



MISSOURI ETHICS COMMISSION

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Julie A. Allen

Executive Director

December 7, 2012

Re: Advisory Opinion # 2012.12.CI.004

Dear

At the December 4, 2012 meeting of the Missouri Ethics Commission, your request for an opinion was discussed. The following is the Commission's response to your questions by a vote of 4, with two commissioners abstaining due to a conflict of interest:

The governing board of a county hospital established under Chapter 205 of the Missouri Revised Code is considering either (1) acquiring a local physician practice (the "Practice") and employ its physicians, or (2) lease the real estate and equipment from the Practice and employ its physicians.

One of the physician owners (the "Physician") of the practice is currently a member of the Board. The Hospital and the Practice are not currently in negotiations. The Practice may, at any time, decide to negotiate with potential buyers other than the Hospital. Before commencing formal negotiations, the Board would hold a vote to approve such negotiations. Anytime the Board discusses or votes on any issue that touches on the purchase or lease of the Practice's assets or hiring of the Practice's physicians, the Physician would recuse himself.

Based on the foregoing, the Board requests an advisory opinion on the following questions:

- 1) Must the Physician resign from the Board prior to the commencement of formal negotiations between the Hospital and the Practice?*
- 2) Can the Physician negotiate with the Hospital regarding the sale of the Practice or lease of assets of the Practice while on the Board?*
- 3) May the Physician, while on the Board, have discussions related to the potential sale transaction with the other shareholder of the Practice and/or the Practice's medical staff after formal negotiations has begun?*
- 4) (a) May the Hospital offer a contract for employment to the Physician while he remains a member of the Board, if he resigns prior to signing the employment agreement? (b) If*

yes, may the Physician negotiate the employment agreement while he is still on the Board?

- 5) *After resigning from the Board, may the Physician negotiate with the Hospital regarding the sale of the Practice or the lease of the Practice's assets to the Hospital?*
- 6) *(a) After resigning from the Board, may the Physician become employed by the Hospital after the sale of the Practice or lease of the Practice's assets to the Hospital? (b) If so, may the Physician negotiate his employment agreement on his own behalf?*

This opinion is issued within the context of Missouri's conflict of interest law pursuant to Chapter 105, and assumes the facts presented by you in your letter. In general, your question addresses either (1) acquiring the board member's practice and employing its physicians, or (2) leasing the real estate and equipment from the board member's practice and employing its physicians. You have represented that the physician's practice is a business with which the physician is associated as defined in §105.450(3), RSMo.

You have also indicated that the hospital board complies with all federal fraud and abuse laws including physician self-referral at 42 U.S.C. Section 1395nn (commonly referred to as the "Stark Law") and the federal anti-kickback statute found at 42 U.S.C. Section 1320a-7b ("Federal Anti-kickback Statute"). The hospital board represents that in order to comply with these federal laws, any transaction with a physician must be for fair market value and commercially reasonable. The hospital board also represents that these laws also limit physician compensation and that the hospital board must pay physicians fair market value. While the Commission does not opine on the application of federal law to your question, conflicts or inconsistencies in the laws may have an impact on the result.

§105.452 and §105.454, RSMo, contain a number of provisions which should be consulted. In addition, §205.170.7, RSMo, states "no trustee shall have a personal pecuniary interest, either directly or indirectly, in the purchase of any supplies for such hospital, unless the same are purchased by competitive bidding." §105.454, RSMo, applies to public officials serving in an executive or administrative capacity, and applies to the board member physician in this scenario. That statute provides that in the event the hospital board seeks to sell, rent or lease property from the board member's practice while the physician is a board member, the hospital board will be required to engage in public notice and a competitive bidding process.

Relevant sections of that statute provide that no elected or appointed official or employee of the state or political subdivision, serving in an executive or administrative capacity shall:

...

- (2) Sell, rent or lease any property to any agency of the state, or to any political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power and received consideration therefore in excess of five hundred dollars per transaction or five thousand dollars per year, unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of

property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(3) Participate in any matter, directly or indirectly, in which he or she attempts to influence any decision of any agency of the state, or political subdivision thereof in which he or she is an officer or employee or over which he or she has supervisory power, when he or she knows the result of such decision may be the acceptance of the performance of a service or the sale, rental, or lease of any property to that agency for consideration in excess of five hundred dollars' value per transaction or five thousand dollars' value per annum to him or her, to his or her spouse, to a dependent child in his or her custody or to any business with which he or she is associated unless the transaction is made pursuant to an award on a contract let or sale made after public notice and in the case of property other than real property, competitive bidding, provided that the bid or offer accepted is the lowest received;

(4) Perform any services during the time of his or her office or employment for any consideration from any person, firm or corporation, other than the compensation provided for the performance of his or her official duties, by which service he or she attempts to influence a decision of any agency of the state, or of any political subdivision in which he or she is an officer or employee or over which he or she has supervisory power;

(5) Perform any service for consideration, during one year after termination of his or her office or employment, by which performance he or she attempts to influence a decision of any agency of the state, or a decision of any political subdivision in which he or she was an officer or employee or over which he or she had supervisory power...

(6) Perform any service for any consideration for any person, firm or corporation after termination of his or her office or employment in relation to any case, decision, proceeding or application with respect to which he or she was directly concerned or in which he or she personally participated during the period of his or her service or employment.

In a previous opinion, the Commission stated there was no violation of §105.454(5), RSMo, for a physician who resigned from a hospital's board of trustees to sell his practice to the hospital, provided the physician, while a board member, did not participate in any discussion with the board concerning the possible purchase. *See* MEC Opinion No. 98.01.102. The Commission has also stated that employees or former employees, serving in an administrative or executive capacity cannot bid on a state contract when they participated in the development of the contract, *see* MEC Opinion No. 02.10.115; and that employees or officials cannot use confidential information or any information not available to the general public in submitting the bid, *see* MEC Opinion No 99.01.100.

Finally, public officials and employees who seek to do business with their political subdivision must recuse themselves on any matter or application coming before a board where they may have an interest or competing interest. This includes not discussing, voting, or in any

way trying to influence the outcome of the board's decision. MEC Opinion Nos. 98.04.106, 97.07.117 and 96.08.142.

In the event the hospital board engages in negotiations for the sale, rental or lease of any property to the practice while the physician is a board member, these state statutes require public notice, competitive bidding with the board member's practice being the lowest received. In addition, §105.454(3), RSMo requires that board member recuse himself from all discussions related to acquisition of his practice, and the board member not negotiate the sale or lease of his practice's assets, or an employment agreement while the physician is a member of the board.

§105.452, RSMo, prevents the board member physician from using or disclosing confidential information obtained in the course of his employment or in his position on the board, and from favorably acting on any matter specifically designed to provide a special monetary benefit to himself, spouse, or dependent child. The board member shall not disclose or use confidential information from his time on the board in any discussions or negotiations with any other shareholders of his practice or any medical staff of his practice that could be used to influence the hospital board, both while a member of the board and after he leaves the board.

Chapter 105, RSMo, does not specifically require a board member to resign from the board in the event the board member seeks to do business with the hospital board. The hospital board has stated that because it may only pay fair market value for a physician practice, competitive bidding raises concerns. The hospital board has stated the following:

"If the Hospital were to accept a bid, it would be required to accept the practice with the lowest bid. The Hospital could only complete such transaction with the practice submitting the lowest bid if the bid price was confirmed to be fair market value. If the bid price is fair market value, then in order to be a lower price than the fair market value price of a competing practice, it must offer less in terms of assets (whether it is physical assets, workforce or medical records).

To the extent the state statutes may be in conflict with other laws that govern the purchase of a physician practice, the practical effect may be that the board member physician resigns from the board to stay in compliance with all applicable laws which require competitive bidding, including Chapter 105.

In the event the physician resigns from the board, §§105.454 (5) and (6), RSMo apply. The physician may not receive any payment or consideration, during one year from his resignation, in which he attempts to influence a decision of the board, and may not perform any service for consideration in relation to any case, decision, proceeding or application with which he was directly concerned or personally participated while on the board.

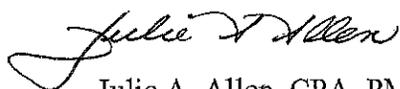
In order to comply with the state statutes, the physician must not receive any payment or consideration from the practice to influence the board's decision, and should stay an arm's length from the negotiations to the extent possible. The hospital board has represented that the physician has been recused from the decision by the board to purchase the practice. If the transaction were to be negotiated between the hospital board and the board member's practice,

the board intends to negotiate with the physician owner who has not served on the board. The board will also rely in third party information to verify that the purchase price or lease rates are fair market value.

If the physician resigns from the board, it may eventually be necessary to negotiate his own employment contract. Your request states that the physician has not been and will not be in possession of any of the board's confidential information that would place him in a better negotiating position than another physician, and that he has not personally participated in any application while on the board. Also, the compensation the hospital board would pay the physician must be fair market value according to federal law.

In the event the physician becomes employed by the hospital board after he resigns from the board, he may not attempt to influence the board in any manner for one year after he resigns from the board. The hospital board states that the physician's core duties would be to treat and care for patients. Any employment agreement should ensure that the physician not work on any matter that he addressed as a member of the board and that any interaction the physician have with the board be characterized as "technical advice" or "ministerial duties."

Sincerely,



Julie A. Allen, CPA, PMP
Executive Director