

New York State Ethics Commission

Advisory Opinion No. 93-12: Application of Public Officers Law §73(8) to a former employee of the [a State facility] who wishes to treat patients from her former facility.

Introduction

The following advisory opinion is issued in response to a request from the executive director of [a State facility], whether [], a former employee of [the State facility], may treat patients from the facility.

Pursuant to its authority under Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that Public Officers Law §73(8) prohibits [the former State employee] from treating [State facility] patients for two years following her separation from [the State facility] under the circumstances described herein.

Background

[The former State employee] was a part-time [] at [the State facility] and the only [] at the facility until her resignation effective May 27, 1992. At the time, [the former State employee] was also working part-time at the [] County Medical Center [], a county medical facility. Prior to her resignation from [the State facility, the former State employee] requested an opinion from the Commission on whether she would be able to provide [specialized] services to [the State facility's] patients off-site following her separation from the facility as [the State facility] did not intend to fill her position and that there would be no one available to provide [] services on-site.

At the time of her initial inquiry, [the former State employee] explained that she planned to work for the [county medical center] following her separation from [the State facility].⁽¹⁾ However, she anticipated that the [specialists] at [the county medical center] would "go on contract" in July 1992 and be paid a salary through [], a not-for-profit professional service corporation. [The former State employee] also stated that all [specialists] at [the county medical center] are on the State University of New York at [] faculty although all are not on the university's payroll.

The Commission's informal opinion to [the former State employee], dated August 19, 1992, noted that because [the county medical center] is a public hospital she would not violate Public Officers Law §73(8) as long as she treated [the State facility's] patients as part of her duties as [a county medical center] employee because, as a public employee, she would be covered by the "government-to-government" exception to Public Officers Law §73(8) (*See, infra.*). The informal opinion continued:

However, once you become an employee of a non-governmental entity [], the post-employment restrictions do apply. You may not appear, practice or render services for compensation before your former agency for two years commencing May 27, 1992. Hence, you would be prohibited from seeing [the State facility's] patients [as an employee of the not-for-profit professional services corporation]. You may want to explore the possibility of continuing to be paid by [the medical center] or some other governmental entity such as the State University of New York at [] for your treatment of [the State facility's] patients and to be paid by [the not-for-profit professional services corporation] when treating other patients.

On December 22, 1992, the Commission received the instant request for a formal opinion from the executive director of [the State facility]. According to that letter, [the former State employee] is actually working under the auspices of a private practice plan, [], a subsidiary of [the not-for-profit professional services corporation], which has a contract with [the medical center] for the provision of [] services at [the medical center]. He confirms that she is not an employee of [the medical center].

According to the executive director's letter, because of the nature of the work and the State salary schedule, it is virtually impossible for [the State facility] to retain the services of a board-certified []. [The former State employee] has expressed a willingness to provide [] services to [the State facility's] patients under an arrangement where [the medical center] would bill [the State facility] for [the former State employee's] services. This billing would be in accordance with the fees specified in the New York State Medical Fee Schedule established by the New York State Department of Health. Payments would be from New York State to [the medical center]. The arrangement would not alter in any way [the former State employee's] status as [an employee of the subsidiary of the not-for-profit professional services corporation].

Applicable Law

Public Officers Law §73(8) states, in relevant part, that:

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. (emphasis added.)

The above provision of §73(8) is broad in scope. Section 73(8) prohibits appearing, practicing or the rendering of services for compensation on any matter before one's former State agency for a two year period.

In 1989, the New York State Legislature amended Public Officers Law §73(8) to include the following:

This subdivision shall not apply to any appearance, practice, communication or rendition of services, rendered by a former state officer or 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.

The Commission has interpreted the above amendment to exempt former State employees from the provisions of Public Officers Law §73(8) provided that the former State employee is acting in his or her capacity as a governmental employee. The exception is not available to individuals who are independent contractors to governments.⁽²⁾

Discussion

In the instant matter, the issue is whether Public Officers Law §73(8) prohibits [the former State employee], as an employee of a private not-for-profit professional corporation, from treating patients from her former facility.

A similar issue arose concerning physicians formerly employed by the [], a Department of Health ("DOH") facility. Within two years of their separation of service from [the Department of Health facility], the physicians became employees of [the not-for-profit professional services corporation], a private entity, which had contracted with DOH to provide medical services at [the Department of Health facility]. The arrangement caused the former [Department of Health] employees to appear before their former agency within two years of their separation of State service in an apparent violation of Public Officers Law §73(8). Specific legislation enacted in 1992 legitimated the affiliation agreement between [the Department of Health facility] and [the not-for-profit professional services corporation].⁽³⁾

In the instant matter, [the former State employee] cannot treat [State facility] patients as [an employee of a subsidiary of the not-for-profit professional services corporation] for two years following her separation from [the State facility] because she would be appearing, practicing and/or rendering services for compensation in a matter before her former agency. As [the subsidiary] is a private not-for-profit professional corporation, [the former State employee] cannot qualify for the government-to-government exception to Public Officers Law §73(8) as long as she treats [the State facility's] patients as [an employee of the subsidiary]. There is no specific legislation that would otherwise permit [the former State employee] to treat her former agency's patients.

As the Commission suggested at the time of its informal opinion to her, [the former State employee] and [the State facility] may wish to explore the possibility of entering into an arrangement whereby [the former State employee] would be employed by [the medical center] or some other governmental entity, such as the State University of New York at [], for her treatment of [the State facility's] patients and to be paid by [the subsidiary] when treating other patients.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding.

All concur:

Joseph M. Bress, Chair

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

Dated: March 8, 1993

Endnotes

1. According to [the former State employee, the county medical center] is the public hospital for the area and has a "no decline" policy (i.e., no patients are turned away) for institutionalized patients. [The State facility's] patients are sent to [the county center] for specialty clinics that are not available at [the State facility.]
2. See [Advisory Opinion No. 89-5](#).
3. See Laws of 1992, chapter 293.