

ADVISORY OPINION NO. 89-4

A board member of a state board of review requested an advisory opinion from the State Ethics Commission ("Commission") regarding the application of the State Ethics Code to the board member's representation of private clients. The board member sat on one of four boards of review in the State that had jurisdiction over certain matters. The boards were assigned to separate districts, but were all attached to the same state department.

Each board heard appeals from members of the public within the board's district regarding decisions made by the department. The board served as an independent body before which members of the public and the department appeared as parties. Members of the public, however, did not have to appeal to the board before appealing to court. Appeals could be taken directly to court. Members of the public or the department could also appeal a board's decision to the court.

The board member was a professional in private practice who provided services to clients. The board member requested an advisory opinion from the Commission because in the board member's private practice it was possible that one of the board member's clients would need to appeal a matter to the board on which the board member served, and the board member was concerned about the potential conflict of interest.

Additionally, it was apparent to the Commission's staff that there were other conflict of interest implications, because in the board member's private practice the board member assisted or represented clients before the department to which the boards of review were attached. In the board member's letter requesting an advisory opinion and in discussions with the board member, the board member expressed her interest in clarifying these issues not only for herself, but also for the other professionals who served on the boards of review and who were faced with similar potential conflicts of interests. In deciding the issues, therefore, the Commission addressed the board member's request for guidelines and also addressed the specific question posed by the board member, as to whether the board member could recommend to a client that the client's matter be appealed to the board member's board.

The relevant provision of the State Ethics Code ("ethics code") was HRS §84-14(d), which states as follows:

No legislator or employee shall assist any person or business or act in a representative capacity for a fee or other compensation to secure passage of a bill or to obtain a contract, claim, or other transaction or proposal in which he has participated or will participate as a legislator or employee, nor shall he assist any person or business or act in a representative capacity for a fee or other compensation on such bill, contract, claim, or other transaction or proposal before the legislature or agency of which he is an employee or legislator.

This provision of the ethics code prohibits a state employee or legislator from assisting or representing any person or business for a fee or other compensation in a matter in which the employee or legislator participated or will participate as an employee or legislator, or in a matter before the agency or legislature of which the employee or legislator is an employee or a legislator. For the purposes of the ethics code, "employee" includes members of state boards.

In the board member's situation, the board member indicated that there was generally a remote possibility that the board member's clients' matters would be appealed to the board member's board. In determining whether a board member may assist or represent a person or business for a fee or other compensation in a matter in which there was a possibility that the board member would participate as a board member, the Commission had considered whether there was a reasonable probability, at the outset, of the matter coming before the board member in the board member's state capacity. If a reasonable probability did exist, the board member could not assist or represent that person or business for a fee or other compensation in that particular matter. If a reasonable probability did not exist, the board member could provide the assistance or representation to the person or business. However, if the board member did provide such assistance or representation and the matter did eventually come before the board member in the board member's state capacity, the board member had to cease to provide assistance or representation in the matter and had to disqualify himself or herself from the matter in the board member's state capacity.

As applied to the board member's situation, if there was a reasonable probability, at the outset, that a prospective client had a matter which would be appealed to the board on which the board member served, the board member could not assist or represent the prospective client in that matter for a fee or other compensation. However, if there was not a reasonable probability that the matter would come before the board member's board, the board member could engage in such assistance or representation, provided that if the matter did eventually come before the board member's board, the board member had to cease to provide assistance or representation and had to disqualify herself from participation in the matter as a board member. The board member was informed that if the board member had an associate, the board member could have the associate continue the board member's firm's assistance or representation, provided that the board member refrained from any input into the matter. Since the board member indicated that, generally, at the time the board member would begin servicing a client, there would be no more than a remote possibility of the client's matter being appealed to the board member's board, it appeared that, in most instances, HRS §84-14(d) would not prohibit the board member's assistance or representation of clients in such matters.

In response to the board member's question as to whether the board member could recommend to her client that the client appeal a matter to the board on which the board member served, inasmuch as it appeared that such a recommendation would be based on the board member's assessment of the client's position and the board member's particular knowledge of how her board functioned, such a recommendation would amount to assistance in a matter in which the board member would be likely to participate as a board member, which is prohibited under HRS §84-14(d). Instead, the board member was advised that the board member could make her client aware of the client's appellate options, including the option of appealing to the board, provided that the advice or information conveyed did not amount to a recommendation.

In regard to the issue of whether the board member could assist or represent a person or business for a fee or other compensation on matters before the department or other review boards on which the board member did not serve, the Commission inquired into the relationship of the boards to the department. Based upon the evidence acquired, although the statutes did not explicitly state that the boards were attached to the department for administrative purposes only, it was apparent that the boards were considered to be and were treated by the department as being attached to the department for administrative purposes only, that the boards were separate and independent from the department and each other, and that the boards received only certain

administrative services from the department. Under these circumstances, it appeared to the Commission that the boards should be treated as separate and independent agencies from the department and from each other for the purposes of HRS §84-14(d).

Therefore, it would not have been a violation of HRS §84-14(d) for the board member to assist or represent a client for a fee or other compensation on a matter before the department or any board of review on which the board member did not serve. Since the boards were to be treated as separate agencies from the department and from each other for the purposes of HRS §84-14(d), assisting or representing a client on a matter before the department or a board on which the board member did not serve would not amount to assistance or representation before the agency of which the board member was a board member.

The Commission also advised the board member to keep in mind, as caveats, the following provisions of the ethics code dealing with confidentiality and fair treatment:

§84-12 Confidential information. No legislator or employee shall disclose information which by law or practice is not available to the public and which the legislator or employee acquires in the course of the legislator's or employee's official duties, or use the information for the legislator's or employee's personal gain or for the benefit of anyone.

§84-13 Fair treatment. No legislator or employee shall use or attempt to use the legislator's or employee's official position to secure or grant unwarranted privileges, exemptions, advantages, contracts, or treatment, for oneself or others;

....

The confidentiality provision pertains to any information which by law or practice is unavailable to the public and which the board member would acquire knowledge of as a board member. The fair treatment section had particular application to the board member's actions as a board member in handling and deciding disputes between members of the public and the department.

The Commission thanked the board member for her concerns regarding the ethics code and for her cooperation in the matter. The Commission also indicated that the advice discussed in this opinion provided general guidelines only. The board member was advised that should there be a specific set of circumstances pertaining to a particular client which the board member would like the Commission to review, the board member was invited to contact the Commission once again.

Dated: Honolulu, Hawaii, April 17, 1989.

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

Note: Commissioner Laurie A. Loomis was not present during the discussion and consideration of this matter. There was also a vacancy on the Commission when this opinion was considered.