



STATE OF CONNECTICUT  
STATE ETHICS COMMISSION

ADVISORY OPINION NUMBER 80-15

Public Member of the Commission on Hospitals  
and Health Care Working in a Health-related Field

A public member of the Commission on Hospitals and Health Care has asked whether her employment as a consultant to a corporation which is investigating the feasibility of developing a health maintenance organization in the greater Danbury area is in violation of section 19-73c, General Statutes, or the Code of Ethics for Public Officials, Chapter 10, Part I, General Statutes. The corporation involved is a private nonprofit corporation organized under Title 33, Chapter 593a, General Statutes for the purpose of becoming a health care center to provide prepaid health care in the greater Danbury area. So far, the corporation has commenced an investigation into the feasibility of establishing a health maintenance organization (HMO) operating as an individual practice association (IPA); that is, health professionals providing health care would see prepaid HMO member patients in the professionals' offices but would also serve private patients and patients with various types of health insurance. 42 C.F.R. § 110. 101. The corporation has been funded by contributions from the physician community in the Danbury area and from the Danbury Hospital. Its incorporators are physicians who have staff appointments at the Danbury Hospital. It has been provided free office space by the Hospital. The corporation initially applied for a Federal grant to help fund a survey into the feasibility of developing and operating an IPA model HMO for the Greater Danbury area. Subsequently, its board of directors voted not to accept any Federal funds for the feasibility survey.

The Commission on Hospitals and Health Care was established to promote the State's interest in the provision of health care to its citizens and in controlling the costs of such health care. Section 19-73a, General Statutes. Among the powers granted the Commission to be used in carrying out its purposes is authority to grant or deny requests by a health care facility or institution to introduce additional functions or services. Subsection 19-731(a), General Statutes. The Attorney General has construed this provision to cover the development or establishment of a new health facility or health maintenance organization. Opinion of the Attorney General to the Commissioner of Health Services, August 8, 1979. The Commission also sets the rates which health care institutions and facilities may charge (section 19-73i, General Statutes); reviews and acts on the operating and capital expenditure budgets of hospitals and other health care institutions and facilities (section 19-73o); and reviews and acts on all capital expenditures by a health care facility or institution of \$100,000 or more, and some capital expendi-

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tures in excess of \$50,000, not included in an approved budget (sections 19-73m, 19-73n, General Statutes). In its deliberations the Commission may consider any factor it deems relevant, including the quality of available health care, the duplication of services by institutions and facilities in the area served, and the community or regional need for any particular function or service. Section 19-73k, General Statutes.

There are 17 Commission members: 5 represent various health care providers and professions; 9 represent the public; and 3 are commissioners or deputy commissioners of State departments having responsibilities associated with health care. Section 19-73c, id. The public members of the Commission "shall not be affiliated with, employed by or have any past professional affiliation with any health care facility or institution, health product manufacturer or corporation or insurer providing coverage for hospital or medical care...." Ibid. This provision states qualifications specifically for public members of the Commission on Hospital and Health Care which are similar to those required of the public members of any board or commission within the Executive Branch to avoid conflicts of interest. See subsection 4-9a(b), id. Ten members constitute a quorum. Section 19-73e, id. Where applicable, the Code of Judicial Conduct, 1 Practice Book, 1978, pp. 53 through 59, governs the conduct of Commission members participating in any Commission proceeding. Section 19-73a-19, Regulations of Connecticut State Agencies. Public members of the Commission are public officials for purposes of, and therefore subject to, the Code of Ethics for Public Officials. Section 19-73c and subsection 1-79(j), id.

The issue of whether there may be a conflict of interests, under the various standards to which the public member is subject, depends to some extent on the nature of her relationship to the corporation and to some extent on the corporation's activities. The member states she is a consultant to the corporation. While she is therefore doubtless an independent contractor, as opposed to an employee of the corporation, her duties as a paid consultant are "employment" for such purposes as the prohibitions of subsection 1-84(a), General Statutes, concerning employment which is in substantial conflict with the proper discharge of a public official's duties in the public interest and responsibilities as prescribed in State law, and subsection 1-84(b), General Statutes, concerning impairment of independence of judgment and disclosure of confidential information acquired in the course of a public official's duties. To date the connection of the Commissioner in question, though a consultant to the corporation, has been so close that she has been identified, mistakenly, by some State agencies, press, and others as project director for the corporation's feasibility study.

The corporation itself is embarked on a several stage program. The initial stage has been incorporation and preparation for a study into the feasibility of establishing an IPA model HMO in the Greater Danbury area. Next will be the feasibility study itself. Should the project look feasible, initial development of the HMO could commence, with a campaign to enroll members plus design of, and arrangements for, their medical care by physicians and hospitals.

Under the Code of Ethics for Public Officials the Commissioner does not appear at present to have a substantial conflict of interest. Subsection 1-84(a), section 1-85, id. Presumably she would not be assigned to a Commission panel considering anything involving the HMO or any health care facility or institution providing similar services in the area. There is sufficient connection between her corporation and the Danbury Hospital that she should not be on panels which consider it or other hospitals serving the same general region. Should any of the foregoing facilities or institutions be involved in proceedings before the full Commission, she can avoid any potential conflict by requesting to be excused. Section 1-86, General Statutes. If she believes she can act impartially and in the public interest, she can file a written statement to that effect. Ibid. It is not apparent that her employment will impair her independence of judgment in her official duties at this time, and her request for an advisory opinion states it has not. There is no reason to believe she cannot avoid violating the provisions concerning disclosure and use of confidential information and improper use of office contained in subsections 1-84(b) and 1-84(c), General Statutes.

The situation remains much the same while the corporation conducts the feasibility study, using its own funds. The feasibility study consists of collecting demographic statistics for the area, data on what health care providers and insurers are charging for various services, developing estimates of the cost of similar services provided by a IPA model HMO, etc. The procedures described above should avoid any potential conflicts of interest.

The situation will be different when the feasibility study has been completed if a decision is made to proceed with development of an HMO, and even more different once the HMO reaches the developmental stage and offers at least basic health services (42 U.S.C.A. 300e-1 (1); 42 C.F.R. 110.102) to members. If still employed in a consultative or other capacity once the HMO has decided to enter a health care market already served by others who must appear before the Commission for rate increase and budget approval, for permission to add additional functions and services or make large capital expenditures, etc., she would appear to be so entangled with one potential health care provider that she should not serve as a public member on an agency with the general duties assigned the Commission on Hospitals and Health Care by section 19-73h, General Statutes. Cf. State Ethics Commission Advisory Opinion 80-7, 41 Conn. L.J. No. 37, p. 21. Some of the potential problems and conflicts of interest are obvious. Others are less so. For example, the Commission on Hospitals and Health Care is the State "certificate of need" authority, under the National Health Planning and Resources Development Act of 1974, Public Law 93-641 as amended, for new and additional services, and capital expenditures in excess of \$50,000, proposed by health care institutions and facilities. Health systems agencies, authorized by the same Public Law to serve much the same basic purposes as the Commission, have been established in Connecticut. See 42 U.S.C.A. § 3001-2(a); State Ethics Commission Advisory Opinion No. 79-21, 41 Conn. L.J. No. 12, p. 24. When establishment of a health care institution or facility in its health service area is proposed, or an operating institution or facility in the area proposes an additional service or function or desires to make a capital expenditure of \$100,000 or more, the health systems agency submits

to the Commission its recommendations regarding the proposal. 42 U.S.C.A. §§ 3001-2(f); 300n(5); 42 C.F.R. § 122.304; section 19-73m, General Statutes. The Commission must consider the health service agency's view. Cf. section 19-73m, above. The Northwest Connecticut Health Systems Agency, in whose health service area the proposed HMO would be, may have to provide to the Commission its views on whether there is a need for the HMO, whether it offers a useful service, its expected effect on existing health care services, and so forth. (It is not clear that the HMO must obtain Commission authority to start serving the public. The Commission apparently believes it does not have jurisdiction over establishment of an IPA model HMO.) The Northwest Connecticut Health Systems Agency may, or may be required to, review and make recommendations regarding any Federal grant, contract, loan, or loan guarantee the HMO may request to assist with planning and initial development costs or to help cover its initial operating costs. 42 U.S.C.A. §§ 300e-3, 300e-4, 300e-5; 42 C.F.R. §§ 110.406(a)(2), 110.506(c), 110.203. The fate of the HMO might hinge on the Health Systems Agency's action. In addition, a condition for Federal financial assistance with planning and initial development costs would be that the HMO cooperate with the Northwest Connecticut Health Systems Agency. 42 U.S.C.A. § 300e-3. The fact that a request by the HMO was before the Health Systems Agency, or the nature of the action the Health Systems Agency took on the proposed establishment of the HMO or on a request for Federal financial assistance possibly critical to the life of the HMO, is almost certain to affect how a Commissioner closely associated with the HMO views the recommendations of the Northwest Connecticut Health Systems Agency (and perhaps those of other health systems agencies) on other matters. The Commissioner's involvement with the HMO will start to raise questions about her impartiality, and whether her employment might not have affected her judgment as a commissioner. Subsection 1-84b, General Statutes.

Further, she would not appear to be eligible to be a public member of the Commission when the HMO starts providing for the health care of its members. While the Attorney General is the final authority in construing the language, it seems reasonably clear she would be "affiliated with, [or] employed by ...[,a] corporation or insurer providing coverage for hospital or medical care ...." Section 19-73c, above. Also, while an IPA model HMO need not own anything made of bricks and mortar, a business organization incorporated under Chapter 593a, General Statutes, as a health care center might well be considered a "nonprofit health center", one of the definitions of "health care facility or institution". Section 19-73b, General Statutes; Opinion of the Attorney General to Senator Fauliso and Representative Abate, March 13, 1979. Section 19-73c, above, forbids a public member of the Commission to be affiliated with, or employed by any health care facility or institution as well as a corporation or insurer providing coverage for hospital or medical care.

Finally, continuing to serve as a member of the Commission should she still be employed by the corporation once it has determined, after conducting a feasibility survey, that there is a need in the area for its HMO would appear to risk violation of several canons of the Code of Judicial Conduct. Canon 2 requires a judge to conduct himself

or herself at all times in a manner that promotes public confidence in the impartiality of the judiciary. 1 Practice Book, 1978, p. 53. Canon 3, again intended to ensure that a judge performs the duties of his or her office impartially, requires a judge to disqualify himself or herself if the judge has an interest that would be substantially affected by the outcome of the proceedings or has been an active participant in the affairs of a party. Id., pp. 55-56. And Canon 4 directs a judge to refrain from financial and business dealings that tend to reflect adversely on his or her impartiality, or interfere with the proper performance of his or her judicial duties. Id., pp. 57-58.

In summary, there appear to be no inherent conflicts of interest when a public member of the Commission on Hospitals and Health Care serves as a consultant to a Chapter 593a corporation which is exploring the feasibility of establishing an IPA model HMO. Once the corporation decides to develop an HMO to compete with the facilities and institutions already providing health care in the area, the Commissioner should either disassociate herself from the corporation to which she has been a consultant or resign as a public member of the Commission.

By order of the Commission,



Rev. Thomas J. Lynch  
Chairman

Dated September 5, 1980

