

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)
42 IAC 1-5-10 Benefiting from confidential information
42 IAC 1-5-11 Divulging confidential information
42 IAC 1-5-15 Nepotism (IC 4-2-6-16)

The former sister-in-law of the DCS Director owned a therapy clinic which held a services contract with DCS prior to the Director assuming leadership of the agency. Although the Director's former sister-in-law remarried following the death of her husband (the Director's brother), the two continued to have a close relationship, and the Director wanted to disclose the nature of this relationship in order to avoid any appearance of impropriety in DCS's dealings with the Clinic. SEC found that, since the definitions of "relative" and "immediate family" do not encompass the relationship of former sisters-in-law, neither the conflict of interest nor the nepotism rules would apply; however, in an abundance of caution—and in light of the rules on confidential information—DCS should implement its proposed screen to ensure the Director would not be involved in any decisions at the agency involving the Clinic.

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The Indiana State Ethics Commission ("Commission") issues the following advisory opinion concerning the State Code of Ethics ("Code") pursuant to IC 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee was appointed to serve as the Director of the Indiana Department of Child Services ("DCS") in January 2013. She assumed this role on or about March 25, 2013.

A therapy clinic in Crown Point, Indiana provides a variety of counseling services to children and adults. The therapy clinic currently has a two-year Community-Based Professional Services contract with DCS. The therapy clinic is one of more than 200 Community-Based Professional Services providers. Community-Based Professional Services providers are selected to contract with DCS through Requests for Proposals periodically conducted by DCS.

The therapy clinic has held a Community-Based Services contract with DCS since 2009. Its current contract was entered into in June 2011, effective July 1, 2011 through June 30, 2013. DCS is currently in the process of extending all Community-Based contracts, including the therapy clinic for the next two years, through June 2015.

The therapy clinic is owned by a woman who was married to Director's brother, who passed away in 1997. The former sister-in-law has since remarried.

The Director has no financial interest in the therapy clinic. She has had no involvement in or any discussions regarding the current contract or the possible extension of the therapy clinic's contract with DCS or with any placement or referral decisions relating to the therapy clinic. Further, the Director cannot logistically be involved in decisions of whether and/or when the therapy clinic is assigned to serve DCS families. That decision is not made at the Central Office level or by any executive, but rather by field personnel.

In an abundance of caution and to avoid even the appearance of impropriety, the Director, from first assuming her role with DCS, implemented her own screen of every contract that she has signed, ensuring that she was not related to any individual contracting with the agency. To date she has identified no other providers with whom she has a familial relationship.

In addition, DCS has physically sequestered all contract files relating to the therapy clinic's current and former contracts from the general population of contracts. The files will remain in the possession and control of DCS's General Counsel, who will be responsible for administering the therapy clinic's contract.

While the Director is the signatory of all contracts on behalf of DCS, there is no room in the contracting process for any special treatment for the therapy clinic by the Director or for the Director to affect her former sister-in-law or her contractual relationship with DCS, whether by the sharing of confidential information or the conferring of special terms or conditions in her contract. All substantive input in the contracting process is in the hands of a group made up of Programs and Outcomes personnel, Fiscal personnel, and DCS contracts counsel. The contract itself is based on an Indiana Department of Administration template with modification to the specific DCS content in terms of service standards. Every Community-Based Professional Services contract is form-approved by the Attorney General. The terms and conditions section of the therapy clinic's contract is identical to all other Community-Based Professional Services contracts.

ISSUE

Would a conflict of interest arise for the Director under IC 4-2-6-9 in the performance of her duties as DCS's Director given that her former sister-in-law's company has a current, and possibly future, business relationship with DCS? If so, would a screening procedure be appropriate to prevent a conflict of interest from arising for the Director?

RELEVANT LAW

42 IAC 1-5-10

Benefiting from confidential information

Sec. 10. A state officer, employee, or special state appointee shall not benefit from, or permit any other person to benefit from, information of a confidential nature except as permitted or required by law.

42 IAC 1-5-11

Divulging confidential information

Sec. 11. A state officer, employee, or special state appointee shall not divulge information of a confidential nature except as permitted by law.

IC 4-2-6-9 (42 IAC 1-5-6)

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any

of the following has a financial interest in the outcome of the matter:

(1) The state officer, employee, or special state appointee.

(2) A member of the immediate family of the state officer, employee, or special state appointee.

(3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.

(4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

(1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or

(2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under

IC 4-2-6-16 (42 IAC 1-5-15)

Nepotism

Sec. 16. (a) This chapter does not prohibit the continuation of a job assignment that existed on July 1, 2012.

(b) As used in this section, "employed" refers to all employment, including full-time, part-time, temporary, intermittent, or hourly. The term includes service as a state officer or special state appointee.

(c) An individual employed in an agency may not hire a relative.

(d) Except as provided in subsection (e), an individual may not be employed in the same agency in which an individual's relative is the appointing authority.

(e) An individual may be employed in the same agency in which the individual's relative is the appointing authority, if the individual has been employed in the same agency for at least twelve (12) consecutive months immediately preceding the date the individual's relative becomes the appointing authority.

(f) Except as provided in subsection (e), an individual may not be placed in a relative's direct line of supervision.

(g) An individual employed in an agency may not contract with or supervise the work of a business entity of which a relative is a partner, executive officer, or sole proprietor.

(h) Any person within an agency who knowingly participates in a violation of this chapter is subject to the penalties set forth in section 12 of this chapter.

ANALYSIS

The Director's request for a formal advisory opinion invokes consideration of the provisions of the Code pertaining to confidential information, conflicts of interest, and nepotism. The application of each provision to the Director is analyzed below.

A. Confidential Information

The Director is prohibited under 42 IAC 1-5-10 from benefitting from, or permitting any other person to benefit from, information of a confidential nature except as permitted or required by law. Similarly, 42 IAC 1-5-11 prohibits the Director from divulging information of a confidential nature except as permitted by law. The term "person" is defined in IC 4-2-6-1(a)(13) to encompass both an individual and a corporation. In addition, the definition of "information of a confidential nature" is set forth in IC 4-2-6-1(a)(12). In this case, the Director has access to confidential information, though it is unclear if this information could be used to her former sister-in-law's or the therapy clinic's benefit. While it would be a violation of 42 IAC 1-5-10 for the Director to permit a person to benefit from information of a confidential nature to which she has access, it would also be a violation under 42 IAC 1-5-11 for her to even divulge any such information, regardless of whether it is used to that person's benefit. So long as the Director does not divulge confidential information or allow her former sister-in-law or the therapy clinic to benefit from confidential information, she would not be in violation of these rules.

B. Conflicts of Interest

IC 4-2-6-9(a) prohibits a state employee from participating in any decision or vote if she has knowledge that various persons may have a "financial interest" in the outcome of the matter, including the employee or an immediate family member. The term financial interest as defined in IC 4-2-6-1(a)(11) includes an interest in a contract and an interest involving services. However, the term does not include an interest that is not greater than the interest of the general public or any state officer or state employee.

In this case, the Director does not have a financial interest in the therapy clinic. Additionally, the term "immediate family" as defined in 42 IAC 1-3-13 includes a spouse, a partner, a housemate or an unemancipated dependent. So long as the former sister-in-law is not the Director's housemate, their familial relationship is outside the scope of the definition and the rule would not apply.

Despite the fact that the conflict of interest rule does not apply in this case, the circumstances could create an appearance of impropriety. As such, DCS has proposed a screening mechanism as outlined in IC 4-2-6-9(b)(1). The Director has taken steps to screen herself from matters involving the therapy clinic. Specifically, she has vested her General Counsel with signatory and decision-making authority over the therapy clinic matters and intends to keep those measures in place throughout her tenure as Director of DCS. In addition, DCS has physically sequestered all contract files relating to the therapy clinic's current and former contracts from the general population of contracts. The files

will remain in the possession and control of DCS's General Counsel. In an abundance of caution, the Director should notify the Governor's Office of her familial relationship with the therapy clinic.

C. Nepotism

IC 4-2-6-16(g) states that an individual employed in an agency may not contract with or supervise the work of a business entity of which a relative is a partner, executive officer, or sole proprietor. The term "relative" is defined in IC 4-2-6-1(a)(16). Assuming that the Director and the former sister-in-law are still considered sisters-in-law despite the former sister-in-law's subsequent marriage, the term relative does not include the sister-in-law relationship. Therefore, this rule does not apply to these circumstances.

CONCLUSION

The Commission finds that a potential conflict of interest does not arise for the Director under IC 4-2-6-9 if she participates in any decision or vote in which the therapy clinic would have a financial interest in the outcome of the matter. Nevertheless, to prevent an appearance of impropriety, it is the Commission's opinion that the screening mechanism proposed by DCS for the Director with respect to the therapy clinic is appropriate.