

2. Should the California State University amend its conflict-of-interest code to include employees in positions such as the one occupied by Dr. Murphy as "designated employees"?

CONCLUSION

1. Dr. Murphy should discontinue his examination of the student when he determines that the student could benefit from the lenses he, Dr. Murphy, has developed. The student should then be examined by another psychologist, uninfluenced by Dr. Murphy's evaluation, findings, or comments.

2. California State University's conflict-of-interest code should be amended to designate employees in positions such as the one occupied by Dr. Murphy as "designated employees."

FACTS

Dr. Murphy is employed full-time in a student services professional-academic position at Cal-Poly. Faculty members and administrators refer students to Dr. Murphy for psychological exams including screening for learning disabilities.

Dr. Murphy, as a result of research outside his duties at Cal-Poly, developed lenses which may aid persons with neurovisual inhibition dysfunction such as the visual symptoms associated with visual dyslexia. The developmental costs were borne by Dr. Murphy and ALRIA, Inc. ("ALRIA"). Mr. Dennis Rizzo, president of ALRIA, has formed a product marketing corporation, Neurovision, Inc. ("Neurovision"). Dr. Murphy consults with and expects to receive royalties from both corporations.

Upon examination, if Dr. Murphy determines that a student may benefit from the lenses which he, Dr. Murphy, has invented, he refers them to the off-campus corporation, ALRIA. For a monetary donation, ALRIA will fit the student with appropriate lenses. Dr. Murphy will be working at ALRIA during evenings and weekends. During that time if he helps fit any Cal-Poly student with lenses, he will not charge any fees for his examination. ALRIA will of course solicit a donation for the lenses. Dr. Murphy may receive royalties on copyrighted materials and inventions used in conjunction with services or products ALRIA or Neurovision may sell.

ANALYSIS

Section 87100 prohibits a public official from making, participating in, or using his official position to influence any governmental decision in which he has a financial interest. An

official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his immediate family or on:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(a), (c) and (d).

Dr. Murphy is a public official. (Section 82048.) Therefore, he may not make or participate in making any decision in which he has a financial interest.

Dr. Murphy has a financial interest in, and is therefore prohibited from participating in, any decision that would have a reasonably foreseeable and material financial effect on the following:

(1) Himself.

(2) Any business entity, such as ALRIA or Neurovision, in which he has a direct or indirect investment of \$1,000 or more.

(3) Any source of income which has paid or promised him \$250 or more in the preceding 12 months. Thus if Dr. Murphy has received, or been promised, \$250 or more in the preceding 12 months from ALRIA or Neurovision, that corporation is a source of income to Dr. Murphy.

(4) Any business entity, such as ALRIA or Neurovision, in which Dr. Murphy is a director, officer, partner, trustee, employee, or holds any position of management.

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, *supra* at 823.)

The decisions made by Dr. Murphy will result in the referral of students to ALRIA, which will receive donations for any lenses supplied to the students. It is therefore foreseeable that the decision will have an economic effect on ALRIA. It is also foreseeable that the decision will have an economic effect on Dr. Murphy since it will probably result in increased royalties to him.

Materiality

The effect of a decision is material as to a public official if there is a nexus between the purpose for which he receives income and the decision. (Regulation 18702.1(a)(1), copy enclosed.) There is a nexus between the purpose for which an official receives income and a decision if the official receives income to achieve a goal or purpose which would be achieved or aided by the decision. (Regulation 18702.1(d).) In essence, the regulation prevents a public official from accomplishing by a decision that which he or she is paid to accomplish in his or her private capacity. (See Best Advice Letter, No. A-81-32, copy enclosed.)

There is a nexus between the purpose for which Dr. Murphy receives income and his decision to refer a student to ALRIA if Dr. Murphy receives or is promised income from ALRIA for a purpose which is achieved or aided by the decision. (Regulation 18702.1(d).) Dr. Murphy expects to receive royalties and fees for seeing clients to be fitted with lenses. Arguably, such royalties and fees will increase as more clients are fitted with lenses.

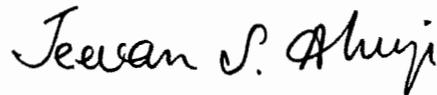
Thus, Dr. Murphy has a financial interest in attempting to have more clients fitted with these lenses. There is, therefore, a nexus between the purpose for which he receives income from ALRIA -- the fitting and sale of lenses, and the decision he makes in referring students to ALRIA to be fitted with lenses. The effect of the decision, referring students to be fitted with the lenses, is thus material and Dr. Murphy must disqualify himself from participating in the decision.^{3/} Dr. Murphy should not continue with an examination when it becomes reasonably foreseeable that the examination will result in a referral to a business entity in which he has a financial interest.

As stated in your letter, since Dr. Murphy is not a "designated employee" under your agency's conflict-of-interest code, he is not currently required to file a statement of economic interests. It would appear however, under the present circumstances, that your agency's conflict-of-interest code should be amended to designate employees in positions such as the one occupied by Dr. Murphy as "designated employees". The disclosure category of such "designated employees" should require disclosure of the employees' investments, sources of income and positions held in business entities which may be the recipients of referrals from the designated employees in such positions.

I trust this provides you with the guidance necessary to resolve the issues raised in your letter. If you have any other questions about this letter, please call me at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel



By: Jeevan Ahuja
Counsel, Legal Division

DMG:JA:ld

Enclosures

^{3/} Since the effect of the decision on Dr. Murphy will require disqualification from participating in the decision, we do not attempt to determine if the effect of the decision is material as to ALRIA or Neurovision. Regulations 18702.1 and 18702.2 (copies enclosed) detail the rules to determine whether the effect of a decision is material as to a business entity.

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CAL POLY

CALIFORNIA POLYTECHNIC STATE UNIVERSITY
SAN LUIS OBISPO, CA 93407

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December 8, 1988

Fair Political Practices Commission
ATTN: General Counsel
428 J Street, Suite 800
P.O. Box 807
Sacramento, California 95804

RE: Possible Conflict of Interest

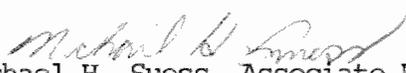
The appended letter from one our employees, Dr. Norman Murphy, raises issues pertaining to a potential conflict of interest. In my role as Conflict of Interest Officer for the California Polytechnic State University, San Luis Obispo, I am requesting your assistance in evaluating what, if any, responsibilities both Dr. Murphy and the University may have in this situation.

Dr. Murphy is employed full-time in a Student Services Professional-Academic Related position. Since he is not a "designated employee" under the California State University conflict of interest code, he has not been required to file a Statement of Economic Interests.

Various faculty members and administrators refer students to Dr. Murphy for psychological exams. Some of these exams include screening for learning disabilities. Dr. Murphy has developed lenses which are currently under research to assist people with visual perceptual anomalies. Dr. Murphy does not charge the student a fee for screening services; however, if Dr. Murphy determines that the student would benefit from the lenses which Dr. Murphy has invented, he refers them to an off-campus corporation (in which Dr. Murphy has a financial interest), to obtain the lenses for a monetary "donation." Dr. Murphy will receive royalties if and when the screening/test instruments/inventories which he is using become copyrighted and marketed.

Please evaluate this situation and advise whether Dr. Murphy is responsible to declare his financial interests under the Fair Political Practices Act and whether he is precluded from referring students, whom he examines as a State employee, to obtain lenses for a "donation" from a corporation in which he has a financial interest. Thank you in advance for your assistance in this matter. Should you need additional information, please contact me at 805-756-2844.

Sincerely,



Michael H. Suess, Associate Director
Personnel and Employee Relations

cc: Norman Murphy, Hazel Scott, Kerry Yamada, Jan Pieper

CAL POLY

CALIFORNIA POLYTECHNIC STATE UNIVERSITY
SAN LUIS OBISPO, CA 93407

COUNSELING SERVICES
(805) 756-2511

RECEIVED
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PERSONNEL
CAL POLY - SLO

November 10, 1988

Dr. Kerry Yamada
Director
Counseling Services
Cal Poly
San Luis Obispo, CA 93407

Dear Dr. Yamada:

Re: Possible Conflict of Interest

As you know, I have broken all ties with the Irlen Institute and Perceptual Development Corporation. While working as a consultant during the summer of 1988 for ALRIA, Inc., a San Luis Obispo based corporation, I developed specific lenses which are currently under research. These lenses appear to alter neurobiological mechanisms so as to ameliorate a number of visual perceptual anomalies associated with neurovisual inhibition dysfunction (e.g. a number of visual symptoms associated with "visual dyslexia") and to some extent other specific neurologically based visual anomalies. I am the sole inventor of the lenses. All developmental costs for the lenses, discovered and perfected during the summer of 1988, were borne directly by me and ALRIA, Inc. Mr. Denis Rizzo, president of ALRIA, Inc., has formed a product marketing corporation, Neurovision, Inc. I may, corporate funds allowing, consult for a fee and receive royalties from both corporations. Said fees and royalties shall not commence until such time the corporations are on a sound fiscal basis, and/or can pay for my services without jeopardizing the ability of the corporations to operate and provide services at a reasonable fee.

1. Because of ethical, professional and legal concerns which I have shared with you, I cannot in good faith refer any students to an Irlen Clinic. The ALRIA, Inc. Clinic in San Luis Obispo will be in a research mode and no donation will be solicited unless the client actually finds a set of lenses which are effective (see attached handouts on Neuro-Visual Inhibition Dysfunction, and coping strategies; as well as, the Experimental Subject Release of Information, Waiver of Right to Litigation, and Statement of Confidentiality). Therefore, students from Cal Poly will be referred to the ALRIA, Inc. clinic for fitting of lenses. Should I fit a Cal Poly student with the lenses, no donation related to the examination will be solicited. The solicited donation is \$150 for the general public and \$100 for Cal Poly, Cuesta College, and Allan Hancock College Students.
2. I may spend time outside that spent at Cal Poly seeing clients to be fitted with lenses. At no time will I see a Cal Poly student on a fee paid basis. If called to consult on a case related to a Cal Poly student, there will be no charge for my services. However, I do expect

that time for such consulting of fitting of lenses for Cal Poly students, regardless of location will be considered as part of my Cal Poly duty hours.

4. Various professionals and organizations will be able to make referrals to ALRIA, Inc. solely owned clinics or licensees. I will work with referred clients during the summer and on weekends. If any referrals from other sources are identified as Cal Poly students, they will usually be referred to another professional on the premises. Regardless of source of referral, any Cal Poly student seen by me will not be charged for any service I render.
6. I will continue to work on projects with Cal Poly, Cuesta and Allan Hancock Colleges to develop student self-report inventories in the areas of visual, auditory, handwriting and spelling skills and efficiency. That work is in conjunction with ALRIA, Inc. and Neurovision, Inc.. Cal Poly, Cuesta College, and Allan Hancock College will have the right without paying a royalty or other fee to any person or corporation, to reproduce and use these self-report inventories within their immediate student populations and not beyond. Cal Poly, Allan Hancock College, and Cuesta College will be specifically prohibited from marketing or making available any copies of these instruments to any other persons or institutions. Should the inventories be copyrighted and marketed, I may share in profits as the author of the psychometric instruments. The original items were generated from previous items developed or researched by me while in Hong Kong on official leave of absence from the CSU.
8. As to remuneration, I have been informed by ALRIA, Inc. and Neurovision, Inc. that in future I can be paid for: doing in-services in the community; prescribing tinted lenses; developing and writing manuals, handouts, other information related to neuro-visual inhibition dysfunction; refining inventions, devices, and psychometric instruments developed in Hong Kong; and researching, developing and finalizing inventions, devices and psychometric instruments to be developed under the auspices of ALRIA, Inc. and Neurovision, Inc.. Except for the possibility of royalties on copyrighted materials or inventions used in conjunction with services or products ALRIA, Inc. or Neurovision, Inc. may sell, after research and development, I shall not profit in any manner from either Cal Poly or Cal Poly students. Should I own any stock or interest of any kind in ALRIA, Inc. and/or Neurovision, Inc., a blind trust, over which I shall have no power or personal knowledge, shall be established and held by another to be appointed at the discretion of Mr. Gerald Mason, attorney at law, and corporate officer of both ALRIA, Inc. and Neurovision, Inc.
9. I will not be a regular employee of any institution, agency, corporation or person other than Cal Poly and the CSU. My remunerative activities, including my forensic practice, are consultative in nature and will not require me to be an employee.

It should be noted I voluntarily approached a possible conflict of interest and at no time have been accused of conflict of interest or any breach of ethical or professional standards.

I have prepared this correspondence so that Cal Poly may approach this issue knowing clearly where I stand and so Neurovision, Inc. and ALRIA, Inc. understand the issues which might arise and can have guidance to protect me from any hint of conflict of interest.

Faithfully submitted,



Norman C. Murphy, Ph.D.
Licensed Psychologist

cc: Dr. Hazel Scott
Dr. George Stanton
Mr. Denis Rizzo (ALRIA, Inc.)
Mr. Gerald Mason (Neurovision, Inc.)