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 Consequently, the analysis reflected in the opinion may be outdated.

Conflict of interest, Moonlighting

Subject to certain guidelines, SEC found the deputy director of the DMH’s Office of Transitional Services was permitted to consult with a business that evaluated mental health providers even though one of the business' clients was a hospital in the State that had a training contract with DMH.

96-I-2 Conflict of Interest, Moonlighting
(Decision March 21, 1996)

Fact Situation

The deputy director of the Office of Transitional Services, Division of Mental Health, wanted to know whether he was permitted to consult with a business that evaluates mental health providers when one of the business' clients was a free standing psychiatric hospital in Indiana. The deputy director and the twelve staff he supervised developed quality assurance systems, oversaw residential and prevention programs, responded to consumer complaints and inquiries, and coordinated resources for public providers with the Medicaid office. The Resource Allocation Section of his office made recommendations on funding levels on all contracts handled by the Division of Mental Health (DMH). The providers to which DMH awarded contracts had not changed significantly over the prior fifteen years except that some agencies had dropped out. The deputy director's skills included computer technology and knowledge of behavioral health issues. His services and expertise were offered to these public providers to the Medicaid office at no charge.

The deputy director had begun work as a consultant for a businessman with an office in Bloomington, Indiana – an office related to a Kansas company. The Kansas company sold computer programs to help employers evaluate the private mental health services which they provided through health insurance to their employees. The computer programs were marketed to employers who operated Employment Assistant Programs (EAPs). EAPs direct employees to counseling services that address the employee's specific mental health and behavioral health problems.

The deputy director said that he would not serve as a consultant for a business which had a provider relationship with DMH. The company's license prohibited the businessman from marketing services to the public sector. Although the public sector product was marketed under the same name, it was sold by a different licensee.

The deputy director's role as a consultant to this business was to develop and install the computer program. He also made sure the software, which was developed elsewhere, ran properly and that data from the provider was transferred onto his computer, then to the Kansas office of the software company. He performed all the work on his own personal computer in his basement. He described the venture as a "small backroom operation" and said the bill for three months' work was $900.

Part of the reason the deputy director was hired by the businessman was to have input into the design and improvement to the software program. He expected his commitment to be a long term, part-time arrangement. He would not assist in sales presentation and would not talk to purchasers except about technical questions after purchasing the program.

One potential customer was a private psychiatric hospital. The hospital did not have a contract with DMH for behavioral health services but did have a $200,000 contract for training. The deputy director's compensation from the business would not be materially affected if the businessman procured a contract with the hospital, although the deputy director's workload would increase. The deputy director's fee was based on an hourly rate, but a core level of work was required whether the venture had one contract or twenty contracts.

The Division of Mental Health had already decided to put the contract for training, which the hospital currently had, out for competitive bidding. Under the current training contract, the hospital provided training on addictions and compulsive gambling to non-state employees and entities that provided services to the public.

The nature of the deputy director's involvement with the hospital training contract was that his staff recommended whether a hospital should get a contract and how large the contract would be. His signature of approval was required after the contract had been negotiated. A different office, the Office of Contract Management, negotiated the specific terms of contracts and monitored subsequent payments, but the authority to decide which providers received the contract rested with the deputy director. He said he could be screened from any future involvement with the hospital.

The hospital was licensed by DMH, but the deputy director played no role in the licensing process; the Office of Contract Management handled licensing. The hospital could also receive funds from government in a secondhand way; a mental health center which received government funds might refer clients to the hospital for certain services. It was also possible that some other prospective clients of the business might be licensed by the state.

Some of the tasks the deputy director performed in his state job were similar to tasks he would perform for the business. A difference was that the business' program was a prepackaged program designed for a different constituency of healthcare consumers. An example of a way that a business client might use the product to evaluate the quality of mental health services their employers were receiving was that the company could survey a sample of employees to ask if the employees were satisfy with the services the company was providing. Or staff from Kansas could call clients of various providers and ask questions for five minutes. In contrast, the telephone survey conducted by DMH lasted eighteen minutes and explored the client's perception more deeply. Nonetheless, the basic skills, the mental health issues, and the criteria to evaluate mental health and behavioral health services were very similar.

The Kansas company, through a different licensee, could market their product to public agencies, but the Office of Transitional Services provided the same product to public agencies without charge. An agency with a contract with DMH would not be motivated to buy the company's product to do their own evaluations because the evaluations services offered by the state were better. However, if the agency also had a large business other than the work they did for the state, there could be some incentive to buy the company's product. This would not happen often.

An additional involvement the deputy director could have with the hospital was that the Office of Transitional Services received consumer complaints or inquiries. One of these could possibly be in regard to the hospital. Ninety percent of the calls the Division received concerned public mental health services. Of the approximately one-thousand calls per year, the deputy director handled only ten or twenty complaints himself. He estimated one-half of the complaints concerned private providers. Complaints were routinely referred to Adult Protective Services, an entity within Family and Social Services Administration, or to the chief executive officer of the provider that was the subject of the complaint. The deputy director said he could easily be screened from the complaint and inquiry process.

Question

Is the deputy director of the Office of Transitional Services, Division of Mental Health, permitted to consult with a business that evaluates mental health providers when one of the business' clients is a free standing psychiatric hospital in Indiana?

Opinion

The Commission found that the deputy director was permitted to consult with the business provided that:

1) The deputy director was screened from decisions involving that hospital;

2) A peer or superior replaced him, not someone he supervised;

3) The hospital did not have a Division of Mental Health contract to provide public behavioral health services; and

4) The deputy director did not engage in direct sales or promotional activities for the business, and the business did not sell to public providers.