New York State
Ethics Commission

Advisory Opinion No. 96-8:	Whether submission of documents by a former State employee to a firm under contract with his former agency should be considered an appearance or rendering of services barred by Public Officers Law §73(8)(a)(i).

INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [ ], an employee of the Department of Social Services ("DSS"), concerning the application of the post-employment restrictions of Public Officers Law §73(8)(a)(i) should he take a position as a case manager for a Medicaid provider. [The requesting individual] asks whether the submission of claims to and contact with a contractor for DSS that is responsible for processing Medicaid claims would be prohibited by the two-year bar.

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by Executive Law §94(15), the Commission hereby renders its opinion that [the requesting individual] would not be able to submit claims that are subject to pre-review by DSS, but his submission of other Medicaid claims to the contractor charged with processing such claims would not be precluded by the two-year bar of Public Officers Law §73(8)(a)(i). However, he would not be able to participate should DSS, in reviewing a claim he has submitted to the contractor, seek further information from the claimant or provider.

BACKGROUND

[The requesting individual] is currently employed by DSS as a [job title]. He has not been designated as a policymaker.

He has informed the Commission that he is considering leaving his current position to become a case manager for a Medicaid provider. As a case manager, [the requesting individual] anticipates that he would assist persons eligible for medical assistance in obtaining necessary services in accordance with goals contained in a written case management plan. Information he provided to the Commission indicates that case management functions are determined by each recipient's circumstances and must be determined with the recipient's involvement. Generally, however, a case manager is required to contact outside entities, including, when appropriate, State agencies, to "identify the barriers to care and existing gaps in services to the recipient." Further, a case manager must "collaborate" with health care and other formal and informal service providers, including discharge planners and other case managers, to encourage an exchange of clinical information.

[The requesting individual] indicated that some of the funds for the position he hopes to obtain "are paid by Medicaid on a fee-for-service basis." He would derive his compensation from a percentage of the successful claims for reimbursement that he submits under the Medicaid program.

Medicaid is a social service program funded with local, state and federal money. DSS, the agency where [the requesting individual] now works, is authorized by Social Services Law §363-a to be the single State agency responsible for administering the program in New York State and to be the State representative with the federal Department of Health and Human Services ("HHS"). It is authorized to promulgate such regulations as may be necessary to implement Medicaid in New York.[(1)]

To process individual claims of providers under the Medicaid program and facilitate the flow of funds to these providers, DSS has entered into a contract with [the contractor].[(2)] In general, [the contractor] has the responsibility of determining which Medicaid claims are to be paid and which are not. However, certain types of claims are subject to pre-review by DSS or the Department of Health.[(3)] For these claims, [the contractor] does not get the opportunity to review them unless they are approved by the agency.

Through use of the Medicaid Management Information System ("MMIS"), the DSS computer unit directs [the contractor] to consider specific criteria in making determinations on individual claims. In general, [the contractor] checks three basic facts:

1. Whether the recipient who received the services is eligible for Medicaid benefits (which is pre-determined by the local social services district);
2. Whether the claimant is a participating provider; and
3. Whether the claim is made for a reimbursable service. (Which services are Medicaid reimbursable is pre-determined at the federal level.)

MMIS has the responsibility of ensuring that [the contractor's] employees translate the DSS-mandated directions into the computer's database so that each determination is made correctly and pursuant to law.

At the end of each business day, MMIS reports to the fiscal agent, a private bank, the amount of money to be paid to Medicaid providers as determined by [the contractor's] computer operations. The fiscal agent then issues the appropriate checks, payable to the providers.

Legally and technically, DSS maintains administrative control over all transactions. However, each claim not subject to pre-review is, from initial submission to the issuance of a Medicaid check, handled via [the contractor's] computer. DSS' authority includes overseeing [the contractor's] handling of these claims. In monitoring its contractor, DSS, in practice, reviews fewer than one percent of all claims filed with [the contractor], although it has the power to review every claim. For some reviews, DSS will ask the provider that submitted the claim to supply additional information.

APPLICABLE STATUTES

Public Officers Law §73(8)(a)(i) provides:

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.

Public Officers Law §73(8)(a)(i), part of what is generally referred to as the "revolving door" provision, sets the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency. It contains a two-year absolute bar on an employee's appearing, practicing or rendering services for compensation on any matter before his or her former agency.

DISCUSSION

[The requesting individual's] request presents the Commission with the question of whether a former employee may make a submission to a contractor retained by his or her former agency when such a submission to the agency itself would constitute a prohibited appearance or rendering of services under the two-year bar. This is a matter of first impression.

The Commission has interpreted the term "appearance" broadly for purposes of Public Officers Law §73(8). For example, an appearance can be in person or by a submission made to a former employee's former agency (Advisory Opinion No. 94-18). The submission of a contract proposal is a barred appearance (Advisory Opinion No. 89-9). With regard to rendering services for compensation on a matter before a former employee's former agency, the Commission has prohibited "back room" services; that is, it is not necessary for the agency to know that the former employee has worked on a matter before the agency for there to be a finding of a violation (Advisory Opinion No. 90-7).

Given these precedents, it is clear that [the requesting individual], for two years following his termination from State service, must refrain from submitting any claim for reimbursement under the Medicaid program to DSS; nor may he work on a claim to be so submitted. This prohibition would preclude him from submitting any claim that would be subject to pre-review by DSS. It would also preclude him from responding to DSS should the agency require additional information in reviewing a claim processed by [the contractor].

With regard to other claims, which constitute the overwhelming majority of all claims filed, [the requesting individual] anticipates that he would prepare them and/or submit them to the contractor retained by DSS, which would determine them without DSS' review. The central question, then, is whether the fact that the contractor, rather than DSS, receives and processes the claims allows their submission by [the requesting individual].

In Advisory Opinion No. 94-18, the Commission had occasion to consider the circumstance of a former DSS employee who proposed to assist entities in developing programs to enhance their ability to collect Medicaid reimbursement for eligible services. Unlike [the requesting

individual], the former employee in that situation did not propose to prepare or submit the specific applications for Medicaid reimbursement, as his clients were to submit the billings to [the contractor]. The Commission concluded that there would be no two-year bar violation on the part of the former employee. In its opinion, the Commission noted what it described as "the independent nature" of [the contractor] in making Medicaid payment disbursement decisions.

Because of this independence, the Commission now concludes that a submission to [the contractor] should not be deemed a submission to DSS. [The contractor], although following criteria mandated by DSS, handles each claim independently of the State agency. From filing to payment, a claim is processed solely by the contractor. Since DSS is not inserted into the process, there is no opportunity for [the requesting individual] to misuse his prior relationship with his former colleagues. The Commission has often stated that the purpose of the 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 Nos. 90-11, 91-2, 91-6).

There is still, however, a question presented by the monitoring of [the contractor] by DSS. Since the agency, as part of its oversight of the contractor, reviews, on a random basis, the contractor's handling of certain claims, the Commission must consider whether [the requesting individual] knows or can reasonably foresee that his work product, even though submitted to [the contractor], will be reviewed by DSS. In its Advisory Opinion No. 89-8, the Commission held that a former State employee was prohibited from making a submission to a State agency other than his former agency where his work would be reviewed by his former agency. The Commission stated that such a submission is in violation of the two year bar unless

the requesting individual has *no reason to know or anticipate* that the [former agency] would be brought in by the [requesting agency] to consult on a particular matter and there is no statute, law or policy providing for such [former agency] involvement (emphasis added) . . .

Subsequently, in Advisory Opinion No. 94-6, the Commission concluded that there was no appearance before a former agency if the former employee had no reason to know or anticipate that his work product, or any other information that identified him as having prepared data and analysis, would be submitted to his former agency.

The Commission recognizes that, in the present case, DSS, in its discretion, may randomly review individual Medicaid claims. However, it is not possible for [the requesting individual] to know whether or not any particular claim he might file would be selected by DSS for review and assessment. Since DSS reviews fewer than one percent of all claims, the chances of its making judgments with regard to [the requesting individual's] work product is very slim. In these circumstances, the Commission finds that [the requesting individual] has no reason to know or anticipate that his work product will be submitted to his former agency after its submission to [the contractor]. Thus, there is no violation of the two-year bar in his making the submission to the contractor.[(4)] However, for the reasons discussed above, should DSS select a claim he has

submitted for review and seek further information from the claimant or provider, he must remove himself completely from the matter at that time.

CONCLUSION

The Commission concludes that [the requesting individual], as a former employee of DSS, would not be able to submit claims under the State's Medicaid program that are subject to pre-review by DSS, but his submission of other Medicaid claims to a contractor retained by DSS which is charged with processing such claims would not be precluded by the two-year bar of Public Officers Law §73(8)(a)(i). However, he would not be able to participate should DSS, in reviewing a claim he has submitted to the contractor, seek further information from the claimant or provider.

In reaching the foregoing conclusion, the Commission considered decisive the fact that DSS reviews relatively few--fewer than one percent--of the Medicaid claims submitted to its contractor. Should that number increase, [the requesting individual] should request the Commission to review the opinion, considering the changed premise.

Furthermore, it is [the requesting individual's] obligation to inform any potential employer for which he intends to perform case management services and submit Medicaid claims of the terms and conditions contained in this opinion. It is for the employer to decide how limiting such terms and conditions may be to its operations.

This opinion, until and unless amended or revoked, shall be 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 supported documentation.

All concur:

Joseph M. Bress, Chair

Evans V. Brewster,
Angelo A. Costanza,
Robert E. Eggenschiller,
Donald A. Odell, Members

Dated: April 15, 1996

Endnotes

1. This opinion is based on an analysis of the Medicaid program as it is currently structured in New York State. Congress and the State Legislature are considering proposals that may

significantly change the manner and method of Medicaid administration. Should such changes occur, it may be necessary to revisit the conclusions reached in this opinion.

2. The DSS/[contractor] contract is due to expire in October, 1996.

3. Examples of claims that require pre-approval are those for certain prescription footwear, special sized wheelchairs, power air flotation beds, and certain diabetic diagnostic aids. Pre-approval of goods or services is required for only a small percentage of all Medicaid claims, certainly less than 10 percent and probably much closer to 1 per cent. (Information supplied by DSS.)

4. Since this opinion deals only with the two year bar, [the requesting individual] would also have to consider Public Officers Law §73(8)(a)(ii), the lifetime bar, which precludes former employees from appearing, practicing, communicating or otherwise rendering services in relation to a case, proceeding, application or transaction with respect to which they were directly concerned and in which they personally participated during the period of their State service or which was under their active consideration. Should a lifetime bar issue arise, he is invited to contact the Commission.