doing, the Commission has determined that the two-year bar is applied inconsistently to former State employees who seek to participate in adjudicatory proceedings as attorneys and expert witnesses. Below, the Commission details proposed changes to this specific application of the two-year bar in order to address these inconsistencies. The Commission seeks feedback from the regulated community regarding the proposed changes.

The Commission notes that the lifetime bar may impose additional restrictions on former State employees who wish to participate in adjudicatory proceedings as attorneys and expert witnesses. Those restrictions are not addressed here.

Two-Year Bar: General Application

The two-year bar, contained in Public Officers Law §73(8)(a)(i), prohibits former State officers and employees, for two years following their separation from State service, from (a) appearing or practicing before their former agencies (the “appearance/practice” clause), and (b) rendering services for compensation, in relation to any case, proceeding, application, or other matter before their former agencies (the “back room services” clause). The Commission and its predecessor agencies have determined that the appearance/practice clause prohibits any former State employee from, among other things, engaging in certain communications with his former agency during the two-year period, including: submitting a response to a Request for Proposal issued by his former agency; negotiating a contract with his former agency; submitting a grant proposal or application to his former agency; or representing a client in an audit before his former agency.

The “back room services” clause of Public Officers Law §73(8)(a)(i) prohibits a former employee from rendering services in relation to any case, proceeding or application or other matter before the individual’s former agency, “even in the absence of a personal appearance.” The Commission and its predecessor agencies have determined that during the two-year period, the clause precludes, among other things, a former State employee from accepting compensation to prepare documents for a private firm when it is reasonably foreseeable that the documents will be reviewed by the individual’s former agency. Moreover, a former State employee may not accept compensation for assisting another person in the creation or development of (i) an application to be submitted to the former employee’s State agency, or (ii) a plan or strategy for influencing a decision of the former employee’s State agency.

Two-Year Bar: Application to Adjudicatory Proceedings

In past Advisory Opinions, predecessor agencies to the Commission have addressed questions concerning the application of the two-year bar to the activities of a former State employee with respect to adjudicatory proceedings involving the former employee’s State agency. The rules promulgated by predecessor agencies have evolved over the years and have, at times, developed along disparate paths. The end result is a patchwork of precedent that is dependent upon the venue in which the dispute is being heard; the party the former State

employee is representing or testifying on behalf of; the role – attorney or witness – the former employee is playing; and whether the former employee is being compensated for his services.

For example, under current precedent, in an adjudicatory proceeding involving a non-State party and an individual's former State agency, the two-year bar *prohibits* the former State employee from receiving compensation for representing his former agency in the matter. The two-year bar, however, does *not* prohibit the former State employee from representing the non-State party. But, when representing the non-State party, the two year bar *prohibits* the former employee from participating in settlement discussions with, and directly requesting documents from, his former agency in the course of that representation. (For more background on this issue, see Advisory Opinions Nos. 89-07, 92-22, 95-28, 00-01, 01-04, 02-04, 07-02.)

This confusing framework necessitates review by the Commission. Consequently, the Commission is considering issuing new guidance that would clarify the restrictions the two-year bar places on former State employees who seek to undertake certain activities in relation to adjudicatory proceedings involving their former agencies. The guidance would also articulate restrictions that, in the Commission's estimation, better comport with the language and purpose of the two-year bar.

The Commission is seeking input from individuals and entities that would be impacted by the proposed guidance. Below is a brief explanation of the changes to the current rules the guidance proposes to make, as well as the rules that will be left unaltered.

If you have comments, questions, or suggestions, please email legal@jcope.ny.gov with the subject line "Adjudicatory Proceedings" no later than September 5, 2014.

**OVERVIEW OF RULES IN THE PROPOSED GUIDANCE ON THE APPLICATION
OF THE TWO-YEAR BAR TO LAWYERS AND EXPERT WITNESSES**

SERVICE AS AN ATTORNEY

	CURRENT RULE	PROPOSED RULE
Representation of Non-State Party	Compensated – Permissible <i>provided that</i> the individual does <i>not</i> (i) engage in any settlement discussions or (ii) discovery-related activities involving the State agency or State party.	Compensated – Prohibited
	Uncompensated – Permissible provided that the individual does not (i) engage in any settlement discussions or (ii) discovery-related activities involving the State agency or State party.	Uncompensated – Prohibited, except for “backroom services.”
Representation of State Party	Compensated – Prohibited	SAME
	Uncompensated – Permitted	SAME

SERVICE AS A TESTIFYING EXPERT

	CURRENT RULE	PROPOSED RULE
Expert Witness for Non-State Party	Compensated — Permitted	Compensated — Prohibited
	Uncompensated – Permitted	Uncompensated — Prohibited unless (i) engaged in “back room services” or (ii) testimony is pursuant to a validly issued subpoena
Expert Witness for State Party	Compensated – Permitted if Public Officers Law §73(8-a) is satisfied	SAME
	Uncompensated – Permitted	SAME