

New York State Ethics Commission

Advisory Opinion No. 99-12: Application of Public Officers Law §§73 and 74 to the limited outside practice of law by a commissioner of [a State Commission].

INTRODUCTION

The following advisory opinion is issued in response to a request from [], a Commissioner of [a State Commission], who has inquired about his ability to engage in a limited outside practice of law and what restrictions there would be on both his practice and that of the law firm with which he is associated.

Pursuant to the authority vested in the State Ethics Commission ("Commission") by Executive Law §94(15), the Commission renders its opinion that [the requesting individual] may continue his work involving trusts and estates and alternative dispute resolution, subject to the restrictions of Public Officers Law §§73 and 74. The other attorneys at the law firm have no such restrictions provided that [the requesting individual] does not share in the net revenues of the firm.

BACKGROUND

[The requesting individual] is currently "of counsel" to the law firm of []. Prior to his recent appointment to [the State Commission], he was special counsel to the firm. In [the requesting individual's] status as "of counsel," his income will be derived from services he personally performs divided proportionally between him and the firm. This is in contrast to his arrangement when he was special counsel to the firm when [the requesting individual] received an annual draw paid bi-weekly based on the fees generated by his work. Under his current arrangement with the firm, [the requesting individual] will not share in any funds that are distributed to the firm's partners and he will have absolutely no participation, directly or indirectly, in the firm's finances. He will maintain office space and receive secretarial, library, mail and telephone services.

[The requesting individual] asks whether he may be associated with the firm which represents clients that are regulated by [the State Commission] on matters that do not come before the agency. For example, the firm represents a [regulated] corporation with regard to certain easements and has performed collection work for another [State Commission]-regulated corporation.

[The requesting individual] also seeks the Commission's permission to continue to engage in a certain, limited practice of law with the firm. [The requesting individual's] caseload primarily

involves trusts and estates, and alternate dispute resolution. He does not have as clients entities that are subject to the regulatory jurisdiction of [the State Commission].

APPLICABLE LAW

Public Officers Law §73(2) provides:

[N]o . . . state officer or employee . . . shall receive, or enter into any agreement express or implied for, compensation for services to be rendered in relation to any case, proceeding, application, or other matter before any state agency, whereby his compensation is to be dependent or contingent upon any action by such agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise or other benefit . . .

Public Officers Law §73(3)(a) provides:

No . . . 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 . . . the court of claims.

Public Officers Law §73(4)(a) provides:

No . . . state officer or employee . . . or firm or association of which such person is a member . . . shall (i) sell any goods or services having a value in excess of twenty-five dollars to any state agency, or (ii) contract for or provide such goods or services with or to any private entity where the power to contract, appoint or retain on behalf of such private entity is exercised, directly or indirectly, by a state agency or officer thereof, unless such goods or services are provided pursuant to an award or contract let after public notice and competitive bidding. . . .

Public Officers Law §73(7)(a) provides:

No . . . state officer or employee, other than in the proper discharge of official duties . . . 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 rate making;
- (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.

Public Officers Law §73(10) provides:

Nothing contain in this section . . . shall be construed or applied to prohibit any firm . . . in which any present . . . state officer or employee . . . is a member, associate, retired member, of counsel or shareholder, from appearing, practicing, communicating or otherwise rendering services in relation to any matter before, or transacting business with a state agency . . . where such . . . state officer or employee . . . does not share in the net revenues . . .

Section 74, the Code of Ethics, 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, which 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.

....

(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

The outside activities of policymaking officials are governed by the Commission's regulations, which are found at 19 NYCRR Part 932. Procedurally, these regulations require an individual, such as [the requesting individual], to obtain approval from his approving authority prior to engaging in any private employment from which more than \$1,000 in annual compensation is expected to be earned. If more than \$4,000 in annual compensation is expected, permission of the Commission must also be obtained.

Substantively, the regulations provide that a State officer or employee may not "engage in any outside activity which interferes or is in conflict with the proper and effective discharge of such an individual's official duties or responsibilities" (19 NYCRR 932.3[a]). In implementing this regulation, the Commission looks to Public Officers Law §§73 and 74.

Neither of these sections precludes [the requesting individual] from engaging in certain activities in the outside practice of law.

However, with regard to §73, he should be aware of subdivisions 2, 3, 4 and 7.

Subdivision 2 precludes [the requesting individual] from handling any matter where his compensation is contingent (not based on the value of his services) upon the action of any State agency with respect to any license, contract, certificate, ruling, decision, opinion, rate schedule, franchise or other benefit. Subdivision 3 precludes him from handling any matter against the interests of the State in the Court of Claims. Subdivision 4 prohibits [the requesting individual], as a State official, from selling his services, including personal services, to any State agency or to any private entity where the power to contract is exercised directly or indirectly by a State agency, unless the services are provided pursuant to an award or contract let after public notice and competitive bidding. Subdivision 7 prohibits him from receiving compensation for appearing or rendering services, other than in the proper discharge of official duties, on a matter before any State agency where the appearance or rendition of services is in connection with, among other things, the purchase or sale of goods or services, rate making, the adoption or repeal of any rule or regulation having the force and effect of law, the obtaining of a grant or loan, licensing, or a franchise under the public service law.

Pursuant to Public Officers Law §73(10), the above-mentioned restrictions would not apply to others at the law firm if [the requesting individual], as proposed, does not share in the net revenues resulting from any matter as to which he would be prohibited from appearing or receiving compensation (*see also* [Advisory Opinion No. 90-14](#)).

This leaves the question of whether [the requesting individual's] proposed outside employment would be permissible under the standards of Public Officers Law §74. In assessing whether a State employee may engage in an outside activity, the Commission, in general, considers several factors: the employee's duties on behalf of the agency for which he or she works, the relationship of the agency and the employee to the proposed outside activity, whether the employee would be in a position to use his or her position to secure unwarranted privileges, and whether the outside

activity would impair the employee's independence of judgment in the exercise of official duties (*see* Public Officers Law §74[3][a], [d], [f] and [h]).

With respect to [the requesting individual's] work involving trusts and estates and alternate dispute resolution, the Commission anticipates no conflict or appearance of a conflict of interest on his part. [The requesting individual] does not have any clients that are subject to the [the State Commission's] regulatory jurisdiction, and it does not appear that such work will run afoul of subdivisions 2,3,4 or 7 of §73. Further, there is no conflict for him with regard to the firm's practice of representing [State Commission]-regulated clients on non-[State Commission] matters such as debt collection, real estate transactions and litigation defense, particularly since [the requesting individual] does not share in the net revenues of the firm but receives compensation based on the work that he personally performs. [The requesting individual] states that he has absolutely no involvement, either directly or indirectly, with the finances of the firm.

Therefore, the outside activity of the practice of law, in the limited areas of trusts and estates and alternative dispute resolution described above, is approved.

CONCLUSION

The Commission concludes that neither Public Officers Law §§73 nor 74 would prohibit [the requesting individual] from engaging in the limited outside practice of law provided he follows the conditions set forth in this opinion. The Commission further concludes that neither Public Officers Law §§73 nor 74 would restrict the law firm in its practice of law, provided that [the requesting individual] does not share in the net revenues from any prohibited activities.

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: September 15, 1999