

Advisory Opinion No. 00-3: Application of Public Officers Law §74 to an employee of the State Education Department who wishes to testify as an expert witness.

INTRODUCTION

The following advisory opinion is requested by [], an employee of the State Education Department's Office of Vocational and Educational Services for Individuals with Disabilities ("VESID"). [The requesting individual] has requested the Commission's opinion concerning the propriety of the rendition of consultant services and testimony by him and other VESID employees, for private claimants in litigation, in administrative proceedings before the Social Security Administration and the State Insurance Fund, or in claims made to insurance companies.⁽¹⁾

Pursuant to the authority vested in the New York State Ethics Commission ("Commission") by §94(15) of the Executive Law, the Commission renders its opinion that [the requesting individual], a non-policymaking Senior Vocational Rehabilitation Counselor, may provide advice and testify as an expert witness on behalf of plaintiffs and defendants in proceedings, as defined herein, provided that he does not testify in cases in which the plaintiff has applied for VESID services or refer to confidential information obtained by virtue of his State employment; and, further provided that he must take reasonable steps to clearly indicate that his views as an expert are not the views of the State or any State agency. He must not receive compensation for such services against the interest of the State in a case before the Court of Claims. [The requesting individual] must receive the permission of his employing agency to engage in the outside activity and abide by any additional conditions placed on the activity by the agency.

The Commission issues this opinion to guide both the requesting individual and other State employees who also serve as expert witnesses.

BACKGROUND

[The requesting individual] is a full-time salaried Senior Vocational Rehabilitation Counselor with the New York State Education Department Office of Vocational and Educational Services for Individuals with Disabilities. According to the current New York State Department of Civil Service classification standard for the title dated June 1977, a Senior Vocational Rehabilitation Counselor would "supervise and direct a unit of Vocational Rehabilitation Counselors who plan and coordinate the vocational rehabilitation of persons with disabling physical and/or mental handicaps with the primary goal being to aid these individuals obtain and retain optimum employment." Typical activities, tasks and assignments include assigning new cases to professional staff for evaluation and the preparation of a rehabilitation plan; evaluating the progress of counselors' case activities; expediting the process of case referrals; and promoting the securing of rehabilitation services and employment opportunities for the handicapped.

[The requesting individual] also submitted a job description which indicated that the tasks of the unit are to "plan, schedule, assign and control workload; coordinate with other organizational

units by functioning effectively as a member of the management team; maintain relations with outside organizations and communicate Agency policy to them." Individual employees "provide on the job training; keep employees aware of Agency objectives and monitor counselor's caseload management by doing case reviews . . . evaluate work performance and productivity by reviewing work as indicated in Supervisory Plans and maintaining case reviews according to policies and procedures." Senior Vocational Rehabilitation Counselors are not designated by VESID as policymakers under Public Officers Law §73-a. [The requesting individual] is not so designated and he does not appear to be a policymaker in fact.

[The requesting individual] has been engaged in an outside activity as a vocational consultant for fifteen years. As such, he has been retained by plaintiffs' attorneys and has provided advice and testimony about the nature and extent of a plaintiff's injuries, the nature and cost of necessary rehabilitation services, the vocational abilities and disabilities of a plaintiff after an accident, and the future earning capacity (or lack thereof) of the plaintiff.

According to [the requesting individual], many other VESID counselors, including colleagues in the [] VESID office, engage in the same outside activity.⁽²⁾ [The requesting individual] states that he and his colleagues do not accept cases of individuals who receive services through VESID. To ensure that there is not a conflict between his State duties and his outside activity, [the requesting individual] will ask the private attorney who may seek him as an expert whether the plaintiff is a VESID consumer and will also question the individual. If a plaintiff becomes involved with VESID during the pendency of the case, [the requesting individual] and his colleagues will no longer work on the private matter. If the plaintiff is deemed appropriate for VESID services, [the requesting individual] and his colleagues will advise the individual to apply for VESID services. [The requesting individual] recalls only one instance where private consultant services were provided when the person was a VESID applicant.

[The requesting individual] is aware of an informal opinion of the Commission issued in October 1997 concerning the activities of a colleague engaged in the same outside activity. In that informal opinion, an attorney who represented a plaintiff in a personal injury action asked about the ethical propriety of a VESID counselor who, in his outside activity, was expected to testify for a defendant concerning the plaintiff's future earnings capacity. The Commission noted that it did not have the authority to determine whether or not the VESID counselor might testify; that was for the court to determine.⁽³⁾ Nonetheless, the Commission observed that the VESID employee's testimony for the defense might discourage the plaintiff from seeking from VESID the public services to which he was entitled. Furthermore, if plaintiff sought VESID services, VESID's response might be affected by the testimony given by the counselor in the private matter. The Commission concluded that the employee could not testify as an expert for the defendant in the lawsuit without violating Public Officers Law §74, because such testimony would tarnish the appearance of VESID's neutrality. The Commission expressed no views about whether the employee could testify as an expert for a plaintiff.

APPLICABLE STATUTES

Public Officers Law §73(3)(a) states:

No statewide elected official, member of the legislature, legislative employee, full-time salaried state officer or employee shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another against the interest of the state in relation to any case, proceeding, application or other matter before, or the transaction of business by himself or another with, the court of claims.

Public Officers Law §73(7)(a) states:

No statewide elected official, or state officer or employee, other than in the proper discharge of official duties, or member of the legislature or legislative employee, or political party chairman shall receive, directly or indirectly, or enter into any agreement express or implied for, any compensation, in whatever form, for the appearance or rendition of services by himself or another in relation to any case, proceeding, application or other matter before a state agency where such appearance or rendition of services is in connection with:

(i) the purchase, sale, rental or lease of real property, goods or services, or a contract therefor, from, to or with any such agency;

(ii) any proceeding relating to ratemaking;

(iii) the adoption or repeal of any rule or regulation having the force and effect of law;

(iv) the obtaining of grants of money or loans;

(v) licensing; or

(vi) any proceeding relating to a franchise provided for in the public service law.

Section 74 provides minimum standards against which State officers and employees are expected to gauge their behavior. The rule with respect to conflicts of interest is contained in subdivision 2, and provides:

No officer or employee of a state agency . . . should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct which address actual as well as apparent conflicts of interest:

(a) No officer or employee of a state agency . . . should accept other employment which will impair his independence of judgment in the exercise of his official duties.

(b) No officer or employee of a state agency . . . should accept other employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority.

(c) No officer or employee of a state agency . . . should disclose confidential information acquired by him in the course of his official duties nor use such information to further his personal interests.

(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

....

(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

....

(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

DISCUSSION

In assessing whether a State officer or employee may engage in an outside activity, the Commission looks to the provisions of Public Officers Law §§73 and 74.

No provision of Public Officers Law §73 addresses [the requesting individual's] situation. As long as [the requesting individual] and his colleagues do not appear in cases before the Court of Claims, the restriction of Public Officers Law §73(3) does not pertain. Furthermore, the Commission concludes that [the requesting individual] is not prohibited by Public Officers Law §73(7) from serving as a vocational rehabilitation expert in matters before the State Insurance Fund ("SIF"). Public Officers Law §73(7)(a) prohibits State employees from appearing or rendering services before State agencies, including the SIF, relative to such matters as the purchase, sale, rental or lease of real property, goods or services; any proceeding relating to rate making; the adoption or repeal of any rule or regulation having the force and effect of law; the obtaining of grants of money or loans; and licensing. [The requesting individual's] testimony for a claimant coming before the SIF seeking benefits would not fall within any of the prohibited activities of the statute.

Section 74 is concerned with both actual and apparent conflicts of interest. It provides minimum standards against which State officers and employees are expected to gauge their behavior, addressing the conflict between an employee's obligations for the State and his or her private, often personal financial interests. As the Attorney General stated in a 1979 opinion applying Section 74:

A public official must not only be innocent of any wrongdoing, but he must be alert at all times so that his acts and conduct give the public no cause for suspicion. He must give no appearance

of a potential conflict between his duties and personal activities even though an actual conflict is not present . . . [1979 Op. Atty. Gen. 66]

Based on the appearance standard, the Commission has considered how the public would gauge the State employee's outside activity. In Advisory Opinion No. 91-16, the Commission held that a Department of Motor Vehicles "Motor Vehicle Violations Bureau Referee" ("MVR") could not engage in the private practice of law representing clients in traffic violations cases, either before his agency or in traffic courts outside of the county in which he was employed. The Commission stated:

Traffic court appearances would also pose a problem. Such appearances could easily lead people to question the MVR's objectivity as he performs his "judicial" activities. The investment of time and energy to build a reputable private practice is significant. To be successful, a private practice attorney must aggressively defend persons in traffic court using every advantage legally available. Yet in another forum, the same attorney, in the very same type of cases, must render unbiased and impartial decisions as an MVR to enforce the Vehicle and Traffic Law and, in those appropriate cases, punish undesirables whom he is advertising to defend. It is reasonable to anticipate that the persons who know of the MVR's private practice will question the objectivity of his decisions regardless of the results.

The Commission has permitted State employees to receive royalties from the sales of books they have written concerning the subject matter for which they have responsibility for the State, provided that the preparation and writing of such books is not a part of their job responsibilities for the State. *See, Advisory Opinion No. 98-15*. (Contrast Advisory Opinion No. 98-16, where the Commission held that a State employee may not provide a particular type of training as an outside activity if his employing agency would make providing such training a part of the employee's official duties for the State.)

A VESID counselor, such as [the requesting individual], is not required by his official duties to provide private persons with advice or testimony in litigation or other proceedings. Therefore, the rendition of such advice or testimony does not appear to duplicate a VESID counselor's public functions. In this way, the outside activity is analogous to the activity discussed in Advisory Opinion No. 98-15, in which a State employee wrote a book concerning his or her area of professional expertise and the writing of such a book was not part of the employee's official duties for the State.

Nevertheless, there are restrictions on a VESID counselor serving as an expert witness. First, to ensure that [the requesting individual] will remain impartial in his State position, he should not serve as an expert witness in any case on behalf of an individual who has either applied for VESID services or has provided a reasonable basis for [the requesting individual] to conclude that he will do so. By declining to be involved in matters involving a VESID client, [the requesting individual] will abide by the standard of conduct of Public Officers Law §74(3)(a) which prohibits an employee from accepting other employment which will impair his independence of judgment in the exercise of his official duties. This is also consistent with the Commission's opinion in Advisory Opinion No. 91-16.

If VESID is not involved in the case in which the employee serves as an expert, there is not the appearance that the outside employment will have an effect on how the VESID counselor performs his duties for the State, or that any VESID claimant's case will be in any way connected to the employee's service as an expert. [The requesting individual's] services in such a case would not violate Public Officers Law §74(3)(f).

In addition, [the requesting individual], in serving as an expert witness, should be careful not to accept an assignment which will require him to disclose confidential information which he has gained by reason of his VESID position or use such information to advance his outside employment as an expert. In that way, he will avoid violation of Public Officers Law §74(3)(b) and (c).

Finally, [the requesting individual] should take reasonable steps to make it clear that his expert testimony does not reflect the official position of the State. A State employee should not give the impression that his or her testimony as an expert should be given any additional weight because it might be perceived to be an official position of the State. In this manner, a VESID counselor would abide by the ethical standard that a State employee should not use his or her official position to secure unwarranted privileges or exemptions for himself or others and should not pursue a course of conduct that will raise among the public the suspicion that the employee is engaged in acts in violation of the public trust.

[The requesting individual] may be unable to ensure that, during oral testimony, he can disclaim any implication that his views are those of the State, because the scope of his testimony may be limited by questions, objections and rulings. However, he should make reasonable efforts to do so. Moreover, he should include the disclaimer in any written report he makes, particularly if it will be introduced as an exhibit. By taking reasonable steps to ensure that his testimony is not confused with an official position of the State or any State agency, a VESID counselor, such as [the requesting individual], will address the ethical concerns of Public Officers Law §74(3)(d) and (h).⁽⁴⁾

The Commission further notes that nothing contained Public Officers Law §74 prohibits a State agency from disapproving an outside activity on other grounds or imposing additional conditions on an approved outside activity. The Commission is aware of at least one State agency that prohibits any of its employees from testifying as an expert witness on the subject matter for which the agency has authority even if the particular matter in which the employee seeks to serve as an expert does not involve either the State agency or the State.

CONCLUSION

The Commission concludes that [the requesting individual] is not prohibited by Public Officers Law §74 from providing advice and testimony as an expert witness on behalf of plaintiffs and defendants in proceedings, as defined herein, provided that he does not provide such services in cases in which the plaintiff has applied for VESID services or refer to confidential information obtained by virtue of his State employment; and, further provided that he must take reasonable steps to clearly indicate that his views as an expert are not the views of the State or any State agency. He must not receive compensation for such services against the interest of the State in a

case before the Court of Claims. He must receive the permission of his employing agency to engage in the outside activity and abide by any additional conditions placed on the activity by the agency.

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:

Paul Shechtman, Chair
Robert J. Giuffra, Jr.
Henry G. Gossel
Lynn Millane
O. Peter Sherwood, Members

Dated: April 12, 2000

Endnotes

1. For simplicity, unless the context requires more precision, the Commission in this opinion will use the terms "plaintiffs" or "claimants" to refer to the victims of personal injuries or their agents, whether or not formally denominated as plaintiffs, claimants, petitioners or otherwise, and whether in the context of an action, claim or proceeding in a judicial, administrative, business or other forum, including the courts, administrative agencies, insurance companies and others. Similarly, the Commission will use the term "defendants" to refer to persons and entities, no matter how denominated, from whom plaintiffs or claimants seek compensation or services to deal with their personal injuries. Finally, the Commission will use the term "proceedings" to refer to litigation, administrative proceedings, alternative dispute resolution, mediation, arbitration, claims made to insurance companies and to other methods for plaintiffs or claimants to resolve their claims against defendants.
2. The other VESID employees who engage in such activities are not necessarily in the title "Senior Vocational Rehabilitation Counselor".
3. [The requesting individual] states that he is aware of circumstances where judges have not followed the Commission's informal opinion and have refused to disqualify the expert testimony of [the requesting individual] or his colleagues.
4. The Commission has reviewed the laws and regulations of other jurisdictions including the federal government and other States, and with the exception of the United States Air Force, which prohibits its employees from serving as an expert witness in any forum, the other

jurisdictions would appear to permit [the requesting individual] to serve as an expert witness provided that the agency was not involved in the matter.