

# New York State Ethics Commission

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**Advisory Opinion No.  
96-1:**

Application of the lifetime bar and the government-to-government exception of Public Officers Law §73(8) to two former employees of the Department of Environmental Conservation who each seek to be a court-appointed mediator in certain litigation.

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## INTRODUCTION

The following advisory opinion is issued in response to requests by two former employees of the Department of Environmental Conservation ("DEC"). The first, [employee A], is former [senior level employee in] to the agency; the second, [employee B], is former Director of the Division of [ ]. Each, separately, has asked the State Ethics Commission ("Commission") to determine whether he may serve as a mediator appointed by a Federal District Court in a case in which he was involved while in State service.

Pursuant to the authority vested in it by Executive Law §94(15), the Commission hereby renders its opinion that, since the government-to-government exception, contained in Public Officers Law §73(8)(e), does not apply to a mediator appointed by a Federal court, the lifetime bar, contained in §73(8)(a)(ii), precludes either individual from serving as a mediator.

## BACKGROUND

Each requesting individual, separately, has provided the following facts:

### [Employee A]

[Employee A] served as [a senior level employee] to DEC until [date]. His responsibilities included oversight of the legal aspects of the agency's implementation of the State's environmental programs. He directly or indirectly supervised DEC's litigation involving the State's environmental matters, although DEC was represented by the Attorney General ("AG") in essentially all cases. This litigation ordinarily involved the defense of DEC's regulations and policies and the State's implementation of its permitting and enforcement authority.

Under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), DEC relies upon the AG to commence affirmative litigation to require a site cleanup. The State may also seek the recovery of costs incurred by DEC in conducting remedial actions at a site. Litigation often involves the joinder of numerous parties for the purpose of determining the apportionment of cleanup liability. In cases involving municipal liability for a cleanup, DEC's role is expanded. Under the Environmental Quality Bond Act of 1986, the State is required to pay 75% of a municipality's share of cleanup liability in certain circumstances. The

State's role in legal actions involving municipalities is twofold: to pursue site cleanup and to fund its 75% share.

[Employee A] has told the Commission that there is currently a CERCLA action pending in the United States District Court for [ ] in which he would like to be considered for appointment as a mediator. The State is a party to this litigation, in which there are hundreds of potentially responsible parties. The Court has indicated its intention to appoint a mediator to facilitate negotiations among the parties for the purpose of apportioning liability for the payment of the cleanup costs. According to [employee A], he, as a mediator, would not have any decision making authority. Rather, his role would be to assist the parties in attempting to reach a voluntary settlement.

While at DEC, [employee A] supervised the legal review of several issues involving the design and selection of remedies at the subject site. He also supervised the legal review of DEC's position in the cost allocation aspect of the litigation. However, DEC technical staff did the majority of the work in preparing the State's position in liability apportionment and remediation design.

#### [Employee B]

[Employee B], like [employee A], is interested in being appointed by a Federal District Court as a mediator. In his case, the litigation involves the [site A] and [site B] landfills. Court cases involving these landfills began in the early to mid-1980's, before [employee B] joined DEC. The two related lawsuits in which [employee B] might be a mediator were filed in the United States District Court for [ ] in 1987.

[Employee B] did not join DEC until early [date], when he became Director of [ ]. While he was Director, every proposed consent order that involved a Superfund site would cross his desk before it was finally approved by the agency. The [site A] and [site B] landfills are two such sites. DEC staff negotiated consent orders concerning each site in [date]. The materials in the files reflect that [employee B] approved these proposed orders.<sup>(1)</sup> [Employee B] was also involved in the review and approval of related State contracts for monetary assistance to each city.

According to [employee B], the files indicate that there was more discussion concerning these orders and contracts than is often the case because one of the sites was also a federal Superfund site. DEC thus endeavored to ensure that all federal EPA requirements, as well as State DEC requirements, were met. [Employee B] states that, in sum, it appears that he was "in the loop" in reviewing these orders and contracts, and that he may well have had substantive discussions with his staff and/or the AG's office concerning their terms.

[Employee B] states that the focus of these orders and contracts was limited in the sense that they embodied each city's obligation to investigate the landfill. While they also embodied the statutory requirement that the cities pursue other responsible parties, they did not address the share of liability that other parties should bear. It is [employee B]'s understanding that these issues are the subject of the pending litigation in which he might be appointed as a mediator.

During the next few years, there was occasional paperwork relating to the litigation on which [employee B] was copied. He states that he may have had the opportunity to review certain litigation documents.

[Employee B] states that his only personal recollection of the Federal litigation involves the following: in 1990, the municipalities retained counsel to seek contribution from their insurance carriers as required by the contracts previously discussed. [Employee B] recalls attending one meeting with the DEC attorney handling the case and an attorney representing one of the cities in which the pursuit of insurance carriers was discussed. Thus, he had some direct involvement in that part of the case which dealt with at least one of the city's efforts to seek contribution from its insurance carriers. Although he has no direct recollection, he understands that he was also involved in policy discussions related to the division of the insurance settlement money between the State and the cities.

Both [employee A] and [employee B] seek advice as to whether they may be appointed as mediators.

### **APPLICABLE LAW**

The lifetime bar, found in Public Officers Law §73(8)(a)(ii)<sup>(2)</sup>, 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.

The government-to-government exception is set forth in §73(8)(e) as follows:

This subdivision shall not apply to any appearance, practice, communication or rendition of services before any state agency, or either house of the legislature, or to the receipt of compensation for any such services, rendered by a former state officer or employee or former member of the legislature or legislative employee, which is made while carrying out official duties as an elected official or employee of a federal, state or local government or one of its agencies.

### **DISCUSSION**

The first issue the Commission must address is whether, in the absence of an exception, the lifetime bar would preclude each individual's service as a mediator. As noted, the lifetime bar prohibits a former employee from rendering compensated services in relation to any "case, proceeding, application or transaction" with respect to which he or she was directly concerned and in which he or she personally participated or which was under his or her active consideration while in State service.

In determining whether the lifetime bar precludes [employee A] and [employee B] from serving as a mediator in the litigation each describes, the Commission is guided by two previous Advisory Opinions. In the first, [Advisory Opinion No. 95-6](#), a former DEC staff level engineer asked the Commission to consider whether the lifetime bar prohibited him from performing engineering services with respect to the clean-up of the [site B] landfill, one of the landfills that is the subject of the litigation for which [employee B] might serve as a mediator. The engineer had performed investigative services at an early stage while he was in State service. The Commission undertook a detailed examination of the history of the landfill. It held that the former employee could not render engineering services despite many intervening events, the passage of a significant period of time, the progression from investigation to remediation, and the issuance of a new consent order. The Commission found that the essence of the "transaction" remained the same.

In a different opinion, [Advisory Opinion No. 95-11](#), the Commission considered a proceeding before the Public Service Commission ("PSC") that was being conducted in several distinct "phases," with each culminating in one or more specific actions by the PSC. The proceeding was broad in scope, involved 60 active parties, and was anticipated to last several years. The question presented was whether the proceeding, which had been divided into several distinct phases, could be defined as a series of separate transactions for purposes of the lifetime bar. Relying upon the statutory language, which bars the rendering of services in the same "case, proceeding, application or transaction" (emphasis added), the Commission held that the same proceeding cannot be divided into separate transactions. If an individual participated at any stage of a proceeding while in State service, he or she was held to be barred from future participation in the entire proceeding.

Considering the facts in each of the instant cases and the foregoing Advisory Opinions, the Commission concludes that, absent an exception, the lifetime bar precludes both [employee A] and [employee B] from serving as a mediator in the litigation which each describes. Each, while in State service, was directly concerned with and personally participated in the same case as that in which he now seeks to be appointed as mediator. While neither individual may have been actively involved in the specific issue of liability apportionment, it is clear that each personally participated in the litigation. [Employee A], as [a senior level employee], supervised the legal review of several issues involving the design and selection of remedies at the site, and supervised the legal review of DEC's position in the cost allocation aspect of the litigation. [Employee B], as Director of [ ], personally participated in the litigation by, *inter alia*, approving consent orders. Thus, the Commission concludes that, in the absence of an exception, the lifetime bar would preclude both [employee A] and [employee B] from rendering services for compensation as mediators.<sup>(3)</sup>

The question, then, becomes whether the government-to-government exception would apply to their appointments as mediators. This exception, found in §73(8)(e), applies to the receipt of compensation for services rendered by a former State employee which is made while carrying out official duties as an employee of a federal, State or local government or one of its agencies. Before §73(8) was amended to include this exception, the Commission held, in [Advisory Opinion No. 89-5](#), that the post-employment restrictions should not be deemed to apply to "one who terminates employment with a State agency and takes employment with the . . . judicial

branch of government . . . as long as he or she is acting within the proper discharge of his or her official duties." Following the enactment, in 1989, of paragraph (e), the Commission held, in [Advisory Opinion No. 89-7](#), that the government-to-government exception does not extend to paid consultants or retained representatives of the federal, State or a local government. However, in [Advisory Opinion No. 94-8](#), the Commission held that an appointed member of a regional planning board, even though not an elected official or employee, is covered by the exception, equating the non-compensated position to that of an employee.

To decide the instant case, the Commission must determine whether a mediator should be equated to an employee. Basically, a mediator is retained for a specific project and is paid by agreement. He or she is usually appointed to handle one case, and is granted authority in that case, pursuant to a court order, to compel the parties to attend settlement conferences and attempt to reach a resolution. The judge maintains jurisdiction over the matter and customarily sets the terms and conditions of the mediation, but does not supervise the mediation. Clearly, the mediator is not placed on a court's payroll.

Under these circumstances, the Commission concludes that a mediator should not be equated to a judicial (or government) employee. The arrangement between the court and the mediator has the attributes of a consultant arrangement which, as noted above, does not trigger the government-to-government exception.

The Commission believes that its conclusion that [employee A] and [employee B] are prohibited by the lifetime bar from serving as mediators is consistent with federal law. The Local Rules of Practice of the United States District Court for [ ] contain conflict of interest rules currently applicable to arbitrators and which are proposed to be made applicable to mediators in a somewhat modified form. Rule 83.7-4(c) provides that "[n]o person shall serve as an arbitrator in an action in which any of the circumstances specified in 28 USC §455 (conflict of interest) exist or in good faith shall be believed to exist." 28 USC §455 provides, in pertinent part, that:

(a) Any justice, judge, or magistrate of the United State shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . . .

(3) Where he served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

. . . .

(d) For purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review or other stages of litigation;

....

(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b).

....

Thus, it appears that 28 USC §455(b)(3) contains a bar similar to that of Public Officers Law §73(8)(a)(ii), and that [employee A] and [employee B] would be precluded from serving under federal law as well, assuming that the federal provision is made applicable to individuals appointed to serve as mediators.<sup>(4)</sup>

## CONCLUSION

The Commission concludes that since the government-to-government exception, contained in Public Officers Law §73(8)(e), does not apply to a mediator appointed by a Federal court, the lifetime bar, contained in §73(8)(a)(ii), precludes both [employee A] and [employee B] from serving as a mediator, as each, while in State service, was directly concerned with and personally participated in the same proceeding in which he would serve.

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 opinion or related supporting documentation.

All concur:

Joseph M. Bress, Chair  
Angelo A. Costanza,  
Robert E. Eggenschiller,  
Donald A. Odell, Members

Dated: February 5, 1996

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## Endnotes

1. [Employee B] states that he does not have a personal recollection of virtually any of the details discussed in his request letter. The summary of facts that he provides is based on his conversation with a DEC employee who reviewed the case file.

2. Section 73(8)(a) also includes a two year bar separate from the lifetime bar. However, the Commission need not consider the two year bar since [employee A] has been granted a limited exception, pursuant to §73(8)(b)(ii), permitting him to be appointed as a mediator where he is not precluded from serving by the lifetime bar, and it has been more than two years since [employee B] left State service.

3. Each individual could, however, serve without compensation. The lifetime bar prohibits: (1) appearing, practicing, communicating or rendering services before any State agency, and (2) the receipt of compensation for services rendered anywhere. Since a Federal court does not fit within the definition of "State agency" found in §73, [employee A] and [employee B] would not be covered by the first clause, and, if services were rendered pro bono, they would not fall within the second clause.

4. This opinion does not reflect consideration of any limitation under the Code of Professional Responsibility which might affect an attorney's fulfilling the role of mediator in a case in which he or she was involved as a counsel to one of the parties or agencies involved.