# New York State
# Ethics Commission

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| **Advisory Opinion No. 92-20:** | Application of Public Officers Law §73(8) to a former [State agency head] who wishes to perform certain activities [for the lobbying arm of an organization with which he had dealings while in State service.] |

## INTRODUCTION

The following advisory opinion is issued in response to a request by a [former State agency head] concerning how the post-employment proscriptions contained in the Public Officers Law affect certain services he has contracted to perform and has performed for the [lobbying arm of an organization with which he had dealings while in State service.]

Pursuant to the authority vested in it by Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that the lifetime bar prohibits certain of the services [the former agency head] has described.

## BACKGROUND

From 1978 to 1987, [the requesting individual] was employed by [a State agency] he was its director from 1983 to 1987. The agency is responsible for dealing with certain organizations, including the organization whose lobbying arm now employs [the requesting individual]. From 1987 to 1991 he served as [the head of another State agency.] He left State service in October 1991 and, in November 1991, signed a contract to provide services for [the lobbying entity]. It is that contract which is the subject of this opinion. [The requesting individual] supplied a copy of his contract with [the lobbying entity] and, in a subsequent transmittal, a list of the issues he anticipated working on pursuant to such contract. He and his attorney also discussed his contract [with the lobbying entity] and his prior work while in State service with Commission staff members on at least two occasions.

To determine the application of the New York State Ethics in Government Act and, in particular, Public Officers Law §73(8) to this inquiry, the Commission will examine the functions of the State agencies [ ] formerly employing [the requesting individual], his responsibilities while so employed and the responsibilities which he has contracted to perform for [the lobbying entity].

### [State Agency 1987 to 1991]

[The opinion recites the mission of the agency which the requesting individual headed from 1987 to 1991, lists several issues in which the individual indicated he was particularly involved and identifies a number of positions (on councils, boards, etc.) the head of the agency routinely holds.][(1),(2)]

**[State Agency 1978 to 1987]**

[The requesting individual served as assistant director and deputy director of a State agency from 1978 to 1983 and director from 1983 until May 1987. The opinion recites the agency's mission including the fact that the agency deals with the affiliate of the organization for which he recently agreed to lobby.[(3)] As director of this agency, the requesting individual served on numerous boards and committees.][(4),(5)]

**The [lobbying entity] Contract**

In November 1991, [the requesting individual] signed a contract with [the lobbying entity] which requires [him] to provide the following services as a lobbyist on an independent contractor basis:

1. The Lobbyist shall respond to requests for advice and consultation on matters related to [the lobbying entity] involving strategic planning, public policy development and governmental relations;
2. Lobbyist, with the assistance of staff provided by [the lobbying entity] shall provide the following services:
    a. Review and analyze all relevant legislation.
    b. Legislation advocacy encompassing presentation of [the lobbying entity's] issues to the Legislative and Executive branches.
    c. Preparation of legislation for introduction, production of memoranda of support and securing sponsorship of [the lobbying entity's] bills.
    d. Attendance at public hearings, committee meetings and other related activities to ensure that legislators are aware of [the lobbying entity's] issues and positions.
    e. Preparation of regular reports, tracking pending legislation, analysis and recommendation for future action on pending legislation.
    f. Be available on an as needed basis for advice and consultation on matters involving local government issues.
    g. Be available on an as needed basis for advice and consultation on matters involving federal issues.
    h. Discussions and recommendations regarding [the lobbying entity's] legislative program.
    i. Coordination of [the lobbying entity's] program issues with appropriate administrative agencies.
    j. Conferences with the [lobbying entity's] Trustees and staff as necessary.
    k. Be available to discuss and advise on general health care matters and issues affecting [a particular fund of the lobbying entity affiliate organization].

[The requesting individual] advised the Commission that, as a lobbyist for [the lobbying entity] he will appear before the Legislature and the Office of the Governor to discuss budget and legislative issues as they pertain to [the lobbying entity's affiliate.] He anticipated providing "in house" advice to [the affiliate], particularly by writing memoranda on bills. He advised the Commission that he would not participate in any negotiations or even internal [ ] discussions concerning the then current [ ] discussions between [the affiliate and the State agency he served from 1978 to 1987.][(6)]

In his February 24, 1992 correspondence to the Commission, [the requesting individual's] attorney stated that [the requesting individual] would specifically be involved with advancing "[the affiliate's] agenda in the Legislature with respect to the executive budget and, more specifically, to strive for sufficient funds with a proper mix for State agencies and localities in order to prevent or minimize [certain actions]," as well as [twelve described legislative proposals].[(7)]

Pursuant to requests from the Commission for elaboration, [the requesting individual] supplied further information and documentation of his involvement on the twelve issues while he was in State service. These are discussed later in this opinion.

[The requesting individual's] attorney indicated that in only three of the twelve matters did his client have any involvement while in State service and in each such case he characterized such involvement as "remote." Specifically:

**PRIVATIZATION**

Prior participation - None. The remotest connection that could be made is [the requesting individual's] involvement in [the matter while at the State agency where he served as agency head] regarding displacement of employees due to contracting out. However, this involvement was associated with [a matter] which was a specific 'transaction'; and which pertained to an entirely different aspect of the issue e.g. the proposed legislation does not mention displacement.

**PENSION SUPPLEMENTATION/PERMANENT COLA**

Prior participation - None. The remotest connection that could be made is the memos prepared at [the State agency where he served as agency head from 1978 to 1987] commenting on previous bills which pertained to a specific class of retirees for a specific time period. [The State agency] neither originated nor lobbied the bills; [the State agency] submitted memos as did other State agencies. The proposed legislation pertains to an entirely different class of retirees for a different time period.

**AGENCY SHOP**

Prior participation - None. The primary thrust of this bill is to make agency shops mandatory at the local level as they are at State level. Although [the State agency where he served as agency head from 1978 to 1987] was not involved in this issue, [the requesting individual] does recall that while he was at [that State agency], he was approached by a [ ] lobbyist seeking an opinion as to the disposition of such a measure if it were to receive the support of the Legislature. [The requesting individual] recalls that this was a topic of discussion at [the State agency] and that an opinion memo may have been written. To his knowledge nothing ever came of the proposal and a bill was never introduced. [The requesting individual] intends to lobby for passage of this bill which pertains to the affiliate of the lobbying entity with which he now has a contract].[(8)]

[The requesting individual's] attorney concluded that [the requesting individual's] activities for [the lobbying entity] are not affected by the post-employment proscriptions of Public Officers

Law §73(8). He assured the Commission that [the requesting individual] would "remain alert to his involvement in any issue which would call into play the provisions of §73(8) and seek an informal or formal opinion from the Commission" when needed.[(9)]

In a visit to the Commission, [the requesting individual] indicated that he is currently affiliated with [a law firm.] Although his work for the firm is not the subject of this opinion, the Commission advises [the requesting individual] that, depending on the nature of the work of the firm, Public Officers Law §73(10) concerning net revenues, and the Commission's interpretation of such subdivision as articulated in Advisory Opinion No. 90-14 may apply. We remind [him] of his right to seek an opinion from the Commission as it relates to such relationship.

By a letter dated August 4, 1992, [the requesting individual's] attorney withdrew his client's request for an opinion with respect to the agency shop issue as "this issue is now moot," citing the Governor's signing of the agency shop bill into law on July 24, 1992. "[The requesting individual,] effective immediately will remove himself from future involvement regarding any Agency Shop legislation."

## APPLICABLE LAW AND DISCUSSION

Purpose and intent of the post-employment restrictions

The sweeping reforms made by the Ethics in Government Act of 1987 are intended to restore the public's trust and confidence in government through the prevention of corruption, favoritism, undue influence and abuses of official position. In proposing the Ethics in Government Act, the Governor stated:

Public trust and confidence in elected and appointed public officials are fundamental and necessary conditions for a strong and stable democratic government. Favoritism and the potential for conflicts of interest, as well as the mere appearance of such, serve to weaken and erode the public's trust and confidence in our government. To enhance the public trust and confidence in our governmental institutions, this bill contains strengthened prohibitions against behavior which may permit or appear to permit undue influence or conflicts of interest . . .[(10)]

In approving the Act, the Governor concluded that the law "constitute[s] the foundation of our efforts to restore public trust and confidence in government."[(11)]

The Commission has previously concluded that these provisions:

can be said to reflect the same intent expressed by Congress when it enacted the federal restrictions . . . that '[f]ormer officers should not be permitted . . . to utilize information on specific cases gained during government service for their own benefit and that of private clients.' [Advisory Opinion No. 89-7, p.4]

The purpose of post-employment restrictions is "to preclude the possibility that a former State employee may leverage his or her knowledge, experience and contacts gained in State service to

his or her advantage or that of a client, thereby securing unwarranted privileges, consideration or action." [Advisory Opinion No. 90-11 pp. 6-8; see also Advisory Opinion Nos. 91-2, 91-6]

The Court of Appeals has elaborated on the post-employment provisions in *Forti v. NYS Ethics Commission*; *Kuttner v. Cuomo*, et al., 75 NY2d 596 (1990):

In general, the purpose of "revolving door" provisions such as those at issue here is to prevent former government employees from unfairly profiting from or otherwise trading upon their contacts, associations and special knowledge that they acquired during their tenure as public servants . . . The underlying premise is that "[f]ormer officers should not be permitted to exercise undue influence over former colleagues, still in office, in matters pending before the agencies [and] they should not be permitted to utilize information on specific cases gained during government service for their own benefit and that of private clients. Both are forms of unfair advantage" . . . (PL 95-521, Senate Report, *reprinted in* 1978 US Code, Cong & Admin News 4216, 4247). (*Forti* at p. 605)

Further explaining such legislation is a treatise on government ethics:

Public attention is activated by concerns with political evils of the 'revolving door'--the process by which lawyers and others temporarily enter government service from private life and then leave it for large fees in private practice, where they can exploit information, contacts and influence garnered in government service.[(12)]

Professional codes of conduct articulate the same concerns. For example, in discussing the disciplinary rule precluding a lawyer from accepting employment on a matter for which he had substantial responsibility while a public employee, the American Bar Association's Committee on Ethics and Professional Responsibility stated "the intent clearly was for DR 9-101(B) [Disciplinary Rule] to be applicable to the lawyer whose former public or governmental employment was in any capacity and without regard to whether it involved work normally handled by lawyers."[(13)] [The requesting individual], who informed the Commission that he is admitted to the practice of law in the State of New Jersey, may be subject to the standards required of lawyers which, in this context, may be stricter than those imposed by the Public Officers Law.[(14)]

**Two-year bar**

The Commission first considered whether [the requesting individual's] services described in the [ ] contract and his attorney's letter would violate the §73(8) prohibition against appearing, practicing or receiving compensation for services rendered on a case, proceeding, application or other matter before his former agency within two years of his termination from that agency. Since it has been more than two years since [the requesting individual] left the employ of [the State agency that had dealings with the affiliate of the lobbying organization] and since none of the activities described will either explicitly or even seem likely to take [him] before [the other State agency for which he worked] or working anywhere on matters before [that agency] the two-year bar does not apply to these circumstances. [The requesting individual] should exercise care, however, not to appear, practice or receive compensation for services rendered in relation

to any case, proceeding or application or other matter before [his former State agency] until two years after his departure from [that agency].

**Lifetime bar**

The Commission next addressed whether [the requesting individual's] activities fall within the Public Officers Law §73(8) lifetime bar provision. [The requesting individual] has argued that the services described in his contract with [the lobbying entity] cannot violate the lifetime bar because (1) his participation on these matters while in State service was "remote" and, even if it were not, (2) Public Officers Law §73(8) restricts activities before State agencies, not those before the Legislature.[(15)]

The Commission must determine:

1. whether Public Officers Law §73(8) prohibits services rendered before the Legislature, and if so
2. whether any of the issues described in the contract on which [the requesting individual] intends to lobby is a case, proceeding, appearance or transaction with respect to which [he] was directly concerned and personally participated or which was under his active consideration while in State service.

Turning to the first issue, the Commission holds that the lifetime bar of Public Officers Law §73(8) applies to services rendered in matters before the Legislature, and, as in cases otherwise falling within the language of §73(8), operates to prohibit such services. The Commission is aware that the matter is not free from doubt, and we have carefully considered arguments on all sides, both those resting in the statutory language and those deriving from the purpose behind the statute.

Public Officers Law §73(8) provides, in pertinent part:

No person who has served as a state officer or employee shall within a period of two years after the termination of such service or employment appear or practice before such state agency or receive compensation for any services rendered by such former officer or employee on behalf of any person, firm, corporation or association in relation to any case, proceeding or application or other matter before such agency. 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 personally participated during the period of his service or employment, or which was under his or her active consideration.

The question is whether this language limits the lifetime bar to appearances before State agencies; if it does not, then it would seem to apply to the Legislature (and indeed to other entities, although we need not decide the broader issue at this time).

The lifetime bar contains two separate clauses, and two separate provisions:

(1) the officer or employee may not appear, practice, communicate or otherwise render services *before any State agency*, and

(2) the officer or employee may not receive compensation *for any such services rendered* . . . in relation to [certain issues].

What is noticeable here is that in the second clause there is no limitation, or no *express* limitation, to "State agency." If we are to draw the conclusion that the second clause (which applies to compensated services) is limited to State agencies, we must do so by interpreting the words *"any such services rendered"* as containing that limitation; that is, we must hold that "such services" is a reference back to the words "before any State agency" in the first clause, and *means* "services before State agencies."

Even if there were no clues to interpretation to be found in the statute, we would not be inclined thus to find a limitation to State agencies by implication. It happens, however, that the structure and language of Public Officers Law §73(8) help us out on this issue. If we look at the two-year bar, we find an interesting parallelism with the lifetime bar; in the former as well as in the latter there are two clauses, amounting to two separate provisions; in the former as well as in the latter it is the second clause that applies to compensated services. The clauses in the two-year bar provisions are these:

(1) the officer or employee may not appear or practice *before such State agency*,[(16)] and

(2) the officer or employee may not receive compensation for any services rendered on behalf of [others] in relation to [certain matters] *before such agency*.

What is notable here is that, in sharp contradistinction to the lifetime bar, the second (compensated services) clause repeats the words "before such agency," thus making clear the limitation to an agency.[(17)] The obvious conclusion is that the words were deliberately and purposefully omitted from the second clause of the lifetime bar, and thus that any interpretation that has the effect of inserting them into that clause would be wrong.[(18)]

We conclude, then, that the lifetime bar of §73(8) is most naturally read to apply to the compensated rendering of services in relation to transactions before the Legislature, as well as in relation to transactions before a State agency. That being so, it would appear to be our duty so to interpret the section. Nor does there appear to us to be anything troubling about this interpretation; on the contrary, had we felt compelled by the structure and language of §73(8) to conclude that the section *was* limited to State agencies, to the one, administrative, branch of State government, *then* we would have been troubled. There does not appear to us to be any support in logic or in policy for such a limitation. The agenda of State government is an integrated whole; the Legislature enacts laws, many of which are implemented and enforced by State agencies. Why would lawmakers protect the later but not the earlier part of the process; the implementation but not the adoption of policy? We think that they would not choose so to limit the effect of such a law as we are now considering, and that they did not do so in this case.

The Commission must address some earlier opinions relating to the revolving door. In prior opinions, the Commission addressed inquiries limited to the application of the lifetime bar to activities before specific State agencies. Consequently, those opinions, many of which were cited by [the requesting individual's] attorney, are replete with language describing the law as prohibiting services rendered "before any State agency" or "before all State agencies." In those instances, referring to State agencies did not necessarily limit the extent of the prohibition. Rather, the Commission was responding to the particular fact patterns and narrow questions presented by the individuals requesting the opinions.

In Advisory Opinion No. 89-7, although responding to a question that related only to appearances before courts, the Commission ruled that:

[t]he lifetime bar of §73(8) of the Public Officers Law is different and distinct from the two year bar, and it also must be considered in light of the question posed. The lifetime bar prohibits a former employee from receiving compensation in relation to any case, application, proceeding or transaction *without any limitation as to where such activity occurs--before any State agency or any court of competent jurisdiction* . . . Therefore, a former State officer or employee is barred from receiving compensation from a client in any federal or State court proceeding where that former officer or employee was either directly concerned with and personally participated in the case, application, proceeding or transaction, or had such case, etc., under his or her active consideration during State employment or service. (emphasis added) (pp.11-12)

In two subsequent opinions, the Commission spoke to the application of the law to work before the State Legislature. In Advisory Opinion No. 89-12, the Commission determined that, because a former employee's proposed post-employment services were unrelated to his State services, the lifetime bar would not apply. In response to the question "may I make appearances before the Legislature?", the Commission replied, "Yes. The Legislature is not defined as a 'State agency' within §73 of the Public Officers Law and, therefore, the post-employment restrictions do not apply to this former employee." [at p.5]

In Advisory Opinion No. 89-13, even though the Commission concluded that the activities the former State employee sought to perform did not constitute lifetime-barred activities, it addressed the reach of the lifetime bar in a footnote:

Many of the entities before which the requesting individual intends to appear are outside the coverage of the post-employment restrictions of §73(8); e.g., the Port Authority of New York and New Jersey, the New York State Legislature and the New York City government. [at p.5]

The Commission believes that the circumstances currently before us allow the opportunity to re-examine previous holdings, aware of precedent, yet realizing that interpretation must be an evolving process.

The Commission leaves until a future time a discussion of the lifetime bar's application elsewhere. The decision reached in this opinion shall apply prospectively only.[(19)]

**Case, proceeding, application or transaction**

The Commission must next consider whether the legislation can be a lifetime-barred case, proceeding, application or transaction.

The Commission determines that the current request is not concerned with any case, proceeding or application. Thus, the issue is whether [the requesting individual's] contract anticipates his rendering services on the same transactions with which he was directly concerned and in which he personally participated or was under his active consideration when employed by the State.

The Commission must determine how to construe "transaction" in the context of legislation or issues that ultimately become legislation. The Commission considered rulings by the Office of Government Ethics ("OGE"), the Commission's counterpart in the federal government, which renders opinions on the provisions of federal statutes and regulations governing post-employment restrictions. OGE concluded "early on that legislation does constitute `a particular matter' for purposes of [18 USC] §207(c)" (the federal post-employment restrictions on former executive and legislative branch officers, employees and elected officials).[(20)] In weighing whether a matter constitutes the "same particular matter" on which an individual participated while in federal service, OGE referred to 5 C.F.R. §737.5(c)(4) which explains the concept as follows:

The same particular matter *may continue in another form or in part*. In determining whether two particular matters are the same, the agency should consider the extent to which the matters involve the same basic facts, related issues, the same or related parties, time elapsed, the same confidential information, and the continuing existence of an important Federal interest. (Emphasis in original.)[(21)]

The Commission concludes that bills introduced in the same or different legislative sessions may constitute the same transaction, particularly when they affect the same or substantially the same population [example deleted]. Further, work on substantially the same issue may also be the same transaction. This can be true even when the form in which the issue is presented is not identical. For example, in Advisory Opinion No. 91-12, which involved a former State employee who wished to bid on a construction project on which he worked while in State service, the scope and nature of the project had been altered after he left the State. In that case we stated:

The fact that the exact design of that project has changed does not change the essential nature of the transaction. . . . It is like an amendment to an existing contract which does not change the nature of the transaction but merely modifies its terms. . . .[(22)]

Directly concerned and personally participated or under active consideration

The Commission must next determine whether the bills [the requesting individual] identifies as his assignment for [the lobbying entity] address the same issues "with respect to which [he] was directly concerned and in which he personally participated during the period of his [State] service or employment, or which was under his active consideration." [Public Officers Law §73(8)]

In his position as [agency head from 1978 to 1987, the requesting individual] served as the Governor's agent in [dealing with the affiliate of the lobbying entity with which he now has a contract]. He was required to assure the proper implementation and administration of agreements reached [with that entity]. He was, by law, required to assist the Governor in [the general area of law that relates to, among others, that entity]. As the Governor's expert in such matters, [the requesting individual] was required to be familiar with legislation [in this area].

Some issues listed in the letter of February 24, 1992 were under active consideration at [the State agency that had dealings with the affiliate] while [the requesting individual] was [agency head]. [It appears that the requesting individual considered none of the issues while at the other State agency]. The list of issues on which, pursuant to his contract with [the lobbying entity, the requesting individual] intends to lobby the Legislature contains five issues which could have been under discussion during [his] tenure as [head of the State agency that had dealings with the affiliate]: (1) independent hearing officers [ ] (2) pension supplementation/permanent COLA, (3) dependents' health insurance, (4) South African divestment, and (5) agency shop. The Commission concludes that the remaining issues/legislative proposals are topics with respect to which [the requesting individual] was not directly concerned, and in which he did not personally participate, nor were they under his active consideration while he was in State service. Therefore, the Commission finds that §73(8) does not prohibit [the requesting individual] from lobbying the Legislature on the remaining seven issues.

In response to a specific request by the Commission, [the requesting individual] provided the following information about his involvement with the five listed items while [head of the State agency that had dealings with the affiliate]:

(1) that he had no involvement on the issue of independent hearing officers [ ]. [The requesting individual] said [one of the agency's] divisions might have been acting as ombudsperson [ ] but nothing was brought to his attention. [The requesting individual] stated that [the current agency counsel] confirmed to him that this topic was not an issue when [the requesting individual was agency head].

(2) that he had no involvement on the issue of pension supplementation/permanent COLA. [The requesting individual] said that typically the Division of the Budget would recommend a pension supplement plan to the Legislature for consideration. [The requesting individual's State agency] would make a staff member available,

[ ] to help fashion a formula to allocate the available resources to pensioners. [The requesting individual] stated he never understood the formula. He contacted [ ] who confirmed [the State agency's] level of involvement. [The requesting individual] stated that "[the State agency] might have commented" on the final bill(s) negotiated by the Division of the Budget, but his counsel would have drafted and signed the comment.[(23)]

(3) that he had no involvement on the issue of dependents' health insurance. [The requesting individual] said he "had not heard of the issue" and he said he confirmed with [ ] that the topic was not under discussion when [he was agency head].

(4) that he had no involvement on the issue of South African divestment.

(5) that he had some involvement on the issue of agency shop. [The requesting individual said that before he became agency director, the State agency] recommended language to be included in the Governor's 1983 Annual Message to the Legislature ("State of the State"). On January 3, 1985, [the requesting individual] himself authorized a memorandum in which he offered agency shop language to [ ] Director of State Operations and Policy Management, for inclusion in the State of the State, upon the request of the Governor's Office. [The requesting individual] indicated it would not have been his choice to act on agency shop in a year when contracts with employee organizations expired and were due to be renegotiated. [The requesting individual] told the Commission that in June 1986, on behalf of [ ] he contacted [ ] then Secretary to the Governor, to determine the Governor's stance on the agency shop issue. In response, [the Secretary to the Governor] requested and [the requesting individual] provided two memos outlining the pros and cons of the issue, indicating [the State agency's] past position and citing case law. [The requesting individual] also indicated [the State agency's] current position on the matter. The memos were dated June 20 and 28, 1986. The bill was not passed by the Legislature in that session. In a conversation with Commission staff on August 4, 1992, [the requesting individual] noted that the Governor signed A.10106, the agency shop bill, on July 24, 1992, [c. 606], and therefore he requested that the Commission discontinue its consideration of the agency shop issue.

The Commission determines that, of these five issues, there is inadequate evidence to indicate that three, the hearing officers, South African divestment and dependents' health insurance, are lifetime-barred transactions.

The Commission determines that the agency shop issue, on which bills were introduced during [the requesting individual's] tenure at [the State agency] and which remained substantially the same in the 1992 legislative session, is one with respect to which [the requesting individual] was directly concerned and in which he personally participated or which was under his active consideration while he was [agency head].[(24)] This is clear from his conveying information and [the State agency's] position to the Governor's office. Consequently, his rendering services pursuant to contract with [the lobbying entity] before the Legislature, the Governor's office, or any other State agency, regarding agency shop legislation, would be prohibited under the lifetime bar restrictions of Public Officers Law §73(8). The Commission determines that this opinion applies prospectively only and does not, hereby, render a finding of a violation of §73(8).

The Commission has chosen to address this matter despite the enactment of legislation and the withdrawal of the request for an opinion because it believes analysis of the application of the lifetime bar is instructive to [the requesting individual] and to the public. Should similar circumstances arise in the future, our interpretation set forth today shall serve as a guide.

As to the final remaining issue, pension supplementation, the questions are the same, specifically: is it the same transaction? Was [the requesting individual] directly concerned and did he personally participate, or did he actively consider the issue? The pension supplementation issue, on which bills were introduced during [the requesting individual's] tenure at [the State agency], remain in substantial part the same in the 1992 session. The 1984 pension

supplementation bill commented on by [the State agency] and the 1992 legislation supported by [the lobbying entity] are the same transaction since both bills affect substantially the same identifiable parties (i.e. retired public employees), extend supplemental benefits to additional public retirees and increase both the cost of living adjustments and the base pension upon which the adjustment is made. Accordingly, while the technical aspects of the bills may vary, the basic components of the bills, the parties affected and the issues addressed all remain the same.

[The requesting individual's] participation and concern in the pension supplementation legislation is imputed to him based on the actions of [the State agency's] senior staff, one of whom was counsel to the agency.

The case law is well-settled that knowledge of an agent is the knowledge of the principal,[(25)] that the rule of agency is applicable to the relation of attorney and client[(26)] and that knowledge of facts relating to the subject matter of the employment, acquired while the attorney is engaged in the discharge of his or her duties under the employment, is imputable to his or her client.[(27)] Thus, the principal is chargeable with, and is bound by the knowledge of, or notice to, that which his agent received while the agent was acting within the scope of his or her authority and which was in reference to a matter over which his or her authority extended, although the information may never have actually been communicated to the principal.[(28)]

The rationale for the rule that notice to the agent is imputable to his or her principal rests upon the assumption that an agent will discharge the duty which he or she owes his or her principal by fully, fairly, and honestly disclosing all material facts which come to his or her knowledge or attention, and which relate to the subject of the agency.[(29)] There is a presumption that an agent has discharged his or her duty to disclose to the principal all material facts coming to his or her knowledge with reference to the scope of the agency.[(30)] Accordingly, in the case of a principal-agent relationship, the direct concern and personal participation in or active consideration of a transaction by an agent is imputed to the principal.

[The requesting individual] has informed the Commission that he directed his staff to assist in crafting the pension legislation. In addition, [the State agency's] counsel, acting as an agent of [the requesting individual] was directly concerned with and personally participated in the pension supplement/permanent COLA issue, in preparing the agency's position on the legislation and writing memoranda to the Governor's Office on the topic. Such knowledge and participation were within the scope of the principal-agent relationship, and may be imputed to [the requesting individual], the principal.[(31)] Therefore, [the requesting individual's] receiving compensation for services before the Legislature, the Governor's office or other State agencies, regarding this type of pension supplement/permanent COLA proposal would be prohibited by the lifetime bar. This prohibition extends to the identical or substantially the same proposal--in whatever form--as commented on by [the State agency] in 1984. The Commission determines that this opinion applies prospectively only and does not, hereby, render a finding of a violation of §73(8).

We are aware of the hazard of imputing all actions of staff to the supervisor for purposes of determining whether there has been a violation of the ethics law. In reaching this conclusion, we have considered that the principal here was the head of the agency, the very senior level of the agent who acted on behalf of the agency head, that the action was on a matter of considerable

fiscal impact,[(32)] and that the communications in question were directed to the Counsel to the Governor and became an official part of the record on a law. Were these actions ministerial or inconsequential or undertaken by lower level staff separated from the principal by many layers of organization, we would be far less inclined to reach this conclusion.

Were we to reach a contrary conclusion, high level government employees would be encouraged to remove themselves from involvement in matters under their jurisdiction so as to avoid the limitations of Public Officers Law §73(8).

**CONCLUSION**

By strengthening the post-employment restrictions, the Governor and the Legislature sought to prohibit former State employees from capitalizing to their advantage, or that of their clients, on their insider knowledge and associations gained while in State service. In his position as advocate for [the lobbying entity, the requesting individual] would be able to capitalize on his knowledge of the State's policies and positions gained while in State service.

The Commission finds that, on the questions raised, [the requesting individual] is prohibited from receiving compensation for services rendered before the Legislature and any State agency (as defined in Public Officers Law §73(1)(g) and including the Governor's office), relating only to the pension supplement/permanent COLA issue addressed in this opinion. Services rendered on the balance of the issues raised by [the requesting individual] are not barred by the lifetime bar, based upon the information provided to the Commission. Should other topics or issues arise on which [the requesting individual] wishes to perform services, this opinion's analysis of whether such services are permissible under Public Officers Law §73(8) applies. [The requesting individual] should also be mindful of the Commission's net revenue rule, as articulated in Advisory Opinion No. 90-14.

This opinion shall apply prospectively only.

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

All concur:

Barbara A. Black
Angelo A. Costanza
Robert E. Eggenschiller
Donald A. Odell, Members

Chair Joseph M. Bress recused himself from discussions and voting on this opinion.

Odell, D., concurring. I concur with the opinion expressed by Commission members Black, Costanza and Eggenschiller but would not limit the lifetime bar of §73(8) to simply the two

issues: agency shop and the pension supplement/COLA matters where specific indications, or "finger prints," reflecting the personal involvement by [the requesting individual] were found.

For a period of about ten consecutive years [the requesting individual] was responsible, on behalf of the State of New York, for [specific dealings with the affiliate of the lobbying entity with which he now has a contract]. He was also responsible for developing the research data and the State's positions and strategies with which to conduct these [dealings], assisting the Attorney General in preparing the State's case in lawsuits, and advising State government in many other matters relating to the State's [policies in this area].

Now, having left State service, [the requesting individua] switches sides and becomes the lobbyist for a representative of the [organization's] lobbying affiliate. His contract anticipates his rendering services for the very [organization] with whom he dealt across the table on the same transaction or transactions, [ ] of which he had intimate knowledge and substantial direct responsibility while a State employee. It is a classic example of a conflict of interest and of the evils of the revolving door process by which lawyers and other employees leave State service for large fees in the private practice sector where they can exploit their inside information, contacts and influence gained while in public service--evils which the Public Officers Law of the State of New York is intended to prevent.

I would hold that [the requesting individual] is barred for life by §73(8) of the Public Officers Law from performing lobbying services on behalf of the [lobbying entity] before the Legislature or the Executive department on any matters or issues involving or impacting [those matters which were his responsibility in State service].

Dated: December 15, 1992

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**Endnotes**

1. [Footnote deleted.]

2. [Footnote deleted.]

3. [Footnote deleted.]

4. [Footnote deleted.]

5. [Footnote deleted.]

6. [Footnote deleted.]

7. [The requesting individual's] attorney listed the [following] areas which would be assigned to others and in which [the individual] would not be involved: [ ].

8. [The requesting individual's] attorney's letter dated February 24, 1992, pp. 16-17.

9. Id.

10. See p. 5, Governor's program bill memorandum to the Ethics in Government Act.

11. Approval Message #58, c.813, L.1987.

12. *Modern Legal Ethics*, Charles W. Wolfram, at §8.10.1.

13. Op. 342 at p. 119.

14. The Commission is responsible for interpreting and enforcing only the provisions of Public Officers Law §§73, 73-a and 74.

15. Public Officers Law §73(1)(g) provides:

The term 'state agency' shall mean any state department, or division, board, commission, or bureau of any state department, any public benefit corporation, public authority or commission at least one of whose members is appointed by the governor, or the state university of New York or the city university of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the state.

16. That is, the agency for which the person worked.

17. The point we make here is not affected by the fact that the two-year bar has to do only with the particular agency that the officer or employee worked for; this means only that, if the parallelism had been complete, with the compensated services provisions of the lifetime bar expressly limited to agencies, that provision would have contained, in the second clause, the words "any state agency," rather than the phrase "such agency" which appears in the two-year bar provision.

18. This conclusion might be troublesome if it were the case that declining to interpret the phrase *"any such services"* as a reference back to the words "any state agency" left that phrase without a referent, and arguably meaningless. But that is not the case, for the language makes perfect sense if we understand "any such services" to refer back to "appear, practice, communicate or otherwise render services." The word "such" serves much the purpose that the words "appear, practice, communicate" serve in the preceding clause; it gives shape and definition to the phrase "services rendered," as they do to the phrase "otherwise render services."

19. "With the enactment of the State Administrative Procedure Act in 1975 the Legislature expressly recognized the authority of administrative agencies of State government to change rulings prospectively: '[N]othing in this section shall prevent an agency from prospectively changing any declaratory ruling.'(§204)" *National Elevator Industry, Inc. v. Tax Comm* (1980) (49 NY2d 538, p. 548) A State agency's power to issue declaratory rulings under the State

Administrative Procedure Act is comparable to the Commission's authority to issue binding advisory opinions under Executive Law §94(15).

20. See OGE informal opinion 81x1.

21. See OGE informal opinion 84x16.

22. See Advisory Opinion No. 91-12, pp. 7-8.

23. In fact, in 1984, [counsel to the State agency] prepared agency memoranda on two bills on the topic, recommending approval of S.10126 (introduced at the request of the Governor) and submitting a "no objection" memorandum on S.8390 (introduced at the request of the State Comptroller).

24. The Commission compared A.10106, the agency shop bill introduced during the 1992 legislative session and which was signed by the Governor with bills introduced on the same topic during the 1983, 1984 and 1985 legislative sessions. The bills entitle every qualifying employee organization to deduct from the salaries of employees in the negotiating unit who are not members of the employee organization, an amount equal to the dues levied by the employee organization. They also provide that where there is a collectively negotiated agreement between the non-State public employer and a qualifying employee organization and where the employee has not authorized the deduction of membership dues in such employee organization, an agency shop deduction is to be levied in the same amount as the membership dues. The Commission found that, with the exception of minor inconsequential changes, A.10106 and the bills introduced in earlier years, including the years (the requesting individual) wrote to (the Director of State Operations and Policy Management and the Secretary to the Governor) were substantively similar.

25. *Reynolds v. Snow*, 10 A.D.2d 101, 197 N.Y.S.2d 590 (1st Dept 1960).

26. *Hoover v. Greenbaum* (1874), 61 NY 305, aff'd, 91 US 308, 23 L Ed 392.

27. *Constant v. University of Rochester* (1889) 111 NY 604, 19 NE 631; *Griffith v. Griffith*, 9 Paige 315; *Baruch v. Buckley* (1915) 167 AD 113, 151 NYS 853; *Vogemann v. American Dock & Trust Co.* (1909) 131 AD 216, 115 NYS 741, aff'd, 198 NY 586, 92 NE 1105.

28. *Bonham v. Coe*, 249 A.D. 428, 292 N.Y.S. 423 aff'd, 276 N.Y. 540, 12 N.E. 2d 566 (1937), *Farr v. Newman*, 14 N.Y.2d 183, 250 N.Y.S.2d 272, 199 N.E.2d 369 (1964), *Center v. Hampton Affiliates Inc.*, 66 N.Y.2d 782, 497 N.Y.S.2d 898, 488 N.E.2d 828 (1985).

29. *Hurley v. John Hancock Mut. Life Ins. Co.*, 247 A.D. 547, 288 N.Y.S. 199 (1936).

30. *Otsego Mut. Fire Ins. Co. v. Darby*, 79 Misc.2d 80, 358 N.Y.S.2d 314 (Sup. Ct. 1974).

31. The Commission reaches its conclusion on the agency-principal relationship based, in part, on the fact that (the requesting individual) as agency head had ultimate responsibilities for the

governance of (the State agency). "Although there are many supervisory officials who are ultimately responsible for myriad decisions which they do not personally make and for numerous rulings which they never actually review, nonetheless, since ultimate responsibility is theirs, knowledge of all work done by their subordinates should be imputed to them." [ABA Op. No. 37, cited by Irving R. Kaufman, *The former government attorney and the canons of professional ethics*, Harvard Law Review, vol. 70, p. 666] We reserve to another date a discussion of whether the agency-principal relationship analysis will apply to mid-or-lower level managers and employees.

32. For example, in 1986 the fiscal note attached to S.10126 (pension supplementation) indicates that enactment of the bill would result in a total estimated annual cost of $30.9 million to the State of New York or an additional annual cost of $12.8 million.