

**MINUTES OF THE PUBLIC SESSION OF THE
NOVEMBER 25, 2014
COMMISSION MEETING
OF THE JOINT COMMISSION ON PUBLIC ETHICS
HELD AT THE COMMISSION'S OFFICE LOCATED AT
540 BROADWAY
ALBANY, NEW YORK**

Chair: Daniel J. Horwitz

Members: Paul Casteleiro
Hon. Joseph Covello
Marvin Jacob
Seymour Knox, IV
Gary J. Lavine
Hon. Mary Lou Rath
David A. Renzi
Michael A. Romeo, Sr.
Hon. Renee R. Roth
George Weissman

Members

Absent: David Arroyo

Staff: Letizia Tagliafierro, Executive Director
Monica J. Stamm, Chief of Staff and Deputy Counsel
John T. Milgrim, Director for External Affairs
Stephen J. Boland, Director for Administration
Martin L. Levine, Director of Lobbying and Financial Disclosure Compliance and
Senior Counsel
Robert Cohen, Special Counsel and Director of Ethics and Lobbying Guidance
Shari Calnero, Senior Counsel and Manager of Training
Lou Manuta, Associate Counsel
Michael Sande, Associate Counsel
Patrick E. Coultry, Chief Investigator
Terence Mulderrig, Senior Investigator
Peter Smith, Confidential Investigator
Lori Donadio, Confidential Legal Assistant
Deborah Novak, Executive Assistant
Janeeta Howe, Intern

I. CALL TO ORDER

Chair Horwitz called the November 25, 2014 Commission Meeting to order.

II. APPROVAL OF MINUTES – PUBLIC SESSION – SEPTEMBER 30, 2014

A motion was made by Commissioner Covello, which was seconded by Commissioner Knox, to approve the minutes from the Public Session of the September 30, 2014 Commission Meeting. The motion was approved by unanimous vote.

III. REPORT FROM EXECUTIVE DIRECTOR

Update on Outreach Program

Executive Director Letizia Tagliafierro reported that in 2014, JCOPE has focused on outreach and education, including providing more and improved materials to the regulated community and the public. Executive Director Tagliafierro then provided a brief update on some of JCOPE's recent accomplishments. A new pamphlet on post-employment guidance was issued for State officers and employees who are leaving State service, which is available in a hard copy or on JCOPE's website. A new Ethics Reminder was issued as the holiday season is approaching to remind State officers and those who engage in lobbying activities of the rules pertaining to acceptable gifts. JCOPE has continued to offer the Comprehensive Ethics Training Course and online Ethics Orientation. In addition, since launching the new online Ethics Training for Lobbyists, more than 1,700 individuals have enrolled to take the course. JCOPE will continue to expand its education program and offer more training courses in 2015.

Executive Director Tagliafierro advised that staff has been working on clarifying JCOPE's guidance in other areas. There are two issues relating to the application of the post-employment restrictions for Commission discussion. The application of the two-year bar to adjudicatory proceedings is on the agenda for discussion today, and its application to seeking public information from one's former agency will hopefully be discussed at the next meeting. In addition, in October, JCOPE held a forum with State agency ethics officers to discuss the current outside activity regulations. Staff hopes to

present recommendations to the Commission to address the issues raised at that forum in the near future.

Second Quarter Financial Report

Director for Administration Stephen Boland presented the financial report for the second quarter, ending September 30, 2014. JCOPE's personal service disbursements were \$813,194, and therefore, as of the end of the second quarter, JCOPE has expended 42.2% of the cash available for personal service for the year. The disbursements were higher than the first quarter because there was an extra payroll and payment of performance advances. For non personal services, \$186,169 was disbursed. Year-to-date, 32.5% of cash allocated for NPS has been expended. Of this quarter's NPS expenses, 73% was for lease-related expenses, 8% for IT and telecom expenses, 2% for travel, and 17% for supplies and miscellaneous expenditures. In total, in the second quarter, JCOPE expended \$999,363, which on a year-to-date basis, is 40.2% of JCOPE's cash funds.

IV. ADVISORY OPINION PURSUANT TO EXECUTIVE LAW §94(16)

Application of the Two Year Bar in relation to Adjudicatory Proceedings

Director of Lobbying and Ethics Guidance and Special Counsel Rob Cohen explained that certain inquiries for guidance had prompted staff to undertake a thorough examination of the precedent on the topic of a former employee engaged in litigation involving his former agency. Staff concluded that there was a confusing patchwork of rulings that were not internally consistent and did not appear to be consistent with the purpose of the two-year bar. The proposed opinion is designed to provide one comprehensive guide and resource on this issue.

Director Cohen reported that after previous discussion with the Commission, staff solicited comments from the general public on this opinion; an e-blast was sent out and was published on the Commission's website. The Commission received a solitary comment in response, requesting that the new rule should be applied prospectively only. Staff also proactively solicited views from agencies that employ a large number of lawyers and experts to inform them of the new rules. These agencies did not express any

concern with the proposed opinion. The State Bar Association was also informed and did not express any concerns with the new rules being proposed.

Director Cohen then discussed the substance of the proposed opinion. Under the current precedent, a former State employee may represent a party in an adjudicatory proceeding in which his former agency is a party but he may not engage in any settlement talks or any discovery with his former agency. Rather than parsing out each activity in litigation, the proposed rule simply prohibits a former employee for 2 years after separation of State service from representing a party in an adjudicatory proceeding to which his former agency is also a party. As a practical matter, the proposed rule should not radically alter the regulatory landscape, as the two expressly prohibited activities under the current rule – discovery and settlement negotiations – are fundamental to any legal representation in an adjudicatory proceeding. The relevant law, known as the “appearance/practice rule” can be found in Public Officers Law §73(8)(a)(i).

Commissioner Weissman questioned whether staff considered the legislative history or the bill jacket of the Ethics Reform Act of 1987. Commissioner Weissman does not necessarily disagree with the logic of the proposed opinion, but has concerns as to the Commission’s legal ability to change the Legislature’s words in the statute. He suggested that this topic may be better addressed in the report the Commission is required to provide to the Legislature in February 2015. In his view, prior Commissions had diced this issue very finely, but they did so in the context of what the statute requires, and in terms of the actual words, appearing or practicing before a State agency, which does not include appearing or practicing before a court.

Director Cohen observed that predecessors to the Commission have actually said “nothing in the Public Officers Law provides that a case proceeding or application or related proceeding may not be simultaneously ‘before’ both a State agency and a court.” (Advisory Opinion 00-01, New York State Ethics Commission). Other predecessor agencies have, in fact, taken the view that a matter that is before a court can also be

before an agency. Commissioner Weissman stated that it would be a rare instance because generally a party must exhaust its administrative remedies before going to court.

Commissioner Covello questioned whether there is a distinction between an agency adjudicating something and a court adjudicating something and the relationship with the individual and the prior agency that he worked for versus a court. In other words, does the appearance question turn on who the decision maker is? Director Cohen explained that, based on the precedent, in the context of the two-year bar, the determinations did not turn on whether the appearance is before a court of law or an agency adjudicatory body.

Deputy Counsel and Chief of Staff Monica Stamm stated the precedent tries to strike a balance by focusing on the specific conduct at issue -- certain conduct in a litigation has been identified as before an agency, such as settlement negotiations. In Deputy Counsel Stamm's view, the proposed opinion does not contravene the statutory language. Rather it is the Commission's plenary authority to interpret the statutory language of "appear and practice before such agency." Staff suggested that, in light of the real world application of the current precedent (*i.e.* it is very difficult, if not impossible, to conduct litigation and be prohibited from engaging in discovery or settlement talks), the Commission adopt a rule that applies to litigation as a whole rather than trying to breakdown litigation into its various parts.

Commissioners discussed the effect of the current rule and its impact on former State employees being hired to represent clients given existing limitations. Chair Horwitz queried whether there were ethical implications under the rules of professional conduct if a lawyer was to accept representation given these limitations. Chair Horwitz acknowledged that the practical implications of the current rule seem to raise real concerns. Director Cohen advised that JCOPE has periodically received inquiries over the application of this rule.

Commissioner Weissman stated that in his view the rules have been fairly clear for the past 22 years. From the legislative history it is clear that these issues were debated back

in 1987 when the law was passed implementing the two year bar and that litigation was not intended to be covered by the two-year bar. Predecessor agencies, cognizant of this history, took great pains to strike a balance between the purpose of the two-year bar and the need not to impede future employment. For this reason, Commissioner Weissman is concerned that the proposed opinion does in fact represent a “sea change” and reiterates his earlier suggestion that this matter should be addressed in the February report.

Deputy Counsel Stamm acknowledged that she does not share this insight into the discussion of the Legislature in 1987, but it is worth noting, that unlike the State, New York City has clearly stated its intent with an express carve-out for adjudicatory proceedings. And regardless of the legislative intent more than 20 years ago, predecessor agencies have interpreted the statutory language and there is 20 years of precedent which does encroach into adjudicatory proceedings. However, the lines that have been drawn seem to be confusing based on the inquiries staff has received.

Chair Horwitz stated that there has been a fairly thorough discussion on these issues and Commissioners Covello and Weissman and the staff have identified some issues that warrant additional consideration. Chair Horwitz suggested that the Commission take this matter under further advisement and if necessary it can be discussed at a future date. Executive Director Tagliaferro stated that staff will look into the issues that have been raised.

V. NEW AND OTHER BUSINESS

There was no new or other business discussed.

VI. MOTION TO ENTER INTO EXECUTIVE SESSION PURSUANT TO EXECUTIVE LAW §94(19)(b)*

A motion was made by Commissioner Roth, which was seconded by Commissioner Romeo, to enter into Executive Session pursuant to Executive Law §94(19)(b). The motion was approved by unanimous vote.

VII. PUBLIC ANNOUNCEMENT OF ACTIONS FROM EXECUTIVE SESSION

Chair Horwitz announced that, during the Executive Session, the Commission considered a number of investigative matters. The Commission also considered and adopted the recommendation and reports of an independent hearing officer that were made following public hearings.

VIII. MOTION TO ADJOURN THE PUBLIC MEETING

A motion was made by Commissioner Covello, which was seconded by Commissioner Knox, to adjourn the Public Meeting. The motion was approved by unanimous vote of the Commissioners.