



STATE OF CONNECTICUT OFFICE OF STATE ETHICS

Draft Advisory Opinion No. 2014-6

June 12, 2014

Question Presented: The petitioner asks whether the proposed Department of Mental Health and Addiction Services policy governing private forensic work by the Whiting Forensic Division psychiatrists employed by the State or hired as consultants or independent contractors is consistent with the applicable provisions set forth in the Ethics Code.

Brief Answer: We conclude that the proposed policy is consistent with the applicable provisions set forth in the Ethics Code.

At its May 2014 regular meeting, the Citizen's Ethics Advisory Board ("Board") granted the petition for an advisory opinion submitted by Commissioner Patricia A. Rehmer of the Department of Mental Health and Addiction Services ("DMHAS"). The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials¹ ("Ethics Code").

Facts

The following facts and argument, as set forth by the petitioner, are relevant to this opinion:

¹Chapter 10, part I, of the General Statutes.

[DMHAS] is seeking an advisory opinion to ensure compliance with state ethics laws (specifically C.G.S. § 1-84 and § 1-86e) surrounding the issue of outside employment by psychiatrists employed by DMHAS or hired by the State as a Consultant or independent contractor to the Whiting Forensic Division (hereinafter WFD) of Connecticut Valley Hospital. The issue of outside forensic evaluations by DMHAS clinicians was previously addressed in two separate Advisory Opinions issued in 1988. On page two of Advisory Opinion 88-11, the State Ethics Commission found that “In order to avoid violation, both real and apparent, of subsection 1-84 (b) and (c) of the Code ...[state employees] should not, for compensation, provide private clinical evaluations...” This finding, and a similar one contained in Advisory Opinion Number 88-12, have created a significant obstacle for DMHAS in efforts to recruit and retain the best qualified psychiatrists to work at the WFD. It is noted that this difficulty in recruiting psychiatrists places an ongoing significant burden on DMHAS in ensuring the continuation of high quality patient care.

In 2003 the [State Ethics Commission] considered whether a proposed UCONN policy would provide an acceptable framework for compliance with state ethics laws. On page two of Advisory Opinion No. 2003-9, “Application Of The Code To Outside Referrals By UCONN Mental Health Services Providers,” the [State Ethics Commission] found that the proposed UCONN policy avoided the “conflict identified in the Boneski opinion...as long as any affected clinician does not take part in the review committee decision.” The [State Ethics Commission] found that removing the affected clinician from the approval process created “an acceptable framework which minimizes the potential for conflicts, while at the same time, recognizing the legitimate need to provide adequate localized care.”

DMHAS is proposing a framework to avoid actual and potential conflicts in the proposed policy “Private

Forensic Consultation by DMHAS Employees and Persons Hired by the State as a Consultant or Independent Contractor to the Whiting Forensic Division” which is enclosed for your review. This proposed policy will help ensure that WFD psychiatrists can practice private forensic consultation while avoiding actual and potential conflicts. Under this proposed policy, no psychiatrist shall accept private consultation work which will violate the Code of Ethics for Public Officials. No psychiatrist shall accept private forensic work that creates a conflict with their assigned WFD duties. To avoid potential conflict, a reasonable amount of private forensic consultation work may be performed within guidelines established by the proposed policy. Regarding non-court ordered criminal forensic work inside Connecticut, this proposed policy requires that:

- Before beginning a new private forensic consultation, the psychiatrist shall submit a request to his/her manager who will discuss the request and clarify the nature of the consultation, its potential effects, and the available methods for avoiding potential conflicts;
- Any request to conduct a private forensic consultation will be reviewed by a committee composed of the Director of WFD, the DMHAS Director of Forensic Services, and the psychiatrist’s manager. The committee will approve or deny the request based on the ability to successfully avoid potential conflicts;
- Each psychiatrist will monitor the effect or potential effects of the private consultation on their duties and regularly review such consultations with their manager, who will provide regular reports about such discussions to the Director of Forensic Services and the Director of WFD; and
- Any psychiatrist wishing to pursue such forensic work shall, along with their manager, be briefed by the Director of WFD and/or the DMHAS Director of Forensic Services about the concerns

and methodologies to mitigate concerns associated with the work. In addition, the psychiatrist shall maintain a log of all such forensic work.

As with the finding in Advisory Opinion 2003-9, the affected psychiatrist does not take part in the review committee decision, and the decisions are made by the committee. Further, there are ongoing reviews by the consulting psychiatrist and the manager, which are reported to senior administrators in the DMHAS forensic division.

DMHAS believes this proposed policy will ensure compliance with state ethics laws and will avoid real and potential conflicts of interest.

Analysis

As this Board and its predecessor agency, the State Ethics Commission (“Commission”), consistently noted, the Ethics Code does not contain a blanket prohibition against outside employment, but it does impose significant restrictions on that employment. The Ethics Code has two long-established provisions that govern the outside employment activities of public officials and state employees. First, under General Statutes § 1-84 (b), a public official or state employee shall not “accept other employment which will either impair his independence of judgment as to his official duties or employment or require him, or induce him, to disclose confidential information acquired by him in the course of and by reason of his official duties.”² Second, under General Statutes § 1-84 (c), a public official or state employee shall not “use his public office or position or any confidential information received through his holding such public office or position to obtain financial gain for himself”³ Generally, these provisions prohibit outside employment in a situation in which an outside employer can benefit from the state employee’s official actions—for example, the state employee, in his state job, has supervisory, contractual or regulatory authority over the outside employer.⁴

²General Statutes § 1-84 (b).

³General Statutes § 1-84 (c).

⁴Regs., Conn. State Agencies § 1-81-17.

With regards to consultants and independent contractors hired by the State, the Ethics Code has specific rules of conduct.

No person hired by the state as a consultant or independent contractor shall: (1) Use the authority provided to the person under the contract, or any confidential information acquired in the performance of the contract, to obtain financial gain for the person, an employee of the person or a member of the immediate family of any such person or employee; (2) Accept another state contract which would impair the independent judgment of the person in the performance of the existing contract; or (3) Accept anything of value based on an understanding that the actions of the person on behalf of the state would be influenced.⁵

Although the Ethics Code's treatment of consultants and independent contractors is limited to § 1-86e, its provisions regarding "independence of judgment," "use of authority" and "confidential information" are similar to the outside employment rules applicable to state employees.⁶

The application of the outside employment provisions to DMHAS psychiatrists and the restrictions imposed on consultants and independent contractors have been the subject of prior advisory opinions issued by this Board and the Commission.

In Advisory Opinion No. 88-11, the Commission ruled that an individual who was employed by the Department of Mental Health as a psychiatric social work supervisor and the Director of the Bridgeport Court Clinic could not provide in his private capacity clinical evaluations in criminal matters for private criminal defense attorneys because they also have interest in his official actions regarding competency to stand trial and the sentencing process. The Commission reasoned that acceptance of employment by the Director of the Court Clinic would appear to many as an impairment

⁵General Statutes § 1-86e.

⁶See General Statutes § 1-84 (b) and (c).

of the independence of judgment and an inadvertent use of office to obtain private clients. Further, the Commission noted, “the conflicts are particularly fundamental and acute when a State employee ventures to provide, for private compensation, services which are the same as he is required to provide in his State position.”⁷

Similarly, in Advisory Opinion No. 88-12, the Commission prohibited the Assistant Director of Forensic Services in the Department of Mental Health, who was responsible for overseeing the State’s competency and post-conviction evaluations, to perform compensated, private evaluations in capital felony cases. Again, the reason for the restriction was the public perception that private criminal defense attorneys would not only be seeking to ingratiate themselves with the individual who heads the State’s clinical evaluation program, but the proposed private employment would raise questions about the Director’s independence of judgment as to official duties and use of office for financial gain. Finally, the Commission stated that the Director’s official duties were “so closely related to the subject of her private employment, it might be difficult for those involved in the process to discern when she was acting in her official capacity and when she was representing a private client.”⁸

One noteworthy point that can be gleaned from the rulings in Advisory Opinion Nos. 88-11 and 88-12 is that the individuals subject to outside employment restrictions in those opinions had considerable supervisory authority over the State’s competency and post-conviction evaluations. Both individuals were directors of forensic services performed by the State. Because of their supervisory authority, it would be undoubtedly difficult to ignore public questions as to whether their independence of judgment remained unimpaired. Further, in order to bolster their own cases, private criminal defense counsel would likely seek to hire these individuals more for their level of official authority than for their expertise in performing evaluations, thus raising questions about the use of office, regardless how inadvertent.

The petitioner notes in her request for advisory opinion that

⁷Advisory Opinion No. 88-11, Connecticut Law Journal, Vol. 50, No. 8, p. 1C (August 23, 2014).

⁸Advisory Opinion No. 88-12, Connecticut Law Journal, Vol. 50, No. 8, p. 2C (August 23, 2014).

Advisory Opinion Nos. 88-11 and 88-12 “have created significant obstacle for DMHAS...to recruit and retain the best qualified psychiatrists to work at the WFD,” because the conclusions reached in these opinions established a long-standing prohibition on the ability of WFD psychiatrists to practice private forensic consultation in criminal matters. In order to assuage the concerns expressed in the two cited opinions, DMHAS proposes to implement an internal policy to oversee the outside employment of DMHAS psychiatrists as well as consultants and independent contractors retained by the State who work at WFD, without exempting such individuals from the requirements of the Ethics Code but to permit private forensic work in those instances where conflicts can be avoided.

State agencies may formulate and implement internal policies to govern ethical behavior of its employees, consultants and independent contractors provided such policies are not treated as a less stringent substitute for the Ethics Code. In fact, state agencies are permitted to adopt ethics policies that are more restrictive than the Ethics Code.⁹ Agencies may also introduce policies that address specific provisions of the Ethics Code, e.g., outside employment, gifts, conflicts of interest or revolving-door, policies that are responsive to the particular subgroup of state employees, the nature of official work performed, or the status particular employees hold within state government.

Here, the general principles of the proposed WFD outside employment policy satisfy the outside employment provisions of the Ethics Code. Among other things, the policy requires that any private forensic work will not involve work expected to be performed at WFD for DMHAS, nor will such private employment be permitted in situations where it actually conflicts with the individual’s WFD work duties. In the context of the limitations set forth in the Ethics Code, the WFD policy provides an outline of permissible engagement in private forensic consultation with specific procedures established for review of potential conflicts involving proposed criminal forensic work in Connecticut that has not been mandated by a court. It is these procedures that are the focal point of the petitioner’s request for this opinion. According to these procedures, any WFD psychiatrist who is employed by DHMAS or hired by the state as a consultant or independent contractor and who wishes to pursue

⁹Advisory Opinion No. 2008-3, Connecticut Law Journal, Vol. 69, No. 51, p. 1D (May 30, 2008).

private criminal forensic work in Connecticut that has not been mandated by a court must submit a request for such work to his or her superiors for review and discussion. A review committee comprised of the WFD and DMHAS management will approve and deny the request for private work based on the likely successful avoidance of potential conflicts. If approved for outside employment, WFD psychiatrists will be subject to regular review and oversight by WFD managers.

In support of the proposed procedures, the petitioner cites Advisory Opinion No. 2003-9, in which the Commission reviewed a proposed policy of the University of Connecticut Consulting and Mental Health Services (“CMHS”) to permit its clinical staff to have university students referred to their private counseling practices. Because of increased demand for student clinical services, CMHS proposed a set of procedures to avoid potential conflicts by establishing a review committee to oversee the referral of students to private counseling practices that may include CMHS staff members. The Commission reasoned that “as long as any affected clinician does not take part in a review committee decision and as long as said decisions are made by the individual’s peers and superiors, the process will comply with the Code’s conflict of interests provisions.”¹⁰

We agree that Advisory Opinion No. 2003-9 provides a procedural precedent for handling potential conflicts in outside employment scenarios. Just as in the case of student referrals to private clinical practices of UCONN staff members, here DMHAS proposes to establish a review committee comprised of superiors in whose decision the individuals seeking authorization will not participate. Further, the proposed DMHAS policy appears to take into account the reservations expressed by our predecessor agency in Advisory Opinion Nos. 88-11 and 88-12, by excluding supervisors and directors responsible for the oversight of state forensic services from participation in private criminal forensic work in Connecticut. As noted earlier, individuals who hold supervisory, contractual or regulatory authority should not pursue outside employment that may place them in conflict in the exercise of such authority. Finally, the provisions that comprise the proposed policy governing private forensic consultation by WFD psychiatrists establish clear

¹⁰Advisory Opinion No. 2003-9, Connecticut Law Journal, Vol. 65, No. 7, p. 1D (May 9, 2003).

limitations outside of which private work will be impermissible

Conclusion

We conclude that the proposed DHMAS policy governing private forensic work by WFD psychiatrists employed by the State or hired as consultants or independent contractors is consistent with the provisions set forth in the Ethics Code. This opinion is limited to the policy presented by the petitioner in her request for advisory opinion. Any subsequent changes to the proposed policy which are substantive in nature should be brought to the attention of the Office of State Ethics to ensure compliance.

By order of the Board,

Dated _____

Chairperson