

**STATE OF NEW YORK
COMMISSION ON PUBLIC INTEGRITY**

Advisory Opinion No. 11-03

The lifetime bar set forth in Public Officers Law §73(8)(a)(ii) prohibits a former employee of the Department of Health from performing services related to the amendment or revocation of regulations she participated in drafting while in State service.

INTRODUCTION

The New York State Commission on Public Integrity (“Commission”) issues this advisory opinion in response to a request submitted by [], a retired employee of the New York State Department of Health (“DOH”).

The Commission hereby renders its opinion, pursuant to Executive Law §94(15), that Public Officers Law §73(8)(a)(ii) prohibits [the former State employee] from rendering services before her former agency, regardless of whether she receives compensation, and from rendering services for compensation anywhere else, when such services are in relation to the amendment or revocation of regulations governing [] that she participated in preparing while employed by DOH because she would be rendering services in relation to a transaction with respect to which she was directly concerned, in which she personally participated, and which was under her active consideration while in State service. To the extent Advisory Opinion No. 10-05 is inconsistent with this opinion, it is hereby overruled.¹

BACKGROUND

[The former State employee] worked for DOH for [] years until she retired from State service in [date]. At that time, [the former State employee] was the [job title] of DOH’s

¹ Accordingly, from the date of this Advisory Opinion the person who requested Advisory Opinion No. 10-05 may no longer engage in the activities or provide the services at issue under the circumstances described in Advisory Opinion No. 10-05.

Division of []. At DOH's Division of [], [the former State employee] was responsible for implementing grant programs, participating in the development of [] regulations and forms, and overseeing the approval processes of [] providers and the surveillance of activities of these providers. As Division [job title], [the former State employee] participated in the approval of, among other things, budgets, enforcement decisions, policy directives, regulatory packages, requests for proposals, and grant awards.

Before transferring to DOH's Division of [], [the former State employee] was a member of DOH teams that drafted [] regulations. All of the regulations that [the former State employee] participated in preparing as a DOH employee have been formally adopted through the process required by the State Administrative Procedure Act.

[The former State employee] proposes to become the executive director of an advocacy organization entitled []. In that capacity, she would, among other things, communicate with DOH regarding the amendment or revocation of one or more of the regulations in the preparation of which she participated while at DOH. [The former State employee] requests an opinion as to whether the lifetime bar prohibits her from rendering such services. For the reasons set forth below, the Commission determines that it does.

APPLICABLE LAW

Public Officers Law §73(8)(a)(ii), commonly referred to as "the lifetime bar," provides:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

DISCUSSION

Last year the Commission issued Advisory Opinion No. 10-05 interpreting the lifetime bar provision. In that Advisory Opinion, the Commission determined that, when applying the lifetime bar to a former State employee who participated in the drafting of a statute or regulation, the relevant “transaction” is the creation of the statute or regulation, and that the transaction ends when the relevant provision is publicly enacted. *Id.* at 3-4. In Advisory Opinion No. 10-05, the Commission determined that the lifetime bar only prohibits a former State employee from subsequently rendering services *on* the same “case, proceeding, application or transaction.” The Commission determined that once the “legislative/regulatory creation” has been completed, however, the lifetime bar does not prohibit a former State employee from rendering services repudiating the program that he or she worked to create. Although this “may strike some as embittered and hypocritical,” the Commission wrote, “the law does not preclude such motivations. We are the guardians of public ethics, not private morals.” Advisory Opinion No. 10-05 at 5.

Advisory Opinion No. 10-05 purports to be based on principles of statutory construction, policy concerns, and judicial and Commission precedent. For the reasons set forth below, the Commission has determined that Advisory Opinion No. 10-05 is inconsistent with well-accepted principles of statutory construction, that it erroneously characterized controlling judicial and Commission precedent, and that it is inconsistent with the doctrine of *stare decisis*. Therefore, to the extent Advisory Opinion No. 10-05 is inconsistent with this Advisory Opinion, it is overruled.

Advisory Opinion No. 10-05

Advisory Opinion No. 10-05 focused on the critical statutory language that imposes the lifetime bar against a former State employee only “in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.” Public Officers Law 73(8)(a)(ii). More particularly, Advisory Opinion No. 10-05 relied upon the canon of statutory construction “sometimes referred to as the rule of *noscitur a sociis*, [pursuant to which] words employed in the statute are construed with, and their meaning is ascertained by reference to the words and phrases with which they are associated.” Book 1, Statutes, McKinney’s Consolidated Laws of New York, Section 239(a). Advisory Opinion No. 10-05 at page 3 pointed to the words “case,” “proceeding,” and “application” immediately preceding “transaction,” as follows:

All of these latter terms describe a particular event with defined parties, subject matter and time horizon. In this context, ‘transaction’ should also be seen as a similarly discrete event, in which particular parties come together to conduct a particular piece of business.

Advisory Opinion No. 10-05 concluded that the challenge to the validity of the late fee program as applied to tardy [] amendments was not related to the transaction that consisted of the legislative and administrative adoption and implementation of the program in the creation of which the former State employee was heavily involved. Advisory Opinion No. 10-05 reached that conclusion because the transaction, consisting of the adoption of the program, had already been concluded. “The process of creating the late fee program — the transaction here — is long finished. As noted above, transactions are not open-ended and this one has run its course.” Advisory Opinion No. 10-05 at p. 3.

Advisory Opinion No. 10-05 also articulated a policy reason for a time-constrained meaning to “transaction,” namely, that without a defined time horizon the statute would unduly burden former senior agency executives and counsel. “A contrary conclusion would essentially make the two-year bar coterminous with the lifetime bar.” Advisory Opinion No. 10-05 at 4. Since such executives broadly and routinely participated in the “legislative and regulatory amendments [under] [sic] their agency’s mandate,” a definition of transaction to include “those same amendments . . . would effectively create a lifetime bar for those executives.” *Id.*

Advisory Opinion No. 10-05 next addressed the Third Department’s decision *Gormley v. New York State Ethics Commission*, 46 A.D.3d 1078 (3d Dep’t 2007), *aff’d*, 11 N.Y. 3d 423 (2008). Advisory Opinion No. 10-05 distinguished the decision on the basis that “the petitioner was compensated for submitting an affidavit that relied upon his insider knowledge of a State Medicaid reimbursement system.” *Id.* at 4. Advisory Opinion No. 10-05 stated that since the former State employee in question did not submit a similar affidavit or expressly rely on insider knowledge in his challenge to the late fee program he helped to create, the *Gormley* decision did not control. “As the facts stand, however, [the former State employee] merely represents a client who wishes to challenge the law and [the former State employee] is acting as his lawyer in the matter relying upon the same facts, information and legal theories as any other lawyer.” *Id.* at 5.

Advisory Opinion No. 10-05 distinguished three prior opinions of the Ethics Commission, Advisory Opinions Nos. 92-20, 93-02, and 97-20, in each of which the lifetime bar was held to apply to proposed lobbying activities of former State agency officials. Advisory Opinion No. 10-05 stated that in those cases, the transactions were still in process because “the legislative/regulatory creation was ongoing and the former employees sought to be involved in

that process.” *Id.* at 5. That argument does not withstand further scrutiny.

Advisory Opinion No. 10-05 is in Error

Advisory Opinion No. 10-05 does not claim that the plain meaning of the word “transaction” in and of itself imparts “a particular event with defined parties, subject matter and time horizon”. Advisory Opinion No. 10-05 at 3 (emphasis added). As we note above, the opinion derives its interpretation of that term from the common meaning of the words with which it is associated in the statute, applying the canon of statutory construction called *noscitur a sociis*. Karl Llewellyn, the celebrated legal philosopher and commercial law scholar, famously expressed cogent skepticism toward any total reliance on canons of statutory construction. He observed that “there are two opposing canons on almost every point,” and cautioned that “[p]lainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon.” K.N. Llewellyn, *The Common Law Tradition — Deciding Appeals* (1960) (Appendix C, Canons on Statutes) at p. 521 (emphasis added). Indeed, Llewellyn (*Id.* at 529) cited and quoted from a decision invoking the very opposite canon to *noscitur a sociis*: “a word may have a character of its own not to be submerged by its association.” *Russell Motor Car Co. v. United States.*, 261 U.S. 514, 519 (1923).

The application of *noscitur a sociis* here is even more strained. Although 1954 ethics legislation barred former State employees for two years from receiving compensation for services in relation to any “case, proceeding or application” (1954, Ch 695, §4), “transaction” was not added to the statute until 1987, when the bar also was extended to the actor’s lifetime (L. 1987, Ch. 813, §8). Any inference that the Legislature intended “transaction”

to be constrained by the common characteristics of “case, proceeding or application” seems far weaker when the linkage only occurred some 33 years later.

For several reasons, “transaction” demands a more expansive and less time-constrained meaning than we held in Advisory Opinion No. 10-05. The legislative history is instructive. The lifetime bar was first included in a comprehensive Ethics in Government Act, proposed and enacted as a Governor’s Program Bill at the 1987 Legislative Session (L. 1987, Ch. 813). The Governor’s Memorandum on the Bill stated that it was “designed to limit opportunities for abuse of official positions and eliminate any appearance of undue influence or illegal profit-taking by executive officers and employees.” Bill Jacket L. 1987, Ch. 813 at 5-6 (emphasis added).

The Governor’s Memorandum stated that the bill provided new prohibitions for State officers and employees “from ever appearing, practicing, communicating or otherwise rendering services in relation to matters in which the employee was directly concerned and personally participated.” *Id.* at 7 (emphasis added). The open-ended term “matters” lacks the narrow, time-constrained connotation given “transaction” in Advisory Opinion No. 10-05.

Based upon the foregoing and other facets of the legislative history of the Ethics in Government Act, the appellate courts, looking to the overall purpose of the Act, have given broad application to various provisions of the lifetime bar in other respects. Those statutory purposes were identified as follows:

The ban is designed to prevent former public servants from falling prey to one form of conflict of interest, or the appearance of a conflict, and from taking unfair advantages of their insider’s knowledge and contacts, including the confidences and secrets they may have gained while working on the matter on behalf of the State.

Forti v. New York State Ethics Commission, 75 N.Y. 2d 596, 611 (1980) (emphasis added).²

[T]he Legislature’s primary purpose for enacting the statute [was] to prevent former agency employees from attempting to further their own monetary interest, or the interests of other individuals and entities by utilizing inside information obtained in state service or asserting undue influence on former colleagues who continue to be employed by the State.

Matter of McCulloch v. New York State Ethics Commission, 285 A.D. 2d 236, 241 (3d Dep’t 2001) (emphasis added).

Notably, Advisory Opinion No. 10-05 totally ignored, if not rejected (“we are the guardians of public ethics, not private morals”) the statutory purpose to forestall even the appearance of a conflict of interest, as was identified by our highest court in *Forti*.

At the very least, the conduct of the former State employee at issue in Advisory Opinion No. 10-05 showed an appearance of a conflict of interest. In the former State employee’s role as executive director of his agency: (1) he was the driving force behind the successful five-year effort to gain statutory authority for the imposition of fines for tardy compliance with the filing requirements of the governing act; (2) he directed the regulatory and implementation of that statutory authority; (3) he drafted and published guidelines that specifically addressed the need for timely filing of amendments; and (4) from [date] until his departure from his agency in [date], he presided numerous times over the imposition of those statutorily authorized late fees, including late fees for late [] amendments. Now, as a compensated attorney for a tardy [] amendment filer, he sought to repudiate totally the statutory authority he was instrumental in achieving for his agency, the guidelines he promulgated asserting that authority, and the multiple late fees imposed during his regime for late amendments, which undeniably only were

² The Court also used the open-ended term “matters” in describing the lifetime bar as extending to “matters in which [former State employees] were directly involved during their governmental service.”

valid if statutory authority had existed.

On the basis of the foregoing and upon our further reflection, we conclude that our conclusion in Advisory Opinion No. 10- 05 contradicted the letter and spirit of the legislation. Public Officers Law §73(8)(a)(ii) does not only merely prohibit a former State employee from working “on” a transaction on which he or she worked while in State service. The lifetime bar prohibition is broader. The statute prohibits a former State employee from providing services “in relation to” a transaction on which he or she worked while in State service, and services can be “in relation to” a transaction that already has been completed.

Policy Concerns: There is No Demonstrated Undue Burden on Former Agency Executive Directors, General Counsel, or Other High Echelon Agency Officials

Advisory Opinion No. 10-05 reflects no awareness that the expansive definition of “transaction” it criticized had been applied consistently by the Ethics Commission for almost two decades. As will be shown in later discussion, in various advisory opinions and enforcement proceedings the Ethics Commission routinely applied the expansive, functional approach to “transaction” articulated in Advisory Opinion No. 92-20. If that broad interpretation of transaction were unduly burdensome to former agency executives and general counsel, as Advisory Opinion No. 10-05 suggests (at 4), some oppressed former official surely would have challenged the Ethics Commission’s reading of “transaction” in the courts. Yet, it appears that only one challenge to the Ethics Commission’s application of the lifetime bar may have concerned the term “transaction” (*see, Matter of Gormley v. New York State Ethics Commission, supra*). The realities of post-State service governmental relations work by former State agency executives and counsel do not, accordingly, seem to support the chilling impact expressly feared by Advisory Opinion No. 10-05.

Matter of Gormley

William J. Gormley was a DOH Senior Manager who left in 1995 after 21 years in State service. He was instrumental in developing and implementing the so-called “RUGS II” nursing home rate-reimbursement system between 1983 and 1986. Eighteen years later, Gormley was retained as an expert on behalf of various nursing homes in their lawsuit challenging the RUGS II methodology for its reliance on outdated and unrepresentative 1983 cost data. In support of the nursing homes’ case, Gormley submitted an affidavit critical of DOH’s continual use of 1983 as the base cost year for rate setting. Gormley’s affidavit also “touted his role in creating this system,” and further averred that in that role he “never . . . intended the base year. . . . to ever last as long as it has.” 46 A.D. 3d, at 1080.

Gormley’s activities in the nursing homes’ lawsuit were the subject not of an advisory opinion, but a proceeding seeking the imposition of a civil penalty for his knowing and intentional violation of Public Officers Law §73 (8)(a)(ii), the lifetime bar. The Ethics Commission found after a hearing that Gormley knowingly and intentionally violated the lifetime bar and imposed a \$3,500 penalty. Then, the Appellate Division, Third Department — the Court having direct jurisdiction over our Commission ↓ upheld that determination. Of course, rejection of *Gormley* as a binding precedent, whether expressly or implicitly, is not an option for this Commission.

Gormley is directly on point on the determinative issue in Advisory Opinion No. 10-05 of whether the former employee’s challenge to the validity of the late fee program was “in relation to” the same transaction as the authorization, adoption, and implementation of that program through his efforts as executive director of his former agency. *Gormley* requires us to

conclude that Advisory Opinion No. 10-05 reached the wrong result.

The adoption and implementation of the RUGS II system had been completed by 1986, and Gormley's activities in 2004 were not directed toward any regulatory or legislative proposal to modify or supersede RUGS II. In other words, as to the RUGS II program in *Gormley*, just as Advisory Opinion No. 10-05 found as to the late fee program, the DOH was not "still in the process of enacting regulations or the administrative process to enforce the [RUGS II] program . . . the process of creating [the RUGS II] program — the transaction here — is long finished. As noted above, transactions are not opened ended and this [RUGS II] one has run its course." Advisory Opinion No. 10-05 at 3.

Unpersuasive Effort in Advisory Opinion No. 10-05 to Distinguish Advisory Opinion Nos. 92-20, 93-02 and 97-20

Advisory Opinion No. 10-05 purported to distinguish Advisory Opinions Nos. 92-20, 93-02, and 97-20 on the ground that in each "the legislative/regulatory creation was ongoing and the former employee sought to be involved in the process." Advisory Opinion No. 10-05 at 3.

Advisory Opinion No. 97-20 flatly contradicts the characterization that the activity in which the former State employee proposed to engage was part of an ongoing, incomplete legislative or regulatory process and on that basis was part of the same State service transaction. In Advisory Opinion No. 97-20, the former State employee proposed to join an agency task force to review and revise certain regulations adopted during her period of State service. The regulations to be reviewed by the task force fell into seven categories. The Ethics Commission concluded that the lifetime bar did not apply to six of the seven, either because the former employee's role in the regulatory scheme was so minor that she was not "directly concerned," did not participate personally, or did not have it under active consideration, or because the regulatory

scheme had been altered so drastically after she left State service that it no longer constituted the same transaction. The Ethics Commission imposed the lifetime bar with respect to the single remaining category, the regulation the task force was to review, despite the fact that there was no “ongoing” regulatory process. “The amendment that the former employee wrote with respect to ‘continuation of the base’ is still intact and has not been subject to any revisions or further amendments. Thus, it is clear that she personally participated in the adoption of the amendment, and it is a transaction covered by the lifetime bar.” Advisory Opinion No. 97-20 at 15 (emphasis added). Likewise, the lifetime bar covers [the former State employee’s] participation in preparing prior regulations at DOH.

Advisory Opinion Nos. 92-20, 93-20, and 97-20 have other significance to whether Advisory Opinion No. 10-05 should be overruled. These and other Advisory Opinions rendered since Advisory Opinion No. 92-20 demonstrate that over time the Ethics Commission developed a body of lifetime bar jurisprudence that consistently applied the same criteria, by which the functional analysis compared subject matter, purpose, parties and population affected and ultimate goal to determine whether the compensated activities of former high level agency officials were in relation to transactions in which the former employees were involved while in State service. Further illustrations include Advisory Opinion Nos. 93-13, 94-9, and 95-26. All of these opinions applied the foregoing criteria.

The failure of the Legislature to reformulate the statute, notwithstanding its repeated (and consistent) judicial and administrative construction over the years, is telling. It is black-letter law that “[w]here the practical construction of a statute is well known, the Legislature is charged with knowledge and its failure to interfere indicates acquiescence therein.” *RKO - Keith-Orpheum Theaters, Inc. v. City of New York*, 308 N.Y. 493, 500 (1955); *Engle v.*

Talarico, 33 N.Y. 2d 237, 242 (1973). That principle applies here with compelling force.

Advisory Opinion No. 10-05 is Overruled

As we have demonstrated, Advisory Opinion No. 10-05 represents a drastic departure from a body of Ethics Commission advisory opinions regarding the meaning and proper application of “transaction” in the lifetime bar statute. In making a definite “time horizon” largely dispositive for determining whether the current activity of a former State agency executive related to the same transaction with which that person was involved in State service, it can fairly be said that Advisory Opinion No. 10-05 converted the lifetime bar consistently applied in previous opinions into a two or perhaps three or four-year bar, without fully or fairly considering the previous jurisprudence.³

Under these circumstances, the opinion by Chief Judge Breitel in *People v. Hobson*, 39 N.Y.2d 479 (1976), is instructive. There, the Court of Appeals confronted three recent precedents which, the opinion demonstrated, were inconsistent with and seriously diluted a much earlier and more coherent and consistent body of decisional law on the New York constitutional right to counsel in criminal cases. Here, we have only one recent precedent that undermines to the point of silently overruling a body of sound precedent developed and applied over two decades.

In *People v. Hobson*, Chief Judge Breitel explained why a precedent like Advisory Opinion No. 10-05 should be overruled. First he quoted from Justice Frankfurter:

³ For the reasons stated in the dissent to Advisory Opinion No. 10-05, the majority opinion violates the rule of *Matter of Charles A. Field Delivery Service*, 66 N.Y.2d 516, 517 (1985): A decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.

We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.

39 N.Y.2d at 487. Chief Judge Breitel added his own justification for overruling an anomalous precedent:

Of course, it would be foolhearty not to recognize that there is a potential for jurisprudential scandal in a Court which decides one way one day and another way the next; but it is just as scandalous to treat every errant footprint barely hardened overnight as an inescapable mold for future travel.

Id. at 488 (emphasis added).

To the claim that an errant, recent precedent which had itself ignored or disregarded a body of earlier precedent should be accorded the benefit of *stare decisis*, Judge Breitel retorted:

Indeed, the true doctrine by its own vitality should not, perversely, give to its violation strength and stability. That would be like the parricide receiving mercy because he is an orphan.

Id. at 487.

Just as in *People v. Hobson*, the Commission views the Advisory Opinion No. 10-05 as an “errant footprint.” Here, we endeavor to correct it as quickly as possible and return to the sounder, more consistent and coherent body of opinions applying an expansive meaning of “transaction” to effectuate the letter and spirit of the lifetime bar statute.

The Grave Implications of Advisory Opinion No. 10-05 and the Dissenters’ Position Here

The Legislature in enacting the 1987 Ethics in Government Act, and the Ethics Commission in interpreting and applying it, each adopted a broad approach that was both realistic and prophylactic. The approach recognized that the institutional knowledge acquired

by a former State employee respecting a matter on which he or she worked during State service could be exploited for compensation even without any explicit reference or reliance. Thus, the 1987 statute created the lifetime bar and the Commission applied it to any case, proceeding, application or transaction in which the former public officer was actively involved, without requiring proof of the kind of overt reliance on insider's information seen in *Gormley*.

Consistent with that approach, the Legislature did not expressly include time constraints on the effective existence of each of the terms triggering application of the lifetime bar and, before Advisory Opinion No. 10-05, neither this Commission nor its predecessor imposed any such time constraints. Indeed, the very concept of a lifetime bar is inconsistent with time constraint.

The pillars of Advisory Opinion No. 10-05 and the dissenters' positions here are that each of the terms "case, proceeding, application or transaction" in the lifetime bar statute must be accorded similar connotations (*see*, Advisory Opinion No. 10-05 at 3); that each term should be interpreted to include a defined "time horizon" (*Id.*), so upon completion or consummation of the case, proceeding, application or transaction, the former State employee who had been directly concerned with or who personally participated in one of those matters was free to revisit it and actively engage for compensation in modifying, amending or repealing it; and that "transaction" does not include the drafting of rules, regulations, or regulation. These arguments, if sustained, would effectively overrule or at least cast in great doubt the following, non-exhaustive list of earlier Advisory Opinions:

Advisory Opinion No. 91-2. Former employee of a public benefit corporation who served as its Vice President for Finance and who entered into a consulting contract with his former agency "may not for a fee recite specific facts to his former State agency on past transactions, including any

investments, in which he personally participated and was directly concerned or which were under his active consideration.” (emphasis supplied)

Advisory Opinion No. 91-18. Former Fire Protection and Safety Specialist for a State agency subject to lifetime bar is precluded from working “on any modification or extension of existing projects, training, designs, reviews, inspections or other transactions while with the [State agency].” (emphasis supplied)

Advisory Opinion No. 93-13. Former employee of the Executive Chamber, who had lobbied Congress on behalf of the State regarding legislative subsidies for defense firms to convert to peace time production, leading to enactment of the “1993 Defense Appropriations Act”, proposed to lobby Congress for private clients regarding amendments to the Act. “The Commission concludes that the transaction is the same. [The requesting individual] wishes to influence and alter the structure and formula of the very Act on which he lobbied,” (however, conduct permitted because of no direct participation in the Congressional enactment).

Advisory Opinion No. 93-18. Former Commissioner of a State agency is barred from actively participating on behalf of a company regulated by the former agency from participating in an application to reopen a prior proceeding which was finally determined adversely to the company, where the former Commissioner dissented. (Former Commissioner permitted to attend the application proceeding as a member of the public “so long as he did not seek to intervene”.)

Advisory Opinion No. 95-26. Former State Office of Mental Health (“OMH”) employee who was OMH liaison to a private residential treatment facility hired as a new director of that facility, subject to the lifetime bar for State-related “programmatic and budgetary matters which amend, modify or repeal initial decisions in which she was involved while at OMH”; “[former OMH employee] may also engage in activities which seek clarification of, or changes to existing regulation or policy, provided she was not directly concerned with or personally participated in or actively considered the regulation or policy while she was employed by OMH.” (emphasis supplied)

As the wide scope of these foregoing lifetime bar Advisory Opinions demonstrates, the approach of Advisory Opinion No. 10-05 and the dissenters here would drastically weaken the impact of the lifetime bar statute and cast in doubt the validity of an entire body of precedents that have bound this Commission, without demonstrated justification. This Commission, therefore, rejects the dissenters’ position here, overrules Advisory Opinion No. 10-05, and returns

to the coherent, consistent body of lifetime bar precedents previously in place.

CONCLUSION

[The former State employee] proposes to become the executive director of an advocacy organization entitled []. Appearing before her former agency, or anywhere, for the purpose of effecting an amendment or revocation of the same regulations that she drafted while employed at DOH would be “in relation to” a transaction with which she was directly concerned, in which she personally participated, and which was under her active consideration while at DOH. Thus, [the former State employee] is prohibited by the lifetime bar set forth in Public Officers Law §73(8)(a)(ii) from rendering such services before her former agency, regardless of whether she receives compensation, and from rendering such services for compensation anywhere else. Moreover, to the extent that Advisory Opinion No. 10-05 is inconsistent with this opinion, it is hereby overruled.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for the opinion or related supporting documentation.

Concur:
Mitra Hormozi,
Chair

Virginia M. Apuzzo
Hon. Richard J. Bartlett
Vernon Broderick
John M. Brickman
Hon. Howard A. Levine
John T. Mitchell,
Members

Concurring:
Richard D. Emery
Member

Dissent:
George F. Carpinello
Member

Dissent: Mark
G. Peters
Member

DATED: June 28, 2011

Commissioner Richard D. Emery, concurring:

The thorny issue posed by the [the former State employee's] request for an advisory opinion is whether the lifetime bar precludes former State employees from challenging the validity or applicability of rules, regulations or legislation of general application which they helped enact when in State service. On the one hand, there is an inescapable unseemly appearance when any public servant, especially a lawyer, creates a regulatory scheme and then later converts that experience into personal gain by selling expertise to challenge his/her creation on behalf of a client or new employer. It is especially troublesome if the former State employee opines from personal knowledge acquired during State service that there are defects in a rule because, s/he claims "that was not the way I/we intended it." On the other hand, advocates on behalf of clients routinely take legal positions and challenge rules, regulations or statutes of general application that they may previously have defended or supported for another former client, even the State. So the question is how has the New York State Legislature regulated the role of former State employees when a private client asks them to challenge their earlier State work before their former agency or the Legislature itself.

The starting point is the applicable statute-- Public Officers Law §73(8)(a)(ii):

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity *in relation to any case, proceeding, application or transaction* with respect to which such person was directly concerned and in which he or she personally participated during the period of his or her service or employment, or which was under his or her active consideration. (italics added)

The struggle here is how should the italicized phrase be interpreted. Notwithstanding

the many differences between the majority opinion and the dissents, the one point all agree on is that the key word is “transaction” and that “case, proceeding, application” have no relevance to the instant matter. Modified by the words “in relation to,” the question to resolve is what the Legislature meant by “in relation to any... transaction.” Does “transaction” include work on rules, regulation or legislation of general application while in State service? If so, the lifetime bar applies.

I need not rehearse the arguments of my fellow commissioners except to say that I disagree with the artful attempt at a limiting principle articulated by Commissioner Peters-- that “transaction” *does* include work on rules, regulations or legislation but, that once that work is *complete*, the lifetime bar *does not* apply. The problem with this position, which is also reflected in Advisory Opinion No. 10-05 (overruled today), is that the statute’s words, “in relation to any... transaction,” conflict with the limit Commissioner Peters and Advisory Opinion No. 10-05 would have us impose. It is hard to imagine a challenge by a former State employee to a rule, regulation or law that is not “in relation to” it. Thus, as a matter of inexorable logic, once one concedes that “transaction” in any way comprises rule, regulation or law, the jig is up.

More forcefully, Commissioner Carpinello argues that “transaction” cannot be understood in either common parlance or otherwise to encompass rule, regulation or law of general application. I have a lot of sympathy for this position, both logically and as a matter of public policy. The word “transaction” is a pretty weak attempt at capturing the concept of a rule, regulation or law. Legislators usually do better than this when they define their terms. Also, it is draconian, and perhaps unique to New York, to disqualify former State employees from challenging on the merits, rather than based on inside knowledge or confidences gained,

matters on which they previously worked while in State service. Part of serving the State is gaining expertise that may later be marketable in the private sector as long as what is purveyed is knowledge on the merits and not appropriated State intellectual property. In my view this concern was the essence of why we recently erroneously upheld, in Advisory Opinion No. 10-05, a former agency executive director's representation of clients who challenged the late filing program which he had developed while executive director. In his current representation of his clients, the former executive director limited his arguments to the merits of whether the program was lawful and constitutional; he did not inject his personal knowledge or any State confidential information. This seems wholly reasonable and should be within his rights to practice law and lobby.

While it may seem unseemly to some, including the majority, that the architect of a programmatic or statutory framework later attempts to dismantle her/his construction, as long as the demolition is on the merits and not based on personal assertions of expertise, I believe the perceptual price is worth the freedom to which former State workers are entitled. They should not be constrained more than necessary nor limited more than other advocates.

But the problem with Commissioner Carpinello's position is that prior rulings of this Commission and our appellate courts have plainly found that rules, regulations or legislation, even of general application, *are* encompassed within the meaning of the word "transaction" as used in the Public Officers Law. As strained as these rulings are, and as erroneous as they may be, unlike Commissioner Carpinello, I cannot dismiss them as "error." And, as hard as I might try, I cannot with a clear conscience distinguish them as does Commissioner Peters by denominating them as "completed" rules, regulations or legislation. Though I disagree with much of the majority opinion as to the wisdom of the extant state of the law, it is plain to me

that the majority has correctly concluded that “transaction” has been held to include rules, regulation and legislation of general application. Alongside the phrase “in relation to,” “transaction,” therefore, unavoidably requires that the lifetime bar apply.

As a Commission, we are the functional equivalent of an administrative agency of the State. As such we are required to follow, at a minimum, the applicable precedent of our courts, and give substantial deference to the import of our longstanding Advisory Opinions. In that regard, I have no problem reconsidering and overruling the very recent precedent in Advisory Opinion No. 10-05, because it was so recent and flies in the face of an established prior line of authority. Therefore, I am constrained and I concur with the majority that the applicable precedent applies even though it is ill-conceived. All I can do is recommend that the Legislature reconsider or better define “transaction” in the Public Officers Law to provide former State employees with what they deserve—no unnecessary restrictions on their post-State service. Until the Legislature sees fit to do so, however, I agree that we must overturn Advisory Opinion No. 10-05 and rule that [the former State employee] may not appear before her former department to advocate regulatory changes.

Commissioner George F. Carpinello, dissenting:

I dissent because I do not believe that the term “transaction” as used in Public Officers Law §73(8)(a)(ii) could possibly be stretched to include the drafting of rules and regulations or legislation. Moreover, nothing in the legislative history of the law indicates that the Legislature intended the term “transaction” to include the drafting of rules or legislation.

I also must part company with my fellow dissenter, Commissioner Peters, who argues that the drafting of rules and regulations, may constitute a transaction, but that the transaction ends upon the completion of the drafting or adoption of the rules and regulations.

For me, this is a much simpler matter. Under no possible interpretation of the applicable statute, either generally or specifically, can the Commission hold that a former employee is barred from appearing before his or her former agency with regard to rules and regulations that are of general applicability, as opposed to a specific case, proceeding or transaction that involved particular parties.

As a general matter, the Public Officers Law indicates a legislative judgment that, with regard to a former employee’s exercise of general influence over his or her agency, there should be a two-year “cooling off” period. However, with regard to particular matters, the former employee is subject to the rather draconian lifetime ban. Such a lifetime ban makes sense, as it applies to a specific case, proceeding or transaction involving particular parties. It makes absolutely no sense if it is applied to general policy matters that the employee may have worked on in the form of legislation or regulations.

As to the specific language, it is clear that, if the Legislature intended to bar former State officials from appearing before their former agencies with regard to rules or legislation that they were involved in drafting or commenting on, the Legislature could have easily done

so. The fact that the Legislature did not do so indicates that it was following the general practice of the federal government and states throughout the United States in allowing individuals to appear before former agencies with regard to general policy matters they were involved in.¹

In the absence of clear legislative history to the contrary, well-established case law tells us that words in statutes should be given their ordinary meaning. My dictionary defines “transaction” as “a business deal or agreement.” My copy of Black’s Law Dictionary defines “transaction” as follows:

Act of transacting or conducting any business; negotiation; management; proceeding; that which is done; an affair. Something which has taken place whereby a cause of action has arisen. It must therefore consist of an act or agreement, or several acts or agreements, having some connection with each other, in which more than one person is concerned, and by which the legal relations of such persons between themselves are altered.

Neither definition supports the notion that “transaction” includes the drafting of legislation or rules and regulations.

The concept of a lifetime bar with regard to a particular matter is not new to the Public Officers Law. It has been a principle embodied in legal ethics codes for decades, and that code has been consistently construed to apply to only particular matters involving particular individuals. Particularly instructive is an opinion issued on November 24, 1975 by a committee of the American Bar Association. The ABA committee was interpreting then-existing disciplinary rule 9-101(B), which stated that a lawyer shall not “accept private employment in a matter in which he had substantial responsibility while he was a public employee.” The ABA held that, although the term “matter” was not defined, “the term seems

¹ I know of no state or federal rule in the United States that applies a lifetime ban to work related to the drafting of rules, regulations or statutes, and the majority cites none.

to contemplate a discrete and isolatable transaction or set of transactions between identifiable parties.” Importantly, the committee went on to hold that:

work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures or points of law; the same ‘matter’ is not involved because there is lacking the discreet, identifiable transactions or conduct involving a particular situation or specific parties.

The ABA cited with approval a court opinion² that held that it was “perfectly proper and ethical” for an attorney working in government service to utilize in private practice the working knowledge acquired while in government service. “Were not so, it would be a distinct deterrent to lawyers ever to accept employment with the government. This is distinguishable, however, from the situation where, in addition, a former government lawyer is employed and is expected to bring with him and into the proceedings a personal knowledge of a particular matter.” The ABA went on to say that “a contrary interpretation would unduly interfere with the opportunity of a former lawyer to use his expert technical legal skills, and the prospect of unnecessary limitations of future practice probably would unreasonably hinder the recruiting efforts of various local, state and federal governmental agencies and bodies.”

The New York State Bar Association in 1979 in Opinion Number 506 adopted the reasoning of the ABA committee in interpreting substantially same provision of The Code of Professional Responsibility.³

The majority opinion lacks any explanation as to why the same reasoning should not

² *Allied Realty of St. Paul v. Exchange National Bank of Chicago*, 283 F. Supp. 464 (D. Minn.), *aff’d* 408 F.2d 1099 (8th Cir. 1969).

³ The Code of Professional Responsibility has since been superseded in New York by the Rules of Professional Conduct, which specifically states that “the term matter does not include or apply to agency rule functions.” Rule 1.11(e).

apply here. In fact, most of the majority opinion is devoted to attacking the logic of Advisory Opinion No. 10-05 and its purported failure to adequately distinguish *Gormley v. New York State Ethics Comm.*, 46 A.D.3d 1078 (3d Dep't 2007), *aff'd* 11 NY 3d 423 (2008) and previous precedents of the Commission and the former New York State Ethics Commission. *Gormley* involved very particular facts which are not present here: namely, the former employee's use of information that he learned while in State service in support of his private client's position. That is a slim basis to interpret the statute so as to ban all former State employees from appearing before their former agencies on any matter that relates to any rules, regulations or laws they may have worked on while in State service.⁴

As for the prior precedents of this Commission and the former Ethics Commission, I respectfully believe that those decisions, insofar as they can be construed to apply the Public Officers Law to the drafting of rules and regulations, are simply in error. Significantly, I do not believe that any of those prior opinions adequately explain how, as a matter of simple English, the drafting of such rules and regulations can constitute a transaction. They therefore suffer from the same flaws the majority opinion does here. In any event, the majority's concern for precedent did not deter it from rejecting an opinion that was rendered only a little more than six months ago after extended discussion and debate.

As a policy matter, I think the ABA got it right; the majority's rule will strongly discourage people from going into public service because it will inhibit their ability to use their acquired expertise in their post-public after-life, and it will unnecessarily deprive government of needed expertise.

Take for example, a former general counsel to the Health Department, who, during her

⁴I believe that the more appropriate way to deal with the use of inside confidential information by former employees is to amend the Public Officers Law to specifically provide that former employees may not use such information acquired in State service.

tenure, was involved in reviewing and drafting numerous Department of Health regulations, and advocating changes in the Health Law. That former General Counsel would effectively face a lifetime bar from appearing before her former agency on virtually any matter that touched in any way statutes, rules and regulations that she was involved in reviewing or drafting. That clearly was not the intent of the Legislature in passing the lifetime ban.

Or take the example of an engineer at the Department of Environmental Conservation (“DEC”), who is asked to draft the regulations applying to sanitary landfills. Having acquired an expertise in the area, the employee leaves State service and obtains employment at a private engineering firm which represents numerous municipalities and private clients who operate landfills. That employee would be barred for his entire life from appearing before DEC on any application relating to a landfill because such application would, of necessity, implicate regulations that he worked on while in public service, even if those regulations went through several iterations and changes over the decades.

The flawed logic of the majority opinion can also be exposed by analogous examples involving other public employees, even though those employees are not technically governed by the Public Officers Law. For example, a law clerk to a state or federal judge may be intimately involved in the drafting of an important court decision. Of course, as a matter of legal ethics, that law clerk, upon entering private law practice, could never represent any party on that specific case. But in the majority’s view, that lawyer also could never appear before the court again in *any* other case, if that decision were cited by either side in the dispute. The concept of such a bar would be absolutely absurd to practicing attorneys, yet the majority is imposing exactly that kind of bar on thousands of State employees.

Finally, I believe that there are serious constitutional concerns implicated by the

majority's position. Absent the use of confidential information by a former public employee, I see no reason why that employee should be banned from advocating any change in the rules or legislation she was involved in drafting, or even arguing that those rules are bad public policy, *ultra vires* or unconstitutional. Banning such advocacy interferes with the former employee's exercise of her First Amendment rights, as well as her right to earn a living, for no valid countervailing reason.

Commissioner Mark G. Peters, dissenting:

The present majority opinion overturns this Commission's own precedent and pursues a radical view of the Public Officers Law that will do great harm. This opinion will pose an insurmountable barrier to government service for many in our State. Moreover, it simply is not correct as a matter of law. I dissent.

Bad Public Policy:

Regulations are vast things, often spanning thousands of pages and encompassing entire industries. Virtually every senior official in a regulatory agency, at one time or another, has cause to help draft some portion of his or her agency's regulations. To now hold, as the majority does, that once an official has some hand in drafting some part of a thousand page set of regulations, that they are forever more precluded from appearing on a matter involving those regulations, is to functionally preclude every senior official, from every agency, from ever appearing before their agency in a private context. Contrary to the majority's contention, no such bar has ever been levied before.

The majority may suggest that this is vastly overstates the situation. However, nothing in the opinion as drafted suggests how this is overstated. For example, if an official works on one section of a regulation, the language of the opinion suggests that they may not appear before their agency on that or any other section of the regulations. If the majority means something different, they fail to say so. Moreover, the majority's rule creates a slippery grey slope of distinctions not answered in the opinion: If an official works on one section and may appear on a different section, what about different paragraphs? What if the regulation is subsequently amended after the official leaves service? None of these questions are answered or considered. Yet these are exactly the practical questions that may take years to parse out

and in the intervening time will cause exactly the confusion and uncertainty this body was designed to prevent.

The result is two fold: First, there will be great confusion about the application of this decision. Second, this draconian rule will discourage government service at exactly a time when such service should be encouraged.

Bad Law:

Beyond considerations of public policy, the majority opinion is simply wrong on the law. Advisory Opinion No. 10-05, which this decision overrules, was correct and should be sustained. That Opinion made clear that the creation of a particular regulation is a “discrete event” which ends when the regulation is enacted. Advisory Opinion No. 10-05 at 3. As such, appearing before the agency to argue about the application or amendment of the regulation is a new transaction and not covered by the lifetime bar. *Id.* at 4.

To begin with, like any other adjudicatory body, the Commission has an obligation to respect its own precedent. “Justice demands that cases with like antecedents should breed like consequences.” *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516, 519 (1985) (citations omitted). “A meaningful and searching Article 78 review, therefore, requires inquiry into precedent to ensure that those similarly situated receive similar treatment.” *Frank Lomangino & Sons, Inc. v. City of New York*, 980 F.Supp. 676, 681 (E.D.N.Y. 1997). The policy reasons for consistent results, given essentially similar facts, is “to provide guidance for those governed by the determination made; to deal impartially with litigants; promote stability in the law; allow for efficient use of the adjudicatory process; and to maintain the appearance of justice.” *Field*, 66 N.Y.2d at 518 (citations omitted); *Frank Lomangino & Sons, Inc.*, 980 F.Supp. at 681. If the Commission ignores its precedent and makes inconsistent

determinations, it would compromise these precepts and erode the credibility of its decision making. *Id.*

Further, Advisory Opinion No. 10-05 sets forth a clear, well defined rule that is consistent with the statute it enforces. That statute precludes a State employee from appearing before her/his agency on the same “case, proceeding, application or transaction.” When dealing with the creation of rules and regulations, only the last of these words even has any relevance. In this context, “transaction” must have some meaning and finite borders similar to the other words it is coupled with – the alternative is for “transaction” to swallow all and preclude a State worker from ever appearing before his agency on any matter at all.

The statute does not define “transaction” and so the task of interpreting the broad term and providing clear, practical and readily followable meaning to the word falls to us. *Mounting & Finishing Co. v. McGoldrick*, 294 N.Y. 104, 108-109, 60 N.E.2d 825, 827 (N.Y. 1945), quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 88 L.Ed. 1170 (1944) (Administrative agencies, when administering a statute, must determine specific application of broad statutory terms initially.); *Hilton Hotels Corp. v. Commissioner of Finance of City of New York*, 219 A.D.2d 470, 476, 632 N.Y.S.2d 56, 61 (N.Y.A.D. 1 Dept. 1995) (citations omitted) (“Statutory construction by an administrative agency, particularly with respect to the application of a broad statutory term . . . , should be upheld unless irrational or unreasonable. A court need not find that its construction is the only reasonable one, or even that it is the result it would have reached had the question arisen in the first instance in judicial proceedings.”). Advisory Opinion No. 10-05 provides exactly that. The Commission determined that “transaction” should be seen as a discrete event, in which particular parties come together to conduct a particular piece of business. More specifically, in the context of

creating a regulation, the “transaction” is the process of drafting and enacting the regulation. The “transaction” thus has a clear end point: The publication of the relevant regulation and its public enactment.

This definition of “transaction” is consistent with the general use of the term, the Legislature’s intent and prior opinions of this Commission. In Advisory Opinion No. 91-2, the Commission noted the difference between the language of the lifetime bar and the language of the two-year bar: “[T]he two-year bar proscribed by §73(8) of the Public Officers Law precludes certain services ‘in relation to any case, proceeding or application or *other matter*’; the lifetime bar, however, speaks to ‘case, proceeding, application or *transaction*.’ ” The Commission determined that the two-year bar was intended to prohibit the widest possible scope of activities, while the lifetime bar is narrower in scope. “The prohibited acts are very specific.” A lifetime ban on future appearances before the agency to argue about a statute’s or regulation’s meaning or to seek to amendments thereof after such statutes or regulations are effective would not be narrow in scope or “very specific.” The Legislature could not have intended that the word “transaction”, typically used to refer to a discrete event with spatial and temporal proximity,¹ would extend to all stages of legislation or regulations which by their very nature extend over years and possibly over generations. Instead, the Legislature, by using

¹ The limited scope of the definition of “transaction” is supposed by other New York case law. *See People v. Duggins*, 3 N.Y.3d 522, 534, 821 N.E.2d 942, 949-950, 788 N.Y.S.2d 638, 645 - 646 (N.Y. 2004) (citations and internal quotations omitted) (“The spatial and temporal proximity of defendant’s homicidal acts, all of which were fueled by a common motivation, establish that he acted during the same criminal transaction. Indeed, defendant’s various acts were both so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident and so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.”); *see also, Kaygreen Realty Co., LLC v. IG Second Generation Partners, L.P.*, 78 A.D.3d 1010, 1013, 912 N.Y.S.2d 246, 250 (N.Y.A.D. 2 Dept. 2010) (“Under the doctrine of *res judicata*, a disposition on the merits bars litigation between the same parties or those in privity with them of a cause of action arising out of the same transaction or series of transactions...What constitutes a transaction or a series of transactions depends on how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”).

the word “transaction” as opposed to “other matter” meant to limit the application of the lifetime ban to discrete, very specific events. In the context of statutes and regulations defining the “transaction” as the creation and enactment of the statutes and regulations is consistent with this intent in that this stage of the process is the discrete, very specific event to which the former State employee has specific factual knowledge.

For all of the reasons set forth above, I dissent.