

## OPINION NO. 32

The State Ethics Commission received two requests from members of a state department as to whether it is permissible under the ethics code (chapter 84, HRS) for members of that department in outlying districts of the neighbor islands to engage in both the private and public practice of their professions within their respective districts. Because the two requests involved substantially the same parties and issues, they were consolidated under Rule 22 of the Commission's Rules and Regulations.

Presently, there are several of these state employees who, under contract with the department, are expressly allowed to practice privately. In their state capacity, they are on call at all hours, seven days a week, and are expected to put in an aggregate 40-hour workweek.

Under department policy, certain regulatory duties are to be performed by these employees without charge. These include services relating to the control of contagious diseases. According to department policy, all other services may be performed as private employment, "insofar as such employment does not interfere with the proper performance of official duties." The purpose of this arrangement is statedly to place the full responsibility of the health of the community in the hands of one professional, thereby allowing state officials to keep informed of all health problems in each district.

Hawaii's unique system of dual practice originated as a result of economic and disease control necessity. There were no private practitioners in the large and sparsely settled outside island areas, and the rigors of transportation in those days made coverage by one or more full-time state practitioners impracticable. Thus, these areas were without this type of health service. Our present system was adopted to make available to a community both private and state services. It would appear that this system has adequately served the dual needs of these neighbor island areas for a long time.

We have been informed that the "public health" aspects of this type of practice in other states are performed by private practitioners under contract on a piece basis or done by full-time state practitioners who, by traveling, cover extensive areas.

This request is specifically for an opinion on whether this situation violates the State Ethics Code. We do not judge the specific actions of any individual. The Commission interviewed both private and deputy state practitioners and recipients of their services in its efforts to obtain impartial information. We are indebted to them for their patient cooperation with our investigation of a difficult matter.

Two of the standards of conduct of the code are here relevant: section 13, the fair treatment section, and section 14, the conflict of interests section.

### **Section 13**

Section 13 prohibits use of official position to obtain unwarranted privileges or treatment. Should a state practitioner use or attempt to use the leverage of his official position, either expressly or impliedly, to obtain private clients, or use or attempt to use state equipment, such as automobiles, in his private practice without an equitable proration of costs, he would violate section 13.

Thus, state practitioners serving in this dual capacity must conduct themselves with care to avoid violation of section 13 of the law.

### **Section 14**

Section 14, the conflict of interests section of the code, also applies to this situation.

Section 14 prohibits an employee's participation, as an agent of a state agency, in official action directly affecting a business or matter in which he has a substantial financial interest. We have held that this section prohibits the existence of a situation where, in the scope of a public officer's or employee's official duties, such action must be taken. [Opinion No. 2.]

Section 84-3(6) of the code defines a financial interest to include an employment. Without going into the size of the private practice of each state practitioner involved, we assume, for the purpose of this opinion, that such private practice is substantial; i.e., of sufficient magnitude to possibly influence the employee in his official action. We know that some of this private employment is in the form of monthly retainer contracts with sizable operations, which contracts clearly constitute substantial financial interests.

The state practitioners have disease control duties which they must perform for all persons needing such services within their district. Thus, they must render services to their private clients as well as to non-clients.

There are numerous instances of a state practitioner's official action directly affecting his private employment: being asked when on a state call to perform private work, or when called in his state capacity, finding the treatment necessary one which must be performed by a private practitioner, switching hats and performing in his private capacity. This is official action (responding to a state call) directly affecting private employment. However, this is not the most serious problem; it could be solved by refusal of these state practitioners to do private work when on a state call.

There is a more basic conflict of interests problem in this situation. The state practitioner who renders treatment for a private client in his state capacity has the private interest of keeping his client satisfied to assure that his client will continue to retain him. However, in this disease control work, the public interest is best served by impartial and stringent enforcement of disease control measures. In deciding upon the measures to be

taken, some of which may be extreme, the state practitioner should be entirely free of concern for his private interests in the matter.

In this case, the state practitioner cannot disqualify himself from performing state work for his private clients. Thus, he will have to take official action which will directly affect his personal interests. It is this inevitable conflicting interrelation of public duties and private interests which we find violates section 14.

This arrangement did serve the needs of the territory and state through its infancy, at which time it seems to have been economically justified. However, in this era of greatly increased populations and of rapid transportation and communication, these areas are no longer inaccessible and sparsely settled or incapable of supporting a private practitioner. It is in areas which can economically support a private practitioner or where there is a private practitioner that the system becomes indefensible on an ethical basis.

We hold that there would be no violation in situations where it is, because of lack of work, impossible to support a private practitioner, or in situations of emergency where the private practitioner is away or unavailable. In these limited instances, and where there is no reasonable alternative, the situation can continue without violating the ethics law.

The Commission is aware that a system which has operated so long cannot be altered in an instant. It is suggested that another system to correct the conflict situation--whether it be a piecework contract system or a full-time, traveling state practitioner--be implemented with all due diligence in the circumstances.

Dated: Honolulu, Hawaii, June 10, 1969.

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