

ADVISORY OPINION NO. 89-2

The chairman of a state board ("the board") requested an advisory opinion from the State Ethics Commission ("Commission") regarding the employment status of an attorney with whom the board had contracted to review and revise its rules and regulations. As part of her private law practice, the attorney represented clients before the board.

The chairman of the board requested the Commission's advice with respect to the following questions:

1. Whether or not the attorney would be considered a state employee for purposes of the State Ethics Code and the post-employment restrictions that are set forth in the ethics code, and
2. Whether or not the attorney could represent clients before the board during the term of her contract with the board.

The attorney had indicated that if, by virtue of her contract with the board, she was deemed a state employee for purposes of the State Ethics Code and if, because she was deemed to be a state employee, she was prohibited from representing private clients before the board, she would be willing to forgo any compensation and to volunteer her services to the board in revising its rules.

The attorney related to the Commission's staff that as part of her private law practice, she made personal appearances on behalf of clients before the board. The attorney also assisted clients who were seeking official action from the board by submitting legal memoranda on their behalf to the board.

The attorney provided the Commission with a copy of her agreement with the board. The Commission was informed that the agreement had been recently finalized and approved by the Attorney General's office and by the Governor. The agreement provided for the attorney to review the board's current rules and regulations; to meet with the board on proposed revisions to the rules and regulations; to prepare draft revisions to the rules and regulations; to review the draft revisions with the board and to modify the draft as requested by the board; to review written comments on the proposed rules and regulations made by interested agencies, organizations, and officials; to modify the proposed rules and regulations as directed by the board; and to submit to the board a final draft of the proposed rules and regulations.

Compensation to be paid to the attorney for her services was specified by the agreement not to exceed \$125 per hour for forty hours for a total of \$5,000. The attorney informed the Commission's staff that she anticipated her forty hours in services to the board would be rendered over a period of approximately three months.

The threshold issue in this case was whether the attorney's agreement with the board rendered her a state employee for purposes of the State Ethics Code, chapter 84, Hawaii Revised Statutes ("HRS"). The Commission stated that if the attorney was a state employee by virtue of this agreement, section 84-14(d) of the ethics code would prohibit her from assisting or representing clients before the board. That section prohibits a state employee from assisting or representing any person for compensation before the employee's agency. In addition, the Commission stated that section 84-18(c) of the ethics code's post-employment laws, if applied to the attorney following the termination of her contract with the board, would prohibit the attorney from assisting or representing

clients before the board for an additional twelve-month period. Section 84-18(c) prohibits a former employee, for a period of twelve months following termination of state employment, from assisting or representing any person for compensation on matters involving official action by the former employee's agency.

The Commission stated that if the attorney was not a state employee, the State Ethics Code would not apply to her and would not prohibit her from representing clients before the board.

HRS section 84-3 defines an "employee" for purposes of the ethics code as follows:

"Employee" means any nominated, appointed, or elected officer or employee of the State, including members of boards, commissions, and committees, and *employees under contract to the State* or of the constitutional convention, but excluding legislators, delegates to the constitutional convention, justices and judges. [Emphasis added.]

The Commission noted that in previously determining whether a person who has contracted with a state agency is a state employee for purposes of the ethics code, the Commission had considered the substance and terms of the contract as well as the person's actual working relationship with the agency. The Commission had addressed this issue on a case-by-case basis.

After reviewing the facts of this particular situation, the Commission concluded that the attorney's contract with the board did not render her a state employee for purposes of the State Ethics Code.

In reaching this decision, the Commission considered the distinction between employment as an independent contractor and employment in the traditional sense of the master-servant relationship. The Commission believed that the facts of this case established that the attorney was an independent contractor as opposed to a servant or employee with respect to the State.

The Commission noted that the extent of control over the work to be performed is an important consideration in determining whether or not a contractual relationship as an independent contractor or a master-servant relationship exists. It is generally recognized that an independent contractor exercises control over the contracted services that are rendered. The agreement between the attorney and the board expressly provided that the attorney ("CONTRACTOR") was an independent contractor with the authority to control her services under the agreement:

INDEPENDENT CONTRACTOR STATUS. In the performance of services required under this AGREEMENT, the CONTRACTOR shall be an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this AGREEMENT; however, the STATE shall have a general right to inspect work in progress to determine whether, in the STATE's opinion, the services are being performed by the CONTRACTOR in accordance with the provisions of this AGREEMENT. All persons hired or used by the CONTRACTOR shall insure that such persons are qualified to engage in the activity and services in which they participate. The CONTRACTOR shall be responsible for the accuracy, completeness, and adequacy of any and all work and services performed by the CONTRACTOR's employees and agents. Furthermore, the CONTRACTOR intentionally, voluntarily, and knowingly assumes the sole and

entire liability (if any such liability is determined to exist) to its employees and agents or to other persons, for all loss, damage or injury caused by the CONTRACTOR or . . . [its] employees and agents in the course of their employment. *The mere participation of [sic] the performance of the services under this AGREEMENT shall not be construed as employment with the State of Hawaii* and shall not entitle the CONTRACTOR or the CONTRACTOR's employees or agents to vacation, sick leave, retirement or other benefits afforded to State of Hawaii employees by statute. The CONTRACTOR shall be responsible for payment of all applicable income, social security, and any other federal, state or county taxes and fees that it may be required to pay. [Emphasis added.]

The above-quoted language in the agreement between the attorney and the board indicated to the Commission that the parties to the agreement intended to contract the attorney as an independent contractor, not as an employee. This had been confirmed by both the chairman of the board and the attorney.

The Commission further noted other factors in this case which evidenced the attorney's status as an independent contractor. The attorney was engaged in a business--the private practice of law--that was distinct from the activities of the board. In addition, the Commission was informed that the attorney possessed a particular legal expertise that was required for the subject agreement. The attorney was required to provide her own facilities, support staff, supplies, and equipment in rendering her services to the board. And, finally, the Commission noted that the length of time for which the attorney was being contracted was only forty hours. The attorney's services would be rendered to the board over a period of approximately three months. These services would not constitute full-time employment for the attorney. All of these factors indicated to the Commission that the attorney was not a state employee within the meaning of section 84-3, HRS, but rather was an independent contractor. Therefore, the Commission held that the provisions of section 84-14(d) with respect to the prohibited representation of clients before an employee's own agency and the post-employment provisions of the ethics code did *not* apply to the attorney.

The Commission believed that the definition of an employee, set forth in section 84-3, HRS, indicates that a state employee may in fact be someone hired under contract to the State. The Commission stated that such an employee would be subject to the provisions of the State Ethics Code. In this case, however, the Commission concluded that the attorney was not an employee under contract to the State. The Commission emphasized that its decision was limited to the facts and circumstances of this particular situation.

The Commission was aware that persons might question the attorney's continued representation of clients before the board while assisting the board in the revision of its rules and regulations. The board chairman had informed the Commission that the attorney's services to the board in revising its rules would not benefit the attorney's clients who had cases pending before the board. The Commission encouraged the board chairman to take whatever administrative precautions were necessary to insure that neither the attorney nor her clients derived any unwarranted advantage as a result of the attorney's contractual services to the board. The Commission stated that such precautions would be in compliance with section 84-13, HRS, which prohibits a state employee from using the employee's official position to give anyone an unwarranted advantage or privilege. The Commission also noted that the attorney was subject to the Hawaii Code of Professional Responsibility and that the attorney had already sought and

obtained advice from the Office of Disciplinary Counsel regarding the professional legal ethics of this situation.

The Commission commended both the board chairman and the attorney for their sensitivity to the ethical considerations in this case and expressed its appreciation for their cooperation in this matter.

Dated: Honolulu, Hawaii, January 27, 1989.

STATE ETHICS COMMISSION
Cynthia T. Alm, Chairperson
Rev. David K. Kaupu, Vice Chairperson
K. Koki Akamine, Commissioner
Laurie A. Loomis, Commissioner

Note: There was a vacancy on the Commission when this opinion was considered.