

**CAUTION:** The following advice may be based on a rule that has been revised since the opinion was first issued. Consequently, the analysis reflected in the opinion may be outdated.

**IC 4-2-6-9(a) Conflicts of interest**

**40 IAC 2-1-8 Moonlighting**

**40 IAC 2-1-9(f) Use of state property**

**40 IAC 2-1-9(g) Ghost employment**

The DMH director sought advice on whether he was permitted to have an outside consulting business setting up accountability and managed care systems in the mental health arena for private providers and public purchasers of care and whether his company was permitted to employ an individual who had a personal services contract with FSSA. SEC found either of these arrangements was acceptable subject to specific conditions.

## **93-I-21, Conflict of Interest, Moonlighting (Decision December 16, 1993)**

### **Fact Situation**

The Director of the Division of Mental Health wanted the State Ethics Commission to determine whether he was permitted to have an outside consulting business to set up accountability and managed care systems in the mental health arena for private providers or public purchasers of care, provided that the consulting is limited to customers who do not conduct any official business with the state and is not with any provider or purchaser within Indiana. The Director also wanted to know whether his company could employ an individual who has a personal services contract with Family and Social Services Administration.

The Director has the responsibility for the overall direction and administration of the Division of Mental Health. The Director incorporated a company in April of 1993 with the name of Advantaged Management. The work is a continuation of activities the Director was engaged in before assuming his duties with the state. He is not utilizing information or skills he acquired in his role as Director.

Through his company, the Director does not do business with any customers who conduct official business for the state and he has not or will not provide services to any providers or purchaser of care within Indiana or to anyone who has a contract with the state of Indiana. The time involved to support the company has been negotiated with the Director's supervisor and the time away from his state position has been minimal (averaging one day per month) and has been on vacation days, personal leave or time off without compensation.

The Director talked to a state employee from the State Department of Health about assisting him in the corporation of the company. The employee volunteered to incorporate, be an officer of the corporation, and file the annual submissions required. He has not received any compensation for his work. The employee negotiated a contractual relationship with Family and Social Services Administration and the Director was not involved in these negotiations. The state employee's duties under the contract were not supported by funds from the Division of Mental Health and the Director does not supervise him or does not evaluate his performance.

The Director's business provides services to mental health providers and mental health purchasing units. Mental health providers, whether general hospitals, mental health centers or private group practices, receive a significant percentage of their income from state or local

governments. The company's services include strategic planning and assistance in the development of funding. In order to prevent relationships with companies that might do work in the state of Indiana, the company limits its clients to regional providers or governmental units that are located far from Indiana.

The Director's company works for the state of Washington, which created regional funding authorities where public mental health funds and Medicaid funds are pooled. In Georgia, the company works for a private nonprofit firm, which provides technical assistance to Georgia's provider community and to the Georgia Mental Health, Mental Retardation and Substance Abuse Division. The company also works for this Georgia State division.

While the state employee was not paid for the preliminary work he did when the company was incorporated, he was not paid for services he helped to provide to the company's Georgia clients, and the Director would like to employ him in future consulting work. The work that the state employee does for the business and the work he does for the state are identifiably separate on the basis of billed hours.

### **Questions**

- 1) Is the Director of the Division of Mental Health permitted to have an outside consulting business to set up accountability and managed care systems in the mental health arena for private providers or public purchasers of care, provided that the consulting is limited to customers who do not conduct any official business with the state and is not with any provider or purchaser within Indiana?
- 2) Is the Director's company permitted to employ an individual who has a personal services contract with Family and Social Services Administration?

### **Opinion**

The Commission found that the Director of the Division of Mental Health is permitted to have an outside consulting business to set up accountability and managed care systems in the mental health arena for private providers or public purchasers of care, provided the company deals only with entities that operate outside the state of Indiana and have no parent or affiliate that operates in Indiana.

The Commission found that the Director of the Division of Mental Health, through his company, may contract with an individual who has a personal services contract with FSSA, on the condition that the individual's consulting through the Director's company be limited to entities outside the state of Indiana who do not do business with FSSA.

The relevant law is as follows:

IC 4-2-6-9(a) on conflicts of interest provides, "A state officer or employee may not participate in any decision or vote of any kind in which the state officer or the employee or that individual's spouse or unemancipated children has a financial interest."

40 IAC 2-1-8 on moonlighting provides, "A state employee shall not engage in outside employment or other outside activity not compatible with agency rules or the full and proper discharge of public duties and responsibilities. This outside employment or other outside activity must not impair independence of judgment as to official responsibilities, pose a likelihood of conflict of interest, or require or create an incentive for the employee to disclose confidential information acquired as a result of official duties."

40 IAC 2-1-9(f) says, “A state officer or employee shall not make use of state materials, funds, property, personnel, facilities, or equipment for any purpose other than for official state business unless the use is expressly permitted by general written agency, departmental, or institutional policy or regulation, considering the cost and the benefit by such use.”

40 IAC 2-1-9(g) says, “A state officer or employee shall not engage in, or direct others to engage in, work other than the performance of official duties during working hours, except as permitted by general written agency, departmental, or institutional policy or regulation.”